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IN THE IOWA SUPREME COURT

Supreme Court No. 22–1444
District Court No. CVCV062900

SUMMIT CARBON SOLUTIONS, LLC
Petitioner-Appellant,

vs.

IOWA UTILITIES BOARD,
Respondent-Appellee,

and

SIERRA CLUB IOWA CHAPTER &
OFFICE OF CONSUMER ADVOCATE,
Intervenors-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY
THE HONORABLE DAVID NELMARK

PROOF BRIEF OF SUMMIT CARBON SOLUTIONS, LLC

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ROUTING STATEMENT

This case will determine whether a voluntary submission to an agency that includes the personal information of thousands of people — people who are not participating in the agency proceedings themselves and lack knowledge of the potential for disclosure of their personal information — is protected from mandatory disclosure pursuant to the statutory exemption for voluntary communications to public agencies set forth in the Open Records Act or application of the common-law balancing test according to the present analytical framework articulated in *American Civil Liberties Union Foundation of Iowa, Inc. v. Records Custodian, Atlantic Community School District*, 818 N.W.2d 231 (Iowa 2012). The Supreme Court should retain the case because it presents fundamental issues of broad public importance and substantial questions of enunciating or changing legal principles. *See* Iowa R. App. P. 6.1101(2)(*d*), (*f*).

STATEMENT OF THE CASE

Summit Carbon Solutions, LLC ("Summit"), a private business based in Iowa, seeks to build a carbon capture and storage project that would partner with ethanol plants in five states, including at least twelve in Iowa, to capture carbon dioxide (CO_2) produced during the fermentation process and transport

it via pipeline to unique geologic formations more than one mile below the surface in North Dakota for safe, permanent storage (the "project").[1]

To construct and operate the proposed pipeline in Iowa, Summit must first obtain a permit from the Iowa Utilities Board ("Board"). Before submitting its application to the Board or negotiating a single easement for the proposed project, however, Summit was first required to hold public informational meetings in each of the thirty-one counties along the proposed route pursuant to Iowa Code chapter 479B (2021).[2] By Board rule implementing the statute, notice of each informational meeting was required to be published and also mailed to people who owned, possessed, or resided on property within the corridor in which Summit intended to seek easements in each county.[3]

In preparation for complying with the notice requirement, Summit worked with a specialized data company to gather from county records, at significant expense, the names and associated addresses of the people required to be noticed for every parcel located within the areas in which it was

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[1] App. ___ (12.14.2021 Pet. Ex. at 1).
[2] Iowa Code § 479B.4(3), (6).
[3] Iowa Admin. Code r. 199—13.3(4) (2010); Iowa Code § 479B.4(4). Revisions to the governing Board rules became effective in September 2021. *Compare* Iowa Admin. Code. ch. 199—13 (2021), *with* Iowa Admin. Code. ch. 199—13 (2010).

interested in potentially seeking easements for the proposed project (the "Landowner Information").[4] The Landowner Information includes over 15,000 records identifying over 10,000 people by both their names and addresses, merely because they were associated with land that was within an area of potential interest to Summit.[5]

As a result of the district court ruling, thousands of Iowa farmers, family farm entities, and individual and family trusts who never submitted their name, address, or status as being near the proposed pipeline route to the Board will — through no action of their own — be unwittingly dragged into a highly contentious public debate, losing their privacy and peace, and potentially even their safety, without ever having notice or a chance to object, unless this Court reverses the decision on appeal.

This case concerns the fate of the Landowner Information and the privacy rights of more than 10,000 Iowans whose personal information is, unbeknownst to them, contained therein. Though the Board determined their

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[4] Iowa Code § 479B.4(4); App. ___ (12.14.2021 Pet. Ex. at 1–2).

[5] Summit uses "over 10,000" throughout this brief as a conservative estimate for the number of people reflected in the Landowner Information accounting for duplication within the data due to anomalies (*e.g.*, records for the same person with and without a middle name or initial) or circumstances (*e.g.*, multiple records for the same person because they own multiple parcels within the easement corridor). *See* App. ___ (12.14.2021 Summit Mot. for Temp. Inj. at 1 n.1).

private information should be kept confidential, it received an open records request seeking the Landowner Information from the Sierra Club Iowa Chapter ("Sierra Club") pursuant to Iowa Code chapter 22 (2021), prompting Summit to seek temporary and permanent injunctive relief from the district court to protect it.[6] The district court granted Summit's motion for a temporary injunction, denied Sierra Club's motion for summary judgment, and then, following a trial of limited scope, did an about-face and declined to issue a permanent injunction to protect the Landowner Information.[7] Summit timely appealed.

Under the open records exception in Iowa Code section 22.7(18) or the common-law balancing tests for weighing privacy interests against the public's right to know previously articulated by this Court, the Landowner Information at issue in this case is entitled to protection and should not be disclosed. The individuals whose personal information is at stake in this case have never filed their information with the Board, and their personal details will not illuminate any decision-making process the Board will undertake. Requiring the identity of private persons who have initiated no interaction with the government to be publicly disclosed, with address information where

[6] App. ___ (12.14.2021 Pet.).
[7] App. ___ (09.02.2022 Notice of Appeal).

their personal information has no nexus to governmental decision-making — not to any decision, to government funding, or even to the action of single government official, as in this case — serves no public purpose and none of the purposes of the Open Records Act. All disclosure would do here is serve the wholly private interests and agenda of a private activist organization, while exposing unwitting Iowa residents to publicity and disturbance. In the current environment, identification as persons who may be making a private decision on whether to enter into an easement agreement with Summit may subject them to harassment and invasion of their privacy, peace, and seclusion through no action of their own, or may even threaten their safety. Yet they have done nothing to put themselves into the public fray.

For the reasons that follow, this Court should reverse the decision of the district court denying the permanent injunction Summit sought to protect the Landowner Information from public disclosure.

STATEMENT OF FACTS

The carbon capture and storage project Summit presently seeks to build is anticipated to capture and store up to 12 million tons of CO_2 per year, eliminating the equivalent of the annual CO_2 emissions from 2.6 million automobiles from the atmosphere.[8] In addition to this environmental benefit,

[8] App. ___ (12.14.2021 Pet. Ex. at 1).

the project is anticipated to yield additional significant tangible benefits for Iowans — new capital investments, tax revenues, landowner payments, thousands of temporary construction jobs, and hundreds of permanent jobs. Moreover, by lowering the carbon intensity of Iowa ethanol, Summit's project is expected to increase the market for Iowa ethanol and for the corn grown by tens of thousands of farmers across the State, safeguarding Iowa's corn economy for decades to come.[9]

By statute, even before Summit could submit an application for the project to the Board, Summit was required to conduct public informational meetings in every county along the proposed pipeline route and send notice by certified mail with return receipt requested to "each landowner affected by the proposed project and each person in possession of or residing on the property." [10] Pursuant to Board rule, such notice must be provided to all persons who own, possess, or reside on "property in the corridor in which the pipeline company intends to seek easements."[11]

At significant expense, Summit curated and compiled more than 15,000 records identifying landowners who might be approached with an offer to

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[9] App. ___ (12.14.2021 Pet. Ex. at 2).
[10] Iowa Code § 479B.4(3).
[11] Iowa Admin. Code r. 199—13.2(5).

enter into a voluntary easement for the project by name and address.[12] The Landowner Information was by design overbroad — once complete, the pipeline would touch only approximately 3,000 parcels but, as is customary with such projects in the early stages of their development, limited flexibility could be maintained by providing the required notice to a larger number of parcels than the number of easements likely to be negotiated.[13] Indeed, the ultimate width of the notice corridor was for Summit to determine based on how much flexibility it sought to retain along any given segment of the proposed pipeline route, a matter of interest to one of its competitors who would soon be seeking easements in some of the same areas.[14]

Events During the Board Proceedings

Neither any statute nor any governing rule required Summit to file the Landowner Information it had gathered with the Board prior to holding the informational meetings.[15] Before Summit had so much as mailed a single notice, however, in a conversation regarding the logistics of scheduling the informational meetings, Board staff verbally requested that Summit provide the Landowner Information.[16] The staff's informal request placed Summit in

