IN THE COURT OF APPEALS OF IOWA

No. 1-534 / 11-0095
Filed October 19, 2011

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF IOWA, INC.,
Petitioner-Appellant,

vs.

RECORDS CUSTODIAN, ATLANTIC COMMUNITY SCHOOL DISTRICT,
Respondent-Appellee.

Appeal from the Iowa District Court for Cass County, Richard H. Davidson, Judge.

The American Civil Liberties Union Foundation of Iowa appeals the district court's entry of summary judgment in favor of the Atlantic Community School District on the foundation's claim seeking disclosure of employee records. **AFFIRMED.**

Randall C. Wilson, Des Moines, for appellant.

Brett S. Nitzschke and Emily K. Ellingson of Lynch Dallas, P.C., Cedar Rapids, for appellee.

Heard by Vogel, P.J., and Potterfield and Danilson, JJ.

DANILSON, J.

The American Civil Liberties Union Foundation of Iowa (ACLU) appeals the district court's entry of summary judgment in favor of the records custodian of the Atlantic Community School District on the ACLU's claim seeking disclosure of employee records. Specifically, the ACLU sought information pertaining to the discipline of two school employees after an alleged "locker room strip search" was conducted on five female students at the school. The district court concluded, as a matter of Iowa law, that the disciplinary records requested by the ACLU were "essentially in house, job performance documents exempt from disclosure" pursuant to Iowa Code section 22.7(11) (2009). The ACLU argues the district court erred in failing to apply a balancing test to determine whether the information was exempt from disclosure. Upon our review, we agree with the district court that the facts are undisputed and all that remains is a question of law. We further conclude the district court correctly applied the law to conclude the school district was not required to disclose the records requested by the ACLU, and we affirm the court's ruling in favor of the school district.

I. Scope of Review.

Our review of the district court's interpretation of section 22.7 is at law. *DeLaMater v. Marion Civil Serv. Comm'n*, 554 N.W.2d 875, 878 (Iowa 1996). Our review of the district court's application of section 22.7 to the undisputed facts shown in the record before it, tried in equity, is de novo. *See id.*; *see also* Iowa Code § 22.5; *Clymer v. City of Cedar Rapids*, 601 N.W.2d 42, 45 (Iowa 1999). The defendants bear the burden to demonstrate the applicability of an exemption under section 22.7(11). *DeLaMater*, 554 N.W.2d at 878.

II. Analysis.

This case is governed by Iowa Code chapter 22, Iowa's "open records" act. Chapter 22 gives every person the right to access public records or information stored by a public entity. *See* Iowa Code §§ 22.1(3); 22.2(2). However, chapter 22 also identifies certain public records that shall be kept confidential. *See id.* § 22.7. At issue is the application of section 22.7(11) pertaining to personnel records. That section states, in part, that the following public records shall be kept confidential: "Personal information in confidential personnel records of public bodies, including . . . school districts." *Id.* § 22.7(11).[1]

In August 2009, two employees of the Atlantic Community School District conducted an investigation in an effort to recover $100 reported missing by another student.[2] The investigation allegedly included a strip search of five teenage girls in a locker room during a gym class. In November 2009, the district superintendent, Dan Crozier, publicly announced that two school staff members would be disciplined, but did not identify the employees or describe the discipline they would receive. The ACLU sent an open records request to the records custodian of the school district seeking "more information about the discipline of two Atlantic Community School staff members in response to the locker room

[1] On May 12, 2011, this section was amended to state, in pertinent part, that the following public records shall be kept confidential: "Personal information in confidential personnel records of government bodies relating to identified or identifiable individuals who are officials, officers, or employees of the government bodies." *See* S.F. 289, 84th G.A. § 10 (Iowa 2011). Subsections were added to the statute excluding from confidentiality the individual's name, compensation, dates of employment, positions held, educational background, and whether the person was discharged as a result of a disciplinary action. *See id.*

[2] The money was not recovered.

strip search incident." The school district replied and provided the names of the two employees who were disciplined, but declined to describe any specific discipline imposed on those staff members, citing section 22.7(11) (noting that confidential personnel records of school districts shall be kept confidential).

