IN THE COURT OF APPEALS OF IOWA

No. 0-985 / 10-0966
Filed February 23, 2011

JOSHUA MARTIN NEER,
Plaintiff-Appellant,

vs.

STATE OF IOWA; IOWA DEPARTMENT OF PUBLIC SAFETY; IOWA STATE PATROL; COLONEL PATRICK HOYE, in his Official Capacity; and COURTNEY GREENE, in her Official Capacity,
Defendants-Appellees.

Appeal from the Iowa District Court for Polk County, Robert A. Hutchison, Judge.

The plaintiff appeals a district court order granting summary judgment to the defendants in an action under the Open Records Act. **AFFIRMED.**

Scott A. Michels of Gourley, Rehkemper & Lindholm, P.L.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, and Jeffrey C. Peterzalek and Matthew Oetker, Assistant Attorneys General, for appellees.

Considered by Sackett, C.J., and Vogel and Vaitheswaran, JJ. Tabor, J., takes no part.

VAITHESWARAN, J.

We must decide whether certain records in the possession of the State are confidential.

I. Background Facts and Proceedings

Joshua Neer was arrested for operating while intoxicated and eluding. After he pleaded guilty and was sentenced, he asked the Iowa Department of Public Safety for records relating to his arrest. When the department declined to release the records, Neer filed suit to compel production. The department voluntarily turned the records over to Neer, then sought summary judgment on the ground the lawsuit was moot or, alternately, the records were confidential. The district court agreed the lawsuit was moot but found the confidentiality issue of sufficient public importance to warrant a decision on the merits. The court concluded the requested records were confidential and granted summary judgment for the State.[1]

On appeal, Neer takes issue with this conclusion. Our review of the district court's ruling is on error. *Gannon v. Bd. of Regents*, 692 N.W.2d 31, 37 (Iowa 2005); *see also* Iowa R. App. P. 6.907. Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 1.981(3).

II. Mootness

As a preliminary matter, Neer contends the district court erred in finding the case moot. The State counters that the district court erred in *sua sponte*

[1] We collectively refer to all the defendants as "the State."

applying an exception to the mootness doctrine to reach the question of whether the records were confidential.

A case is moot if it no longer presents a justiciable controversy because the issues involved have become academic or nonexistent. *Junkins v. Branstad*, 421 N.W.2d 130, 133 (Iowa 1988). "The test is whether a judgment, if rendered, would have any practical legal effect upon the existing controversy." *Id.* Because the State released the records to Neer, we agree with the district court that this case became moot. *See Shannon v. Hansen*, 469 N.W.2d 412, 414 (Iowa 1991) (noting plaintiff no longer sought production of witness statements in light of settlement of underlying civil suit, rendering the issues raised on appeal academic and moot); *see also Papa v. United States*, 281 F.3d 1004, 1013 (9th Cir. 2002) ("[T]he production of all nonexempt material, 'however belatedly,' moots FOIA claims." (citations omitted)); *Clapper v. Oregon State Police*, 206 P.3d 1135, 1139 (Or. Ct. App. 2009) (affirming grant of summary judgment to defendant where plaintiff had received all of the requested records).

We recognize that Neer's lawsuit also contained requests for prospective injunctive relief, statutory damages, attorney fees, and costs. *See* Iowa Code § 22.10(1), (3)(a)–(c) (2009); *see also Marcus v. Young*, 538 N.W.2d 285, 289 (Iowa 1995) ("Iowa Code chapter 22 provides a number of remedies for its violation."). We need not decide whether these remedies remained viable after the State's voluntary production of the requested information,[2] thereby allowing

[2] Chapter 22 does not explicitly foreclose these forms of relief in the event the State voluntarily releases requested documents but does contain some limitations on recovery. *See* Iowa Code §§ 22.8(4)(c) ("Good-faith, reasonable delay by a lawful custodian in permitting the examination and copying of a government record is not a

Neer to overcome the mootness doctrine. That is because the district court instead used the public interest exception to overcome the mootness doctrine. *See, e.g.*, *City of Dubuque v. Pub. Emp't Relations Bd.*, 339 N.W.2d 827, 831 (Iowa 1983) (avoiding question of whether case was moot and choosing to address the merits under the public policy exception); *Rush v. Ray*, 332 N.W.2d 325, 326 (Iowa 1983) (stating moot questions may be addressed where they are of great public importance and likely to recur). We turn to the propriety of invoking and applying that exception.