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[12] *See* App. ___ (12.14.2021 Pet. Ex.; 11.23.2021 Board Order).
[13] *See* App. ____ (11.23.2021 Board Order at 8).
[14] App. ___ (12.14.2021 Pet. Ex. at 3).
[15] *See* Iowa Code ch. 479B; Iowa Admin. Code ch. 199—13.
[16] App. ___ (12.14.2021 Pet. Ex. at 2).

a difficult position: it raised concerns about disclosing the personal information about its potential host landowners and potentially exposing them to unwanted publicity, but Summit also did not want to refuse a request from the decision-maker on its permit, potentially antagonizing its regulator before its permit application had even been submitted.[17]

Reluctantly, Summit complied with the informal request to provide the Landowner Information in separate filings over the course of approximately one month. But Summit filed a request for confidential treatment along with the first submission, requesting that the Board withhold the Landowner Information from public disclosure pursuant to Board rule 1.9(5) and its statutory analogue in the Open Records Act.[18]

Before the Board had ruled on the request for confidentiality, however, Sierra Club filed a "motion," the final line of which called on the Board to release the Landowner Information under the Open Records Act.[19] On November 23, 2021, the Board granted in part and denied in part Summit's request for confidential treatment, assessing the privacy interests at stake under the analytical framework set forth by this Court in *Clymer v. City of*

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[17] App. ___ (12.14.2021 Pet. Ex. at 2–3).
[18] *See* App. ____ (08.13.2021 Request for Confidential Treatment; 08.13.2021 Aff.); Iowa Admin. Code 199—1.9(5).
[19] *See* App. ___ (11.30.2021 IUB Letter).

Cedar Rapids, 601 N.W.2d 42, 45 (Iowa 1999).[20] A majority of the Board concluded that the personal records of the ***individuals*** identified in the Landowner Information are protected and should be withheld from disclosure in their entirety, but that the lesser privacy interests of business and governmental entities dictate that their records should be released.[21] A third Board member, who dissented but nonetheless acknowledged the privacy interests at stake, would have instead released ***all*** the addresses — individual or entity — but ***none*** of the associated names so that the uninvolved, nonconsenting parties would not be specifically identified in connection with the project.[22]

The following week the Board issued a letter notifying counsel for Summit that it had received the public records request for the Landowner Information from Sierra Club, seeking the release thereof in its entirety, including the information the Board had just deemed subject to confidential treatment.[23] In accordance with the procedure outlined in Board rule 1.9(8),[24] the notice informed Summit that the Board would withhold the Landowner

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[20] App. ____ (11.23.2021 Board Order at 5–9).
[21] App. ____ (11.23.2021 Board Order at 9).
[22] App. ____ (11.23.2021 Board Order at 14).
[23] App. ____ (11.30.2021 Letter).
[24] Iowa Admin. Code 199—1.9(8).

Information for 14 days to allow Summit the opportunity to seek injunctive relief in district court.

Summit filed its petition seeking temporary and permanent injunctive relief prohibiting the Board from releasing the Landowner Information in the Iowa District Court in and for Polk County on December 14, 2021,[25] and immediately moved for a temporary injunction. In the motion, Summit laid out several alternate theories supporting the grant of the requested injunctive relief, including Iowa Code sections 22.7(18), 22.7(6), and 22.8, as well as the balancing test set forth 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).[26] The Office of the Consumer Advocate ("OCA") and Sierra Club intervened.

<u>The District Court Proceedings</u>

The district court held a hearing on Summit's motion seeking a temporary injunction on February 4, 2022.[27] The following week, the court issued an order granting a temporary injunction based on the statutory exemption for voluntary disclosures to agencies set forth in Iowa Code section 22.7(18). Specifically, the exemption applies to "communications not

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[25] App. ___ (12.14.2021 Pet., 12.14.2021 Pet. Ex.).
[26] App. ___ (12.14.2021 Mot. for Temp. Inj. at 7–16).
[27] App. _____ (02.04.2022 Tr.; 02.11.2022 Order at 2).

required by law, rule, procedure, or contract that are made to a government body" by persons outside the government when "the government body receiving those communications . . . could reasonably believe that those persons would be discouraged from making them to that government body if they were available for general public examination." *Id.*

Considering whether the exemption in section 22.7(18) applied to the Landowner Information, the district court found 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."[28] It then determined that "the primary issue before the Court" was assessing whether the Landowner Information was "not required by law, rule, procedure, or contract."[29] As the court observed, though it was undisputed that the Landowner Information was not required by law, rule, or contract, the parties disputed whether it was required by "procedure."[30] Nevertheless, recognizing "the difficulty of proving a negative — the absence of a

[28] App. ___ (02.11.2022 Order at 4) (internal quotation marks omitted).
[29] App. ___ (02.11.2022 Order at 4).
[30] App. ___ (02.11.2022 Order at 4).

procedure," the court found "sufficient evidence to hold that [the subsection 18] exemption applies and that a temporary injunction should be granted."[31]

Although the district court had concluded a temporary injunction should issue based on the statutory exemption for voluntary communications in section 22.7(18), as it rightly observed, there was nothing preventing the Board from *requiring* Summit to resubmit the Landowner Information.[32] The court therefore addressed the other bases for protecting the Landowner Information that Summit had asserted as well, concluding none of them applied.[33] With regard to section 22.7(6), the court concluded that although Summit had persuasively argued the Landowner Information would provide useful intelligence to a competitor planning a similar project, Summit could not show that releasing the Landowner Information would "serve no public purpose."[34] For similar reasons, the court concluded section 22.8 did not exempt the Landowner Information from disclosure because Summit could not establish its examination "would clearly not be in the public interest."[35]

Finally, the district court considered whether the common-law balancing test set forth in *DeLaMater* and *Clymer* could provide an additional

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[31] App. ___ (02.11.2022 Order at 5).
[32] App. ___ (02.11.2022 Order at 5).
[33] App. ___ (02.11.2022 Order at 5-8).
[34] App. ___ (02.11.2022 Order at 5–6).
[35] App. ___ (02.11.2022 Order at 6–7).

basis for concluding the Landowner Information was exempt from disclosure.[36] Discussing the Sierra Club's argument, the district court first observed that it was "unable to identify any case where a balancing test was used independent from one or more of the statutory exemptions."[37] Turning next to Summit's argument, the district court expressly declined to follow this Court's articulation of the proper application of the balancing test under the applicable "present analytical framework" described in *A.C.L.U. Foundation of Iowa, Inc. v. Records Custodian, Atlantic Community School District*, 818 N.W.2d 231 (Iowa 2012) — that the court must "first determine" whether the information sought to be protected fits into a category to which a statutory exemption applies and, ***if not***, should "then apply the balancing test."[38]

The parties' submissions to the district court during the summary judgment stage of the proceedings reflect a shared understanding among them that the only issue remaining for trial following the order granting the temporary injunction concerned whether a "procedure" had required disclosure of the Landowner Information. In its statement of uncontested facts supporting its motion for summary judgment, Sierra Club admitted,

> The Court herein issued an Order granting a Temporary Injunction on February 11, 2022, in which the Court identified

[36] App. ___ (02.11.2022 Order at 7).
[37] App. ___ (02.11.2022 Order at 7).
[38] App. ___ (02.11.2022 Order at 7–8).