In February 2010, the ACLU filed suit in district court against the school district, requesting information about the "specific disciplinary consequences" of the two school employees. The school district denied the ACLU's request, maintaining that disciplinary information concerning public employees is exempt from mandatory disclosure under section 22.7(11). The parties filed cross motions for summary judgment. Following a hearing in September 2010, the district court granted the school district's motion for summary judgment, denied the ACLU's motion for summary judgment, and dismissed the action.

In its order, the district court correctly noted that the issue in this case "is whether Iowa's open records law, Iowa Code chapter 22, requires the Atlantic School District to disclose employee disciplinary records to the public." Our supreme court has observed that in considering the scope of the confidentiality exceptions under chapter 22, "the legislature intended for the disclosure requirement to be interpreted broadly, and for the confidentiality exception to be interpreted narrowly." *In re Des Moines Indep. Cmty. Sch. Dist. Pub. Records*, 487 N.W.2d 666, 669 (Iowa 1992); *accord City of Dubuque v. Telegraph Herald, Inc.*, 297 N.W.2d 523, 527 (Iowa 1980). "Nevertheless, where the legislature has used broadly inclusive language in the exception, we do not mechanically apply the narrow-construction rule; instead, we give effect to the legislative purpose underlying the exception." *DeLaMater*, 554 N.W.2d at 878. In this case, the

Atlantic school district, the defendant, fulfilled its burden to demonstrate the applicability of the exemption under section 22.7(11). *See id.*

The ACLU argues the district court erred in failing to apply a balancing test to determine whether the information was exempt from disclosure. Our supreme court has instructed that in determining whether the legislature intended for a particular record to be private, "courts commonly apply" a five-part balancing test to weigh individual privacy interests against the public's need to know. *See Clymer*, 601 N.W.2d at 45 (explaining the balancing test)[3]; *DeLaMater*, 554 N.W.2d at 880-81 (applying balancing test). However, in both *Clymer* and *DeLaMater*, the supreme court distinguished its earlier decision in *In re Des Moines* where the court concluded employee job performance evaluations were exempt from disclosure, and did so without application of a balancing test.

Specifically, in *In re Des Moines*, 487 N.W.2d at 670, the court determined that section 22.7(11) rendered "in-house, job performance documents exempt from disclosure." The court did not apply a balancing test to reach its finding that the requested information (complaints made against a school employee contained in a file with documents mainly about job performance) was exempt from disclosure. *Id*. Subsequently, in *DeLaMater*, the court explained that the document in question in *In re Des Moines* "fell within the category of personal information in personnel records" that the legislature intended to protect, and that

[3] In applying the balancing test, courts commonly consider 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 court did not need to employ a balancing test to reach that conclusion. *DeLaMater*, 554 N.W.2d at 779. The court observed that evaluations of job performance are clearly "confidential under Iowa law," but "generic information" such as that contained in a newspaper job vacancy application are "clearly subject to disclosure." Cases where the information sought "falls somewhere in between" are situations requiring application of the balancing test. *Id*.; *see also Clymer*, 601 N.W.2d at 45.

In this case, the district court correctly determined that the information sought by the ACLU "does not fall in between." The Atlantic school district discipline reports are job performance records that are clearly confidential under Iowa law. *DeLaMater*, 554 N.W.2d at 779; *In re Des Moines*, 487 N.W.2d at 670 (concluding information sought was "essentially in-house, job performance documents exempt from disclosure"). The district court was not required to employ a balancing test to reach this result, a practice consistent with our supreme court's prior applications of section 22.7(11) under facts and circumstances similar to the instant case.