The district court raised this exception without prompting from the parties. While the State asserts this was impermissible, the Iowa Supreme Court has stated it is within the court's discretion to consider the exception. *See Berleen v. Iowa Dep't of Pub. Safety*, 260 Iowa 699, 701, 150 N.W.2d 593, 594 (1967) ("[W]here a question of public interest is involved it lies in the discretion of the court to pass on the question."); *accord Christensen v. Iowa Dist. Ct.*, 578 N.W.2d 675, 679 (Iowa 1998) (stating where the exception applies, "this court has discretion to consider the appeal on its merits"); *City of Dubuque*, 339 N.W.2d at 831 (determining even if the question is moot, "we may still consider it if it is of great public importance and likely to recur"). Accordingly, we find no error in the court's decision to invoke the exception on its own motion.

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violation of this chapter if" the delay occurred to "determine whether the government record in question is a public record, or confidential record."), 22.10(2) (requiring a party seeking judicial enforcement of the act to show, among other things, "that the defendant *refused* to make those government records available for examination and copying by the plaintiff" (emphasis added)).

We proceed to the district court's ruling on the public interest exception. The court applied relevant factors, *see Shannon*, 469 N.W.2d at 414, and reached the following conclusion:

> Whether investigative reports remain confidential upon the completion of an investigation is an important issue. It is very likely that videos from a police chase and other records associated with an arrest will be requested in the future by other individuals. A determination of the issue would guide not only the defendants but other lawful custodians of records and could prevent the delay of court proceedings in the future.

We discern no error in this ruling. *See Berleen*, 260 Iowa at 701, 150 N.W.2d at 594 ("The action of the public safety department was based on an established construction of its duty. It concerns a matter of public interest."). The scope of the public records exception invoked here would be of interest to the State, as well as any arrestee seeking the disclosure of arrest records. For that reason, we proceed to the merits.

III. Exemption from Open Records Law

Iowa's Open Records Act, found in Iowa Code chapter 22, guarantees every person "the right to examine and copy a public record." Iowa Code § 22.2(1). The statute "is designed 'to open the doors of government to public scrutiny.'" *Gannon*, 692 N.W.2d at 38 (citation omitted). While disclosure is the rule, *see Clymer v. City of Cedar Rapids*, 601 N.W.2d 42, 45 (Iowa 1999), there are numerous exemptions to the rule. *See* Iowa Code § 22.7.

The State agrees the materials requested by Neer—video recordings, use of force reports, and pursuit reports—are "public records" within the meaning of the act. *See id.* § 22.1(3) (defining "public records" to include "all records, documents, tape, or other information, stored or preserved in any medium, of or

belonging to this state"). The State claims, however, that those records are confidential "investigative reports" under section 22.7(5). The provision states:

> The following public records shall be kept confidential, unless otherwise ordered by a court . . . .
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> . . . .
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> 5. Peace officers' investigative reports, and specific portions of electronic mail and telephone billing records of law enforcement agencies if that information is part of an ongoing investigation, except where disclosure is authorized elsewhere in this Code. However, the date, time, specific location, and immediate facts and circumstances surrounding a crime or incident shall not be kept confidential under this section, except in those unusual circumstances where disclosure would plainly and seriously jeopardize an investigation or pose a clear and present danger to the safety of an individual. . . .

Neer responds that the requested materials are not protected as confidential "investigative reports" because: (A) "A video recording is not a 'report,'" (B) none of the requested records were "investigative" in nature, and (C) the records were specifically excluded from the section 22.7(5) exemption under the "date, time, specific location, and immediate facts and circumstances" exclusion.[3] We proceed to these arguments, addressing the second and third contentions together.