> that only factual issue for trial was whether the IUB has a procedure requiring landowner lists to be provided to the IUB[.][39]

In response to this statement, Summit agreed "that is the only outstanding issue in the case," with the clarification that the test "is whether the information was provided voluntarily ***at the time it was actually provided***."[40] The Board also acknowledged only one remaining "genuine issue of material fact" — "whether the Board has a procedure of requesting landowner information from petitioners for franchises and permits."[41] Likewise, OCA observed that the order granting the motion for temporary injunction had "limited the issue remaining for consideration of a permanent injunction . . . . to the question of whether the landowner list was a communication that was 'required by law, rule, procedure, or contract.'"[42]

Consistent with the parties' understanding of the remaining issues to be tried, the district court also focused exclusively on the "procedure" question in ruling on the motion for summary judgment. Indeed, the analysis in the order denying summary judgment focused exclusively on whether the evidence proved the Board had a "procedure" that had required Summit to

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[39] App. ___ (03.21.2022 Sierra Club Statement of Facts at 1).
[40] App. ___ (05.12.2022 Summit Resp. to Statement of Facts at 2)(emphasis in original).
[41] App. ___ (04.05.2022 IUB Ans. to Mot. for Summary Judgment at 2).
[42] App. ___ (04.05.2022 OCA Resp. to Mot. for Summary Judgment at 1–2).

provide the Landowner Information to the Board.[43] The court ultimately denied summary judgment, concluding, "At this stage of the proceedings, when the record must be viewed in the light most favorable to Summit, the Court cannot conclude that such a procedure exists."[44]

The district court held a bench trial in July and August 2022. The first day of trial, OCA presented testimony from OCA attorney Jennifer Johnson, who previously served as former assistant general counsel for the Board.[45] The second day of trial, Sierra Club presented testimony from Board Chair Geri Huser.[46] Summit cross examined both witnesses.[47] Summit admitted documentary evidence in the form of the Board's responses to three interrogatories, which were accompanied by a table the Board prepared listing every linear infrastructure docket in which a request to schedule an informational meeting had been received since 2014 and indicating whether the Board had requested or received a list of noticed individuals in connection with the request.[48] Sierra Club also admitted documentary evidence,

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[43] App. ___ (06.02.2022 Order at 2–6).
[44] App. ___ (06.02.2022 Order at 6).
[45] App. ___ (07.07.2022 Trial Tr. at 4–5).
[46] App. ___ (08.03.2022 Trial Tr. at 5).
[47] App. ___ (07.07.2022 Trial Tr. at 11–13, 15–16; 08.03.2022 Trial Tr. at 19–21).
[48] App. ___ (07.07.2022 Summit Trial Ex. 1 at 3–11).

including an order issued by the Board on December 16, 2021, and the Board's responses to additional interrogatories.[49]

Following trial, the district court received post-trial briefs from Summit, the Sierra Club, and OCA.[50] Sierra Club acknowledged that, based on the order granting the temporary injunction, "the only issue at trial was whether the landowner list that was the subject of Sierra Club's open records request was required to be submitted to the IUB pursuant to a procedure of the IUB."[51] OCA likewise acknowledged that order had "limited the issue remaining for consideration of a permanent injunction" and "stated the primary question in this case is whether the landowner list was a communication that was 'required by law, rule, procedure, or contract.'"[52]

Consistent with the understanding of the other parties, Summit argued in its post-trial brief that no Board procedure had required it to submit the Landowner Information to the Board.[53] But despite their own admissions that ***only*** the procedure question remained to be decided, the Sierra Club and OCA

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[49] App. ___ (07.07.2022 Sierra Club Trial Ex. at 1–5, 6–14).
[50] In lieu of a post-trial brief, the Board submitted a statement that merely recounted the procedural history and affirmed its intention to abide by the final determination of the district court. App. ___ (08.05.2022 IUB Statement in Lieu of Br.).
[51] App. ___ (08.05.2022 Sierra Club Post-Trial Br. at 3).
[52] App. ___ (08.05.2022 OCA Post-Trial Br. at 3).
[53] App. ___ (08.05.2022 Summit Post-Trial Br. at 2–9).

each slipped into their briefs arguments that the Board could not have reasonably believed Summit would be discouraged from providing the Landowner Information to the Board had Summit known it would be made available to the public.[54] Because the post-trial briefing schedule provided only for concurrent submissions and not replies, Summit unfortunately had no opportunity to refute these arguments.[55]

The district court issued an order denying Summit's motion for a permanent injunction the following week. Summarizing the evidence presented by the parties, the court correctly found that Summit was not "required" to submit the Landowner Information by "law, rule, procedure, or contract."[56] But on the question of reasonable belief, the court concluded there was no evidence that making the Landowner Information public "would have a chilling effect on companies seeking permits to construct hazardous liquid pipelines."[57] Though it remained undisputed that Summit had requested confidential treatment, and the court pointed out that "nothing further . . . regarding the Board's viewpoint" had been admitted at trial, it

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[54] App. ___ (05.05.2022 Sierra Club Post-Trial Br.at 9–10; 05.05.2022 OCA Post-Trial Br.at 7–10).
[55] App. ___ (08.03.2022 Trial Tr. at 23–24).
[56] App. ___ (08.12.2022 Order at 8).
[57] App. ___ (08.12.2022 Order at 9).

somehow reached the ***opposite*** conclusion based on the ***same*** evidence it had relied upon to grant temporary injunction.[58]

Notably, in arriving at this conclusion, the district court incorrectly found that there was no evidence that informally requested information had ever been withheld from the Board, despite ample evidence to the contrary, including the testimony of the Board Chair.[59] In the end, however, the court found dispositive "that the Board can ***order***" a list of noticed parties be filed, reasoning that "it would be unreasonable for the Board to believe lists would not be voluntarily supplied by applicants upon request" when it could simply order applicants to file them.[60]

Summit timely appealed and filed a supersedeas bond, staying the effect of the district court order that would have lifted the temporary injunction.[61]

ARGUMENT

The purpose of the Open Records Act is "to open the doors of government to public scrutiny — to prevent government from secreting its

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[58] App. ___ (08.12.2022 Order at 10).
[59] *Compare* App. ___ (08.12.2022 Order at 11), *with* App. ___ (07.07.2022 Summit Trial Ex. at 11; 08.03.2022 Trial Tr. at 10–12, 13, 14, 19, 22); *see also* 08.05.2022 Sierra Club Post-Trial Br. at 9 ("*generally* when the information is requested by the IUB from the applicant, the information is provided" (emphasis added)).
[60] App. ___ (08.12.2022 Order at 13) (emphasis added).
[61] *See* App. ___ (09.02.2022 Not. of Appeal, 09.07.2022 Supersedeas Bond).

decision-making activities from the public" and to "facilitate public scrutiny of the conduct of public officers." *Atl. Cmty.*, 818 N.W.2d at 232–33 (Iowa 2012) (citations omitted). In this case, however, it is not the government whose records are sought or government officials whose privacy is being compromised, or even someone who is seeking something from or interacting with the government in some way. Rather, it is ordinary citizens minding their own business, people with no knowledge of and no part in the underlying government proceeding, whose names and addresses Sierra Club demands. Their information is immaterial to any anticipated decision of the Board.

Fortunately, there are two clear paths by which the Court can clarify that the law protects the privacy of these Iowans — first, the exemption from public disclosure for voluntary communications to the government set forth in section 22.7(18) of the Open Records Act, and second, application of the common-law balancing test for weighing privacy interests against the need for public disclosure. By one or both means, the Court should reverse the decision of the district court denying a permanent injunction and protect thousands of Iowa citizens from the needless disclosure of their personal information to the public only to serve the private interests of an activist organization that would only serve views they may not even share.

I. The Landowner Information Falls Within the Exemption From Disclosure of Voluntary Communications to Government Bodies Provided in Iowa Code Section 22.7(18).

Error Preservation.

Summit argued that the Landowner Information falls within the exemption from public disclosure set forth in Iowa Code section 22.7(18), and the district court decided this issue.[62] Summit has preserved error. *Meier v. Senecaut*, 641 N.W.2d 532, 537–38 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.").

Standard of Review.

This action commenced under Iowa Code chapter 22 was triable in equity, therefore review is de novo. *Iowa Film Prod. Servs. v. Iowa Dep't of Econ. Dev.*, 818 N.W.2d 207, 217 (Iowa 2012) (citation omitted). On de novo review of an equitable proceeding, the factual findings of the district court are not binding on this Court, but its assessments of witness credibility are given weight. *In re Langholz*, 887 N.W.2d 770, 775 (Iowa 2016). To the extent this appeal concerns the district court's interpretation of chapter 22, however, review is for correction of errors at law. *Id.*

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[62] App. ___ (08.12.2022 Order at 14).

Argument.

The purpose of Iowa's Open Records Act 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." *Mitchell v. City of Cedar Rapids*, 926 N.W.2d 222, 229 (Iowa 2019) (cleaned up, citations omitted). The structure of the Act reflects that its purpose is ***not*** to allow *indiscriminate* access to public records, however. Instead, the Act "essentially gives all persons the right to examine public records," and "then lists specific categories of records that must be kept confidential by those responsible for keeping records that are not exempt from disclosure." *Atl. Cmty.*, 818 N.W.2d at 233 (citing Iowa Code §§ 22.2(1), 22.7); *see also City of Sioux City v. Greater Sioux City Press Club*, 421 N.W.2d 895, 897 (Iowa 1988).