We also note that the legislature recently amended section 22.7(11) to provide some specific exceptions to the requirement that personnel records are confidential. *See* S.F. 289, 84th G.A. § 10 (Iowa 2011). The amended statute lends support for our conclusion as we may, in "determining the intention of the legislature, . . . consider former and more recent versions of the statute." *State v. Ahitow*, 544 N.W.2d 270, 272 (Iowa 1996); *Barnett v. Durant Cmty. Sch. Dist.*,

249 N.W.2d 626, 629 (Iowa 1977) ("An amendment may indicate an intent either to change the meaning of a statute or to clarify it.").[4]

Here, the amended language clarifies the legislature's intent, because the newly adopted version only exempts from the confidentiality requirement "a final disciplinary action" that resulted in the employee's discharge. *See* S.F. 289, 84th G.A. § 10. The new law identifies as an exemption only this *single* form of disciplinary action—an action that results in discharge. Moreover, the absence of an exemption for *all* disciplinary actions reflects the legislature's intent to retain the confidentiality of the type of information sought in this case. Without clear evidence to the contrary, we presume the legislature's act in refining this statute is with knowledge of the "existing state of the law and judicial interpretations." *State v. Freeman*, 705 N.W.2d 286, 291 (Iowa 2005).

We acknowledge the public interest in open access to governmental records and the conflict between access and the interest in protecting privacy rights of employees. But we agree with the district court that any expansion of the public's right to these records is a matter for the legislature to determine. Accordingly, we affirm the district court's grant of summary judgment in favor of the school district.

AFFIRMED.

Vogel, P.J., concurs; Potterfield, J. dissents.

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[4] In *State v. Hutton*, 796 N.W.2d 898, 904 (Iowa 2011), our supreme court recited that this principle is only applicable where the statute is ambiguous. The court further explained that an ambiguity may arise "from the general scope and meaning of a statute when all of its provisions are examined." (citing *IBP, Inc. v. Harker*, 633 N.W.2d 322, 325 (Iowa 2001). Clearly, the general scope of Iowa Code section 22.7(11) has been the subject of significant litigation and interpretation. We therefore apply this principle to the case at hand.

POTTERFIELD, J. (dissenting)

I respectfully dissent from the majority's conclusion that the records of the discipline imposed by the school district on its employees are "job performance records" that are "clearly confidential" and so not subject to a balancing of the interests involved. While the disciplinary measures may implicitly contain information regarding the job performances of the two individual employees, the privacy interests implicated here, the measures relate most directly to the response of the school district in which the public has a legitimate interest.

My analysis of the decisions of the Iowa Supreme Court in cases involving the exemption to our open records law for "personal information in personnel records" leads me to believe disclosure of the narrow piece of information requested by the ACLU should not be categorically denied under the circumstances here. These circumstances include the important facts that the district volunteered to the public the information that the two employees involved would be disciplined and then released the names of those two employees, while refusing to disclose the disciplinary measures imposed. The privacy interests of the employees in the confidentiality of their job performance records already has been compromised by the release of their names and the fact that disciplinary measures were taken.

The Iowa Supreme Court has recognized that Iowa Code section 22.7(11) does not define "personnel records," making a balancing test necessary in each fact specific inquiry. *DeLaMater v. Marion Civil Serv. Comm'n*, 554 N.W.2d 875, 879 (Iowa 1996). The court also noted that, pursuant to section 22.8(3), the

policy of chapter 22 is "free and open examination of public records even though it may cause embarrassment." *Id*. at 881.

The records requested here are, in my view, more like the test scores in *DeLaMater* than the job performance evaluations in *In re Des Moines Independent Community School District Public Records*, 487 N.W.2d 666, 667 (Iowa 1992), which the majority finds to be the appropriate analogy. Like test scores, the records of disciplinary actions reveal the weighing of values employed by the public agency in addressing a situation in which identities and the factual context have already been disclosed.[5]

I would remand for a re-examination and fact-specific inquiry in the district court.

[5] The recent amendment to the statute, allowing disclosure of the fact that an individual "was discharged as the result of a final disciplinary action" reflects an appreciation for the importance to the public of measures taken by agencies in the event of misconduct or omissions by public employees. *See* S.F. 289, 84th G.A. § 10 (Iowa 2011).