[3] The State contends Neer did not preserve error. We disagree. While the State is correct that the wording of the first two issues on appeal varies slightly from the wording used in the district court, the substance of these issues is identical to the issues raised and decided by the district court. *See Griffin Pipe Prods. Co. v. Bd. of Review*, 789 N.W.2d 769, 772 (Iowa 2010) (stating our "preservation rules are not designed to be hypertechnical"). As for the third issue, Neer concedes it was not explicitly decided but says the ruling was apparent from the circumstances. We agree. *See State v. Walker*, 304 N.W.2d 193, 195 (Iowa 1981) (noting issue was preserved because court's response was tantamount to a ruling); *State v. Wright*, 367 N.W.2d 269, 271 (Iowa Ct. App. 1985) ("[T]he trial court's ruling, though not explicitly addressed to Wright's motion, was crystal clear.").

A. Is the video recording a "report"?

Neer argues

> the statute specifically identifies "peace officer's investigative reports" as qualifying as confidential, but does not identify "tape, or other information, stored or preserved in any medium" as falling under the confidentiality provision, despite those items being specifically defined as "public records."

While this argument is appealing at first blush, the term "investigative reports" has been interpreted to encompass not only reports but also other material and evidence incorporated into reports. *See, e.g.*, *AFSCME/Iowa Council 61 v. Iowa Dep't of Pub. Safety*, 434 N.W.2d 401, 403 (Iowa 1988) (finding lab reports analyzing a suspect's blood were "investigative reports" within the meaning of section 22.7(5)); *State ex. rel. Shanahan v. Iowa Dist. Ct*, 356 N.W.2d 523, 531 (Iowa 1984) ("[T]he district court abused its discretion in ordering the DCI to give the civil litigants and their attorneys access to the *entire* criminal investigation file." (emphasis added)). Based on this interpretation, we conclude video recordings are encompassed within the phrase "peace officers' investigative reports."

B. Are the requested materials "investigatory" or do they fall within "the date, time, specific location, and immediate facts and circumstances surrounding the crime" exclusion?

Neer next argues the video recording, use of force reports, and pursuit reports are not investigatory because the "requested reports and video recording . . . merely detail the actions the Troopers took in pursuing [him] and his eventual arrest. There was no inquiry by the Troopers as to what happened." The State responds that as none of the requested materials were included in the record, "this Court lacks the records necessary to determine whether they are

'investigative' in nature." *See Iowa Land Title Ass'n v. Iowa Fin. Auth.*, 771 N.W.2d 399, 404 (Iowa 2009) ("It is the appellant's duty to make sure the reviewing court has an adequate record to decide an appeal."); *Alvarez v. IBP, Inc.*, 696 N.W.2d 1, 4 (Iowa 2005) (noting if an appellant fails to present a record to the appellate court "'the trial court will be affirmed, at least where its judgment is not fundamentally erroneous on its face'" (citation omitted)).

We are not convinced the missing items were necessary to resolve the issue raised here. It is undisputed that the video recording, use of force reports, and pursuit reports related to the officer's encounter with Neer just prior to his arrest. To require an item-by-item assessment of everything within a criminal investigation file would, for all practical purposes, eliminate the investigative report exemption. *See Shanahan*, 356 N.W.2d at 529–30 (noting "courts have recognized [the] important public purpose of allowing criminal investigation to be conducted in relative secrecy" and stating the "State has a very real interest in protecting the relative secrecy of much of the information its agents *gather, analyze, and record* during their investigation of criminal activity and crimes" (emphasis added)). For this reason, we conclude as a matter of law that the requested materials were part of the investigation. *See, e.g.*, *State v. Curry*, 436 N.W.2d 371, 373 (Iowa Ct. App. 1988) (finding a "field interview card" documenting the date, time, specific location, and description of subject was an "investigative report" under Iowa Rule of Evidence 5.803(8)(B)(i)).

In reaching this conclusion, we have considered the law from other jurisdictions cited by all parties. This law makes a distinction between "incident reports" and "investigative reports" and only deems the latter confidential. *See*

Allen v. Barksdale, 32 So. 3d 1264, 1271 (Ala. 2009) ("An incident report documents any incident—from the mundane to the serious—whereas an investigative report . . . reflects a close examination of an incident and a systematic inquiry and may lead to criminal prosecution. The commissioner's refusal to release incident reports to