The legislature's list of categorical exemptions to public disclosure under the Act is ever-growing, and it has specifically designated over 70 categories of public records as being entitled to remain confidential. *Id.*; *see also In re Langholz*, 887 N.W.2d at 776. Resolution of this appeal requires the Court to construe just one. Iowa Code section 22.7(18) provides as follows, in relevant part:

> 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. . . .

Iowa Code § 22.7(18).[63] The purpose of this exemption, which addresses voluntary communications to government bodies, "is to ***permit public agencies to keep confidential a broad category of useful incoming communications*** which might not be forthcoming if subject to public disclosure." *Press Club*, 421 N.W.2d at 898(emphasis added). Moreover, legislative history conclusively establishes that this exemption extends to "***solicited*** communications." *Id.*

The circumstances under which Summit reluctantly provided the Landowner Information to the Board fit squarely into the legislature's categorical exemption from public disclosure for voluntary communications with the government set forth in Iowa Code section 22.7(18). As the district court correctly recognized, the Board is a "government body," and the Landowner Information was communicated to the Board by Summit, who is

[63] The district court correctly concluded that the remainder of the statute is inapplicable to this case. App. ___ (02.11.2022 Order at 3); *see also Press Club*, 421 N.W.2d at 898.

"outside of government."[64] Summit therefore needed to show just two elements to establish that the exemption applied — (1) that communicating the Landowner Information to the Board was "not required by law, rule, procedure, or contract" and (2) that the Board "could reasonably believe" that Summit and similarly situated entities "would be discouraged from making such communications" if they were to be made "available for general public examination."[65]

As demonstrated below, the district court correctly concluded that communicating the Landowner Information to the Board was not required by law, rule, contract, or procedure. However, the court's conclusion that the Board could not reasonably believe permit applicants would be discouraged from communicating voluntary information subject to public disclosure rested on a legally erroneous interpretation of the statute, was inconsistent with the facts, and was fundamentally at odds with both public policy and with basic notions of procedural and substantive fairness.

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[64] App. ___ (08.12.2022 Order at 4).
[65] App. ___ (08.12.2022 Order at 4).

A. The District Court Correctly Concluded the Communication of the Landowner Information Was Not Required by Procedure.

In granting the temporary injunction, the district court correctly observed it was "undisputed" that Summit's communications of the Landowner Information to the Board were not required by law, rule or contract, but that there was "a factual dispute as to whether they were required by procedure."[66] Accordingly, for the remainder of the proceedings before the court, the parties' submissions consistently reflected a shared understanding that the only remaining dispute in the case was whether Summit's communications of the Landowner Information to the Board had been required by "procedure."[67] Fittingly, the testimony and documentary evidence admitted at trial directly addressed that question.[68]

Chapter 22 does not define the term "procedure," but two guiding principles shed light on its proper construction. First, this Court has repeatedly explained that unlike other categorical exemptions in the Open

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[66] App. ___ (02.11.2022 Order at 4). The Board admitted during discovery that neither Iowa Code chapter 479B nor the Board rules in chapter 199—13 of the Iowa Administrative Code require a prospective applicant for a pipeline permit who seeks to hold an informational meeting to submit anything identifying who is being provided notice of the meeting. App. ___ (Summit Trial Ex. at 6).

[67] *See supra* at 16, 18–20 & nn.28–29, 39–44.

[68] App. ___ (07.07.2022 Trial Tr.; 08.03.2022 Trial Tr.; 07.07.2022 Summit Trial Ex.; 07.07.2022 Sierra Club Trial Ex.).

Records Act, which as a general rule are to be interpreted narrowly, the exemption for voluntary communications to the government in section 22.7(18) ***should be interpreted broadly***, because its purpose was to permit "***public agencies***" (like the Board) to protect useful communications they receive and ensure they continue receiving them. *Press Club*, 421 N.W.2d at 898 (emphasis added). "Section 22.7(18) is broadly inclusive and mechanical application of a 'narrow' construction rule does not aid in the ascertainment of the legislature's intent." *Ripperger v. Iowa Pub. Info. Bd.*, 967 N.W.2d 540, 551 (Iowa 2021) (quotation marks omitted) (quoting *id.*); *see also Des Moines Indep. Cmty. Sch. Dist. Pub. Recs. v. Des Moines Reg. & Trib. Co.*, 487 N.W.2d 666, 670 (Iowa 1992).

Second, the canon of construction known as *noscitur a sociis* dictates that the breadth of the term "procedure" is indicated and controlled by the enumerated terms surrounding it.[69] When words "are associated in a context suggesting that the words have something in common, they should be assigned a permissible meaning that makes them similar." Antonin Scalia &

[69] *See, e.g.*, *State v. Iowa Dist. Ct. for Warren Cnty.*, 634 N.W.2d 619, 621 (Iowa 2001) (explaining that "the rule of *noscitur a sociis* . . . provides that the meaning of words in a statute are to be ascertained in light of the meaning of the words with which they are associated").

Bryan A. Garner, *Reading Law* 195 (2012).[70] Statutes, rules, and contracts all connote some degree of formality, and that shared quality among them indicates that a "procedure" means something more than merely informally asking. If Board staff simply requesting information qualified as a "procedure" within the meaning of the statute, that term would be drastically out of character with the company it keeps and substantially undermine the other terms to the point of rendering them superfluous.[71]

The evidence admitted at trial included the Board's written responses to several interrogatories[72] and a table it had prepared indicating every linear infrastructure docket in which it had requested landowner information in since 2014,[73] along with testimony by the Board Chair, Geri Huser.[74] That evidence was uncontested, and the best evidence on the question of whether the Board had a procedure that required Summit to submit the Landowner Information.

What that evidence shows is that ***no*** discernable pattern or practice governed Board requests seeking landowner information from prospective

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[70] *See also* Antonin Scalia & Bryan A. Garner, *Reading Law* 197 (2012) (explaining that application of this interpretive principle is appropriate whenever there is an "association" between words, which includes, but is not limited to, words appearing together in a list).
[71] App. ___(08.05.2022 Summit Post-Trial Br. at 3–4.
[72] App. ___ (07.07.2022 Summit Trial Ex. at 5–7; 07.07.2022 Sierra Club Trial Ex. at 9–14).
[73] App. ___ (07.07.2022 Summit Trial Ex. at 8–11).
[74] *See* App. ___ (08.03.2022 Trial Tr.)

permit applicants. Though the Board described itself in an interrogatory response as having begun the "routine practice" of requesting a submission identifying the individuals to whom informational meeting notices were being sent in June 2019,[75] the sworn testimony of the Board Chair explained that the phrase "routine practice" in that response merely indicated that the Board requests such information "some of the time."[76] The table provided by the Board confirms this was in fact the case. At best, the Board requested information on noticed landowners sporadically, not methodically, even ***after*** June 2019 — in just three of seven electric transmission dockets from June 2019 to December 2019 and just three of eight dockets in 2020, then in several dockets prior to November 2021, when the requests suddenly stopped, save for a single docket in which the Board made, and then withdrew, a request.[77] The Board had also requested such information ***prior*** to June 2019, but only ***twice*** in the forty-three pending dockets between 2014 and June 2019.[78] Perhaps most importantly, the Board had ***never*** requested information concerning individuals being sent notice in connection with ***any pipeline***

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[75] App. ___ (07.07.2022 Sierra Trial Ex. at 11).
[76] App. ___ (08.08.2022 Tr. at 7–9). The Board Chair was especially emphatic that there was no "routine" for pipeline projects. *Id.* at 9 ("I do not believe anything is routine as it relates to any hazardous liquid pipeline.").
[77] App. ___ (07.07.2022 Summit Trial Ex. at 9–11).
[78] App. ___ (07.07.2022 Summit Trial Ex. at 8–9).

docket prior to August 2021, when Summit provided the Landowner Information to the Board.[79]

The evidence at trial further demonstrated that even when the Board ***had*** informally requested a submission identifying who would receive meeting notice in the past, providing the information had never been "required." The Board Chair conclusively testified at trial that when the Board ***requires*** something that is not addressed in its "written procedures," it "speaks through its orders" and thereby "directs that it be done."[80] The consequences of not providing information the Board wants "depends on what context the request was made, if it's informal and part of a planning meeting versus in an order" because those contexts "have different meanings."[81] Notably, she also testified that in her experience when the Board or its staff informally request information, they "don't always get" information

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[79] App. ___ (07.07.2022 Summit Trial Ex. at 8–9). Pipelines are denoted by the docket numbers beginning with P or HLP. Summit's trial exhibit reflects that prior to August 2021, the Board requested and received landowner information in a pipeline docket only once, and that was a request for the *final, constructed location* of the Dakota Access pipeline in Docket No. HLP-2014-0001 *after* it was operational, not a request for an overbroad list of all the parcels for which easements were being considered before Dakota Access could approach landowners regarding easements. *See id.* The Board Chair confirmed the distinction. App. ___ (08.03.2022 Trial Tr. at 20–21).
[80] App. ___ (08.03.2022 Trial Tr. at 10–11, 12, 14, 22).
[81] App. ___ (08.03.2022 Trial Tr. at 10).

requested.[82] Moreover, when asked if the Board has issued orders in cases in which information that was requested was not provided, the Board Chair confirmed that the Board issued orders requiring the information to be provided ***only*** in "some of those cases."[83] In other words, not providing information that was informally requested by the Board ***might*** result in the Board issuing an order to require it, or it ***might not***.[84]

Finally, there was no evidence to suggest that withholding information that was informally requested had ever carried any penalty or negative consequence. On the contrary, the record contains evidence suggesting at least one of two other pipeline companies, NuStar Pipeline Operating Partnership L.P. ("NuStar") in Docket No. HLP-2021-0002 and Navigator Heartland Greenway, LLC ("Navigator") in Docket No. HLP-2021-0003, had been informally requested to provide for landowner information while Summit's request for confidential treatment was pending and declined to promptly provide it.[85] Months later, the Board issued an order directing both

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[82] App. ___ (08.03.2022 Trial Tr. at 22); *see also* 08.05.2022 Sierra Club Post-Trial Br. at 9 ("*generally* when the information is requested by the IUB from the applicant, the information is provided" (emphasis added)).
[83] App. ___ (08.03.2022 Trial Tr. at 22).
[84] App. ___ (08.03.2022 Trial Tr. at 10–11, 22).
[85] App. ___ (07.07.2022 Summit Trial Ex. at 11; 08.03.2022 Trial Tr. at 12–14, 19). The table prepared by the Board reflects that it informally requested landowner information from NuStar in September 2021. The table does not contain the same notation for Navigator, however, the Board Chair testified at

companies to file the information sought because neither had done so.[86] Even ***after*** their informational meetings had been held, and even ***after*** they had been ***ordered*** to file the information, both companies delayed until after the Board had issued another order assuring that the information would be granted confidential treatment without being penalized.[87] The Board Chair confirmed at trial that Navigator had been allowed to proceed with its informational meetings despite not having provided landowner information beforehand, without penalty.[88] The district court correctly concluded that the Board order directing the other pipeline companies to file their landowner information had required compliance on a prospective basis only.[89]

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trial that she believed the same information had been requested from Navigator prior to December 2021, which was consistent with the understanding of counsel, as well. *See* App. ___ (08.03.2022 Trial Tr. at 13–14; *see also id.* at 19). Whether it had been requested of one or the other or both, there was no consequence when the requested information was not filed before the Board had withdrawn its request or issued an order directing that the information be filed and assuring that it would receive confidential treatment. *See* 08.03.2022 Trial Tr. at 19.

[86] App. ___ (07.07.2022 Sierra Club Trial Ex. at 1–2, 5).

[87] App. ___ (12.28.2021 Board Order at 1–3); App. ___ (08.03.2022 Trial Tr. at 19).

[88] The Board Chair likewise confirmed that Navigator was allowed to proceed with its informational meetings despite not having provided landowner information beforehand without penalty. App. ___ (08.03.2022 Trial Tr. at 19).

[89] App. ___ (08.12.2022 Order at 5); *see also* App. ___ (08.03.2022 Trial Tr. at 11).

There simply was no coherent pattern, and no hint of formality whatsoever, to the Board requests for landowner information, much less any procedure or requirement that such information be provided to the Board. Thus, despite a sincere attempt to locate a procedure or a requirement in Board's past actions, the district court found none:

> If the Board had a policy of requiring landowner lists to be submitted in every case, it could be a procedure. If the Board had a policy of requiring that information in every hazardous liquid pipeline case, it could be a procedure. If such a list was not always required, but the Board had generated specific criteria that triggered when a landowner list would be required, it could be a procedure. The record suggests that none of these things existed. Rather, the Board considered applications on a case-by-case basis. Sometimes the Board or its staff informally requested landowner lists. Sometimes they did not. It appears that Summit was the first applicant for a hazardous liquid pipeline project to have been asked for the information. Summit's competitor, Navigator, was allowed to hold informational meetings despite not having provided such a list.
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> . . . .
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> The fact that Board staff evaluated the situation and then requested the information from Summit does not in and of itself mean that the information was "required by a procedure." Unlike an order from the Board, there was no formality to the request. Further, even if the evaluation and subsequent verbal request could be considered a "procedure" nothing in the record suggests that the information was "required" to be submitted by Summit. A "requirement" would have some sort of penalty for non-compliance. The record does not contain any evidence establishing that if Summit failed to voluntarily submit the information that its application would have been rejected or otherwise negatively impacted. . . .

> For the foregoing reasons, the Court finds that Summit was not "required" to submit its Landowner List by "law, rule, procedure, or contract."[90]

The record supports the above findings by the district court, and this Court should reach the same conclusion on its *de novo* review. Summit was ***not*** required by procedure to file the Landowner Information with the Board.

B. The District Court Erred in Concluding the Board Could Not Have Reasonably Believed Communications Would Be Discouraged if the Landowner Information Were Made Public.

The second prong of the voluntary communications exemption asks whether "the government body receiving . . . communications from . . . 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."[91] Section 22.7(18) thus applies to "useful incoming communications which could be deterred from public disclosure." *Ripperger*, 967 N.W.2d at 544 (citing *Des Moines Indep. Cmty.*, 487 N.W.2d at 667, 670).

Recently, the Court addressed at length the "could reasonably believe" or "deterrence" prong of the analysis in *Ripperger v. Iowa Public Information Board*, 967 N.W.2d 540 (Iowa 2021). *Ripperger* provides useful guidelines

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[90] App. ___ (08.12.2022 Order at 6–8).
[91] Iowa Code § 22.7(18).

regarding the proper analysis as to whether this prong of the statutory exemption in section 22.7(18) has been met. As demonstrated below, the district court here disregarded those guidelines in concluding "that the Board could not reasonably believe that applicants would be discouraged from voluntarily providing landowner lists to the Board if those lists were available for general public examination."[92] The court thus erred in denying the permanent injunction Summit sought to protect the Landowner Information on this basis.

First, and most fundamentally, the voluntary communications exemption must be interpreted ***broadly*** for its scope to comport with legislative intent. As this Court recently reiterated,

> 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.

Ripperger, 967 N.W.2d at 553 (emphasis original, cleaned up) (quoting *Des Moines Indep. Cmty.*, 487 N.W.2d at 670. Not only is the language of the statutory exemption itself "**broadly** inclusive," but that language also appears within a section of the Open Records Act whose "entire thrust . . . is to

[92] App. ___ (08.12.2022 Order at 14).

describe information which is **not** required to be disclosed." *Press Club*, 421 N.W.2d at 897 (emphasis added).

Second, *Ripperger* clarifies that whether a records custodian "could reasonably believe" parties would be discouraged from making such communications "is an objective test, from the perspective of the record custodian." 967 N.W.2d at 552–53. As the Court explained in that case, its past cases have found this prong of section 22.7(18) is satisfied when "presumably some" of the class of persons who might have communicated similar useful information "would have thought twice" or "would have been reluctant" had they known the information would be public. *Id.* at 551. The job of the district court is ***not*** to "independently decide whether the communications at issue would be deterred by disclosure," but rather to determine whether "***some*** evidence exists" to support the reasonable belief that deterrence would result from disclosure. *Id.* at 553 n.6 (emphasis original). Showing disclosure would deter the "the vast majority" of the class of persons at issue "is not required" — the necessary showing is a "far easier" one. *Id.* at 554–55. In other words, the lesson of *Ripperger* is that the "could" in the phrase "could reasonably believe" is the critical ingredient in the proper analysis.

The district court interpreted and applied the "could reasonably believe" prong of section 22.7(18) in a manner fundamentally at odds with *Ripperger*. It thus erred in concluding that the Landowner Information was not within the exemption.

Critically, the district court considered legislative intent in construing the statute, but it weighed that intent in the ***wrong direction***, contrary to the manner in which the Court instructed in *Ripperger*. In interpreting section 22.7(18), the "job" the court was tasked with performing was "seeking out legislative intent." *Des Moines Indep. Cmty.* 487 N.W.2d at 669. The decision here reflects the court's analysis was fundamentally at odds with that task:

> Additionally, the Court recognizes that the purpose of the Open Records Act is "to open the doors of government to public scrutiny-to prevent government from secreting its decision-making activities from the public, on whose behalf it is its duty to act." "There is a presumption in favor of disclosure' and 'a liberal policy in favor of access to public records.'" Having held that voluntarily requesting documents is not a "procedure," a finding that this final element of Iowa Code § 22.7(18) has also been met would allow the Board and its applicants to withhold numerous documents from public scrutiny. In that scenario, the Board could simply "request" documents rather than requiring them. Applicants, knowing that only voluntary provision would keep the records confidential, would provide them before the Board found it necessary to order production.[93]

[93] App. ___ (08.12.2022 Order at 13–14) (citations omitted).

At the very least, the first half of this passage reflects that the district court inappropriately considered "a presumption in favor of disclosure" that did not apply in analyzing whether the "could reasonably believe" prong of the analysis was met.

Compounding that error, the second half of the above passage reflects that the district court opted to balance competing policy interests implicated by section 22.7(18) itself in deciding how to apply it. Doing so was contrary to the clear directive of this Court:

> Notwithstanding the spirit of disclosure evidenced by this legislation, the legislature has denoted numerous areas where confidentiality is to be maintained. In controversies such as the present one, it 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 d[i]vine the legislature's intent with regard to those important policy issues. . . . Where the legislature has chosen to use broadly inclusive language to describe those areas where an established policy does not apply, mechanical application of a "narrow" construction rule does not aid in the ascertainment of the legislature's intent. If the legislature had intended a narrowly drawn exception, it would, we believe, have narrowly described the categories of information which were excluded from public disclosure.

Press Club, 421 N.W.2d at 897. The district court ignored the intended breadth of the exemption in its analysis, and thereby effectively "thwart[ed] the legislative purpose in providing" section 22.7(18) at all. *Des Moines Indep. Cmty.* 487 N.W.2d at 669.

More fundamentally, the district court failed to consider what the Board "***could*** reasonably believe" objectively in the manner that *Ripperger* instructs. Since the record did not concretely address what the Board actually believed, the court reasoned that it was "left to form its own opinion."[94] But that approach was squarely at odds with *Ripperger*, which explained that courts "should not independently decide whether the communications at issue would be deterred by disclosure." 967 N.W.2d at 540 & n.6. Tellingly, though the district court concluded it need not decide the question, it found "unclear whether pursuant to *Ripperger* the proponent of applying the exception must prove both that the government agency believes that parties would be discouraged from providing the information and that the belief is objectively reasonable, or if — in the absence of evidence about the agency's belief — it is sufficient to prove that such a belief *would* be objectively reasonable."[95] Of course, the statute itself answers that question — the proponent needs to show what the agency "***could*** reasonably believe." Iowa Code § 22.7(18) (emphasis added). "This is an objective test." *Ripperger*, 968 N.W.2d at 552–53.

Instead of considering whether evidence in the record ***could*** help support a reasonable belief that deterrence would result from disclosure, the

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[94] App. ___ (08.12.2022 Order at 11).
[95] App. ___ (08.12.2022 Order at 10 & n.7).

district court fixated primarily on one thing the record did not contain — "the Board's actual belief on this issue."[96] That was fundamentally unfair because the court knew the parties believed the court had already conclusively determined that the Board could reasonably believe landowner information would not be voluntarily provided if it would be made public.[97] But more fundamentally, the ***subjective*** belief of the Board was decidedly ***not*** an element under *Ripperger's* "***objective*** test, from the perspective of the record custodian." 967 N.W.2d at 552–53 (emphasis added). The decision thus reflects that the district court did not fully understand what Summit was required to show to satisfy the second prong of section 22.7(18) or how the court was supposed to evaluate whether Summit had shown it. Indeed, the court never asked the dispositive question — whether "some evidence existed" to support a reasonable belief that publicly disclosing the information Summit provided might have a chilling effect.

And here, the record undoubtedly confirms that "some evidence existed" to support a reasonable belief that pipeline companies would be discouraged from voluntarily communicating landowner information requested by the Board if that information were made public. The prospect of

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[96] App. ___ (08.12.2022 Order at 8–10).
[97] *See supra* at 16, 18–20 & nn.28–29, 39–44.

landowner information being made public actually *did* discourage such disclosures by other pipeline companies. Both Navigator and NuStar declined to provide such information to the Board even *after* being ordered to provide it, complying only after receiving assurance the information would receive confidential treatment.[98] This was consistent with the Board Chair's testimony when asked whether the Board always received a list when one was requested — "in my experience, we don't always get the list."[99] Just as in *Ripperger*, the evidence here established that "the feared chilling effect of disclosure was real" and therefore "some evidence existed" to support a reasonable belief that disclosure would cause a chilling effect. 967 N.W.2d at 553–54 & n.6.

The evidence before the district court also paralleled other evidence on which the *Ripperger* decision was based. There, the Court found persuasive testimony that disclosing a list identifying people by name "could put a target on their back," "invite unwanted scrutiny," or "call attention to them and further jeopardize their safety." *Ripperger*, 967 N.W.2d at 553. It further recognized there were people on the list who wanted "to avoid the spotlight."

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[98] App. ___ (Sierra Club Trial Ex. at 1–2, 4–5; 12.28.2021 Board Order at 1–3).
[99] App. ___ (08.03.2022 Trial Tr. at 22).

Id. at 553–54. Once again, uncontested evidence[100] before the court raised similar concerns. The sworn affidavit filed with the petition explained that when Board staff requested Summit file the Landowner Information with the Board, "Summit raised concerns about disclosing information about its potential host landowners and potentially exposing them to unwanted publicity."[101] It further explained, given "the current environment, identification as persons who may be making a private decision on whether to sign an easement on their private property with Summit may subject them to harassment, and invasion of their privacy, peace and seclusion through no action of their own."[102] *Ripperger* treated materially similar concerns as evidence supporting a reasonable belief that disclosure might have a chilling effect ***even though only names*** (and no addresses) appeared on the list at issue in that case. *Id.* Because addresses ***were*** included in the Landowner Information, similar treatment was warranted here.

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[100] As the Board correctly observed, OCA shared Summit's concerns regarding the privacy, safety, and security concerns for the landowners. App. ___ (11.23.2021 Board Order at 2).

[101] App. ___ (12.14.2021 Pet. Ex. at 3).

[102] App. ___ (12.14.2021 Pet. Ex. at 3). The record also indicated that the number of easements sought would be quite large, as around 3,000 people whose information was included in the Landowner Information were "landowners adjacent to the proposed pipeline," *i.e.*, in the area where easements would be sought as opposed to merely "being in the notice corridor." App. ___ (11.23.2021 Board Order at 8).

Rather than asking whether "some evidence existed" to support that the Board "could reasonably believe" that disclosure would deter voluntary disclosures, the district court weighed the existing evidence against other evidence and then disregarded it. For example, even as the court purportedly recognized that Summit "understandably, wants to remain on good terms with the landowners" — presumably because it was undisputed they were people from whom Summit might seek easements for the project — the court discounted that evidence because ultimately "it is the Board" who will determine whether Summit receives a permit.[103] The court even reversed its position on the specific evidence it had previously relied on to conclude "the Board could reasonably believe that such communications would not be voluntarily provided" in granting the temporary injunction — "Summit's request to treat the information as confidential, and the fact that other similar companies did not voluntarily submit the information."[104] Neither of those facts had changed,[105] and no conflicting evidence had been admitted. The court changed its mind anyway.

Finally, merely because the Board ***could*** have ordered Summit to provide the Landowner Information, even though it did not, the district court

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[103] App. ___ (08.12.2022 Order at 11).
[104] App. ___ (02.11.2022 Order at 4).
[105] *See* App. ___ (02.11.2022 Order at 5).

ultimately concluded there was no way the Board could have reasonably believed disclosure would discourage voluntary communication:

> Further, it cannot be overlooked that even if there were a potential chilling effect created by making the Landowner List public, the Board could simply overcome any reluctance to provide information by ordering the applicant to provide it.
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> . . . .
>
> Given that the Board can order that such a list be provided, and that such a list would be subject to an open records request under those circumstances, it would be unreasonable for the Board to believe lists would not be voluntarily supplied by applicants upon request.[106]

If that were the rule, however, the statutory exemption protecting voluntary disclosures to government agencies would ***never*** allow an agency vested with adjudicative authority by the legislature to "keep confidential . . . useful incoming communications which might not be forthcoming if subject to public disclosure." *Press Club*, 421 N.W.2d at 898. The district court decision denying Summit's request to protect the Landowner Information was thus antithetical to the legislative purpose of section 22.7(18).

Under *Ripperger*, Summit had the burden of producing only "some evidence" that the Board "***could*** reasonably believe" that pipeline companies would be "discouraged" from communicating similar information if the information Summit provided were made public. But the decision denying

[106] App. ___ (08.12.2022 Order at 12–13).

the permanent injunction shows that the district court never actually decided whether "some evidence existed" to support such a belief. Summit undoubtedly met that burden, however, and in concluding otherwise the district court erred.

II. The Landowner Information Is Protected from Disclosure Because the Common-Law Balancing Test Applies Pursuant to This Court's Current Analytical Framework.

Error Preservation.

Summit argued that the common-law balancing test protected the Landowner Information from disclosure, and the district court ruled that the test did not apply.[107] Summit therefore preserved error as to that ruling. *Meier*, 641 N.W.2d at 537–38.

Standard of Review.

Summit seeks equitable relief based on the application of the common-law balancing test, therefore review is *de novo*. Iowa R. App. P. 6.907. On *de novo* review, this Court is not bound by the factual findings of the district court but gives weight to its assessments of witness credibility. *In re Langholz*, 887 N.W.2d at 775.

[107] App. ____ (02.11.2022 Order at 7–10; 08.12.2022 Order at 4 n.2).

Argument.

If the Court concludes the Landowner Information is not protected from disclosure under section 22.7(18), the Court should find the Landowner Information is entitled to such protection based on the next step in its "present analytical framework" — the common-law balancing test. *Atl. Cmty.*, 818 N.W.2d at 235.

As this Court has previously observed, in determining whether records should be exempt from public disclosure pursuant to an open records law, "courts commonly apply the following factors as a means of weighing individual privacy interests against the public's need to know:

> (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; (4) whether alternative sources for obtaining the information exist; and (5) the gravity of the invasion of personal privacy."

Clymer, 601 N.W.2d at 45. The Board, in determining whether the Landowner Information should be exempt from disclosure, considered these factors to determine that it was, in fact, exempt.[108] The district court, however, agreed with Sierra Club "that no common law balancing test should be applied in this case," and refused to consider them.[109] In resisting such analysis, both

[108] App. ___ (11.23.2021 Board Order at 5–8).
[109] App. ___ (02.11.2021 Order at 10).

the Sierra Club and the district court substantively misread the law. Recent precedents of this Court instruct that the district court should have consulted the common-law balancing test before denying protection of the Landowner Information from disclosure based on the Open Records Law. Indeed, this is precisely the kind of factual situation that compels a common-law approach to ensure that important individual privacy rights are not blithely tossed aside.

The district court based its conclusion that the balancing test should not be applied here on its reading of *Atlantic Community*. But *Atlantic Community* dictates that the court ***should*** have applied the balancing test once it concluded the categorical exemption set forth in section 22.7(18) did not apply. There, this Court explained that determining whether information is exempt from mandatory disclosure pursuant to the Open Records Act first requires looking to the statutory exemption at issue, and then, if the statutory exemption ***does not fit***, the court must look to the balancing test:

> 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 "personal 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, brackets omitted).

Despite the clear articulation of the "present analytical framework" for open records requests in *Atlantic Community*, in this case the district court declined to apply that framework. The court justified its rejection of the framework, and the balancing test, based on its reading of *other* past precedents of this Court, stating that it had been "unable to identify any case where a balancing test was used independent from one or more of the statutory exemptions."[110] But *Atlantic Community* itself conclusively refutes the district court's analysis with respect to both of the leading cases in which this Court *applied* the balancing test, *Clymer* and *DeLaMater*. *Atl. Cmty.*, 818 N.W.2d at 234. The *Atlantic Community* Court explained the balancing test had been applied in *DeLaMater* only *after* concluding no statutory exemption applied:

> Having determined that the materials sought were **not the type of information our Act categorizes as private**, we performed the balancing test.

Id. (emphasis added). The Court made the same observation in describing how it had applied the balancing test in *Clymer*:

> After determining the Act **did not categorize the records under an exemption**, we applied the balancing test.

[110] App. ___ (02.11.2022 Order at 7).

Id. at 235 (emphasis added). Notably, *DeLaMater* and *Clymer* are the cases the district court relied upon in rejecting the framework set forth in *Atlantic Community*.

The district court placed particularly heavy emphasis on a single footnote in *Atlantic Community* that the Court expressly acknowledged was ***not*** intended to be a controlling statement of the governing law. The footnote states as follows, in full:

> 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). 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***.

Id. at 234 n.2 (emphasis added and omitted). In the end, the analysis undertaken by the district court below reaches the same result it would have

reached had it disregarded entirely the final clause of this footnote. The district court treated as controlling a conclusion that this Court expressly declined to reach — that there is no balancing test. Because this Court expressly declined to reach that conclusion, however, what stands is this Court's instruction on what the "present analytical framework" requires. That instruction ***was*** binding on the district court.

The district court refused to apply the balancing test because it concluded that the *Atlantic Community* majority was not advocating for its use "unmoored from" or "apart from the statutory exemptions."[111] In its view, the balancing test was applied solely "to determine whether certain information met the standard for exemption" under the statute before *Atlantic Community* and this Court did not intend to change that.[112] Because this Court did not actually *apply* the balancing test in that case, the district court explicitly concluded that its discussion regarding ***when*** the test applies is *dicta* and not binding on the lower courts.[113] But that analysis fundamentally misapprehends what the justices in *Atlantic Community* disagreed about — the very heart of their disagreement concerned ***when*** the balancing test

[111] App. ___ (02.11.2022 Order at 9).
[112] App. ___ (02.11.2022 Order at 7).
[113] App. ___ (02.11.2022 Order at 8).

applies, and whether or not it should have been applied in interpreting the statutory exemption at issue.

The majority and the dissent in *Atlantic Community* reached different conclusions about the proper outcome of the case ***precisely because*** they disagreed about when the analytical framework applies. Consequently, *Atlantic Community*'s "present analytical framework" ***is*** binding on the district courts. And subsequent caselaw, to the extent it exists, bears this out. Four years after *Atlantic Community* was decided, this Court again addressed the balancing test in *In re Langholz*:

> When determining whether the injunction should be issued, 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." Iowa Code § 22.8(3). This is true even when allowing access to the records "may cause inconvenience or embarrassment to public officials or others." In addition to the statutory limitations, we have also adopted a five-factor test that balances privacy with the benefits of public disclosure:
>
>> (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; (4) whether alternative sources for obtaining the information exist; and (5) the gravity of the invasion of personal privacy.

887 N.W.2d at 777 (quoting both *Clymer* and *DeLaMater*). Just as in *Atlantic Community*, *In re Langholz* described the balancing test as one that is applied apart from the statutory exemptions in the Open Records Law. Unlike

Atlantic Community, however, *In re Langholz* was a unanimous decision. Even more recently, with only one justice specially concurring, the Court yet *again* confirmed that *Atlantic Community* "clarified" the current "approach to section 22.7's exemptions" in *Mitchell*, 926 N.W.2d at 233.[114]

The Sierra Club and the district court have it backwards: the balancing test does ***not*** apply when the facts of the case clearly fall within the language of a statutory exemption, whether that is section 22.7(11), section 22.7(18), or any other. The balancing test is a backstop to protect important privacy interests where the Open Records Act itself does "not categorize the records under an exemption." *Atl. Cmty.*, 818 N.W.2d at 234. If the Court concludes that section 22.7(18) does not the protect the Landowner Information here, it must apply the balancing test to determine whether the Landowner Information should be exempt from disclosure.

As demonstrated below, examination of each of the five factors in the common-law balancing test leads only to one conclusion — the Landowner Information is entitled to protection from public disclosure.

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[114] The court of appeals also recognizes that the "present analytical framework" requires the court to first determine if a statutory exemption applies, and then apply the balancing test if not. *Doe v. Univ. of Iowa*, 828 N.W.2d 326 (table), 2013 WL 85781 at *2, *4 (Iowa Ct. App. Jan. 9, 2013).

A. Factor One Favors Protecting the Landowner Information Because They Are Not Sought For a Public Purpose.

As the Board correctly concluded, Sierra Club has no public purpose for requesting the Landowner Information.[115] Rather, it made clear in seeking the information from the Board that it desired the list to facilitate private objectors to the project, including itself, in organizing. Assisting the private party on one side to organize against the other private party with respect to a contested subject of public debate is not an appropriate role for the government to play. More importantly, performing such a function would advance no purpose of the Open Records Act.

B. Factor Two Favors Protecting the Landowner Information Because the Purpose Sought to Be Accomplished Does Not Require Disclosure.

Next, even if organizing private parties on just one side of a contested public debate *were* a government function that served the purposes of the Open Records Act, such organizing can be accomplished in any manner of ways without the Landowner Information. Sierra Club and individual opponents of the project could hold their own meetings, attend or send members to the meetings that Summit held, or even advertise in the counties touched by the project. They could easily identify themselves and locate

[115] App. ___ (11.23.2021 Board Order at 6).

others who share their views through the comments in the public Board docket, as many have done. They could use social media for the same purpose, as many have also done. And they can simply talk to their neighbors — because a pipeline is linear infrastructure, those along the project route each have one or more neighboring households that is as well. Sierra Club could have identified individual landowners by putting in the work to compare public land records to the proposed route for the project, or hired a specialized vendor to complete the onerous task, as Summit itself did. Sierra Club's primary objective can be accomplished just as effectively without the needless release of over 10,000 Iowans' personal information without their knowledge or consent. What Sierra Club really wants is simply to free-ride off Summit's list for its own private organizing, and for its supporters and allies to be able to do the same. The mere fact that the list was shared with the Board should not entitle Sierra Club to an organizing windfall it would never have had if — as had been true in every prior pipeline docket — the Board had never informally requested the Landowner Information.

C. Factor Three Favors Protecting the Landowner Information Because The Scope of Records Sought Is Extraordinarily Large.

In analyzing the scope of the public records sought, the Court should consider both the nature of the intrusion and the number of individuals whose

privacy interests will be affected if they are disclosed.[116] The scope of the privacy interests impacted here is *exceedingly* broad — over 10,000 people may lose their privacy, peace, and security by having their names ***and*** addresses publicly exposed and tied to a project opposed by a very vocal, highly organized opposition. That is a status they did not choose, and one which may subject them to harassment, disturbance of their peace, unwanted publicity, and perhaps even concerns for their safety. These 10,000 Iowans have done nothing to put themselves in the situation, and they will have had no real opportunity to avoid the situation — the vast majority of them are unaware that this case even exists.

D. Factor Four Slightly Favors Protecting the Landowner Information Because Alternate Sources Were Available to An Appropriate Extent Under the Law.

As explained above, Sierra Club could ascertain the identities and addresses of the individuals along the project route through other sources, but what it could not precisely determine who was within the corridor in which Summit intended to seek easements.[117] Since that is useful to Sierra Club's

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[116] *See, e.g.*, *Atl. Cmty.*, 818 N.W.2d at 243 (Cady, C.J., dissenting) (looking to the nature of the information sought and the intrusion into individual privacy interests in weighing this factor). While the Board acknowledged the scope of the request was "very large," it focused its analysis on how readily Summit could assemble the requested records for production. App. ___ (11.23.2021 Board Order at 7). That aspect of its analysis was misplaced.
[117] Iowa Admin. Code 199—13.2(5).

core purpose for seeking the Landowner Information — to stir up opposition to the project among persons whom Summit may contact in seeking easements. Yet, for the reasons explained above, that is not a legitimate public purpose. Putting that aside, the aspects of the Landowner Information that Sierra Club could not readily obtain consisted entirely of information that was exempt from disclosure under the Open Record Act. The specific identities and addresses of the precise individuals with whom Summit wants to negotiate private, bilateral contracts also involves proprietary information in the nature of a trade secret, akin to a customer or business contact list — the types of information that is routinely given protection under the law.[118] On balance, this factor probably weights slightly in favor of protection at best, or perhaps neutrally, at worst.

E. Factor Five Favors Protecting the Landowner Information Because Public Disclosure Would Result In Significant Invasions of Privacy.

As the Board noted, the final factor of the balancing test weighs strongly in favor of maintaining confidentiality of the Landowner Information. In *Clymer*, this Court made clear that public disclosure of address information is a grave invasion, as even the public disclosure of the

[118] Iowa Code §§ 22.3 (protecting trade secrets), 22.7(6) (protecting reports to governmental agencies which, if released would give advantage to competitors and serve no public purpose).

addresses of government employees "does not serve the core purpose of the freedom of information statutes — to enlighten the public about the operation or activities of the government." 601 N.W.2d at 47. *Clymer* illuminates the gravity of the privacy interests at stake here — if even "a public employee has a substantial privacy interest in his or her address that outweighs the public's interest in disclosure," surely a private citizen, especially one who seeks nothing from the government, has "a substantial privacy interest in his or her address" entitled to even more protection. *Id.*

And here, the Landowner Information is not "necessary to open the government's actions to the light of public scrutiny." *Id.* The scope of the notice corridor is not even the result of any government action or rule. Sierra Club merely wants the Landowner Information to subject the individuals whose personal information it contains to its own private agenda. Again, that is not a public purpose at all, and certainly not a purpose approaching the high bar *Clymer* sets for invading such substantial privacy interests. The 10,000 Iowans whose personal information is at stake lack the nexus seen in virtually every case where public records are ordered to be released: they asked nothing of the government, their information was not relevant to any decision of a government entity, and there are no state funds at stake — they are not seeking government benefits or employment. Instead, there is no evidence to suggest

they are even aware their privacy interests are at risk.[119] An outcome that leaves their information unprotected would be unwelcomed and unnecessary under the law.

* * * * *

The balancing test is intended to assist the Court in weighing the individual privacy interests that would be affected if the requested records were disclosed against the public interest in the exposure of the information sought. Here, the application of that test, or even just common sense, weighs heavily in favor of protecting the personal information of the more than 10,000 individuals whose personal information is contained in the Landowner Information. Accordingly, even if the Court concludes the Landowner Information does not fall squarely within an exemption from disclosure under the Open Records Act, the Court should protect it from disclosure and grant it confidentiality under the common-law balancing test as demonstrated above.

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[119] App. ___ (11.23.2021 Board Order at 7). The Board found there was no workable way to release the Landowner Information while protecting the privacy of those who did not want their information to be publicly released. *Id.* at 8.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court order denying the motion for permanent injunction and remand the case to the district court for entry of an order permanently restraining the Board from releasing the landowner information or for such further proceedings as it deems necessary and appropriate.

REQUEST FOR ORAL SUBMISSION

Summit respectfully requests oral submission of this matter.

Respectfully submitted this 20th day of April, 2023.

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CERTIFICATE OF COST

The undersigned certifies that the cost for printing and duplicating paper copies of this brief was $0.00.

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This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(*d*) and 6.903(1)(*g*)(1) because it has been prepared in a proportionally spaced typeface using 14 point Times New Roman font in Microsoft Word 2010 and contains 12,783 words, excluding the parts of the brief exempted from the type-volume requirements by Iowa R. App. P. 6.903(1)(*g*)(1).

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The undersigned certifies the foregoing document was electronically served on the Clerk of the Supreme Court using the Electronic Document Management System on April 20, 2023, which will serve a notice of electronic filing to all registered counsel of record.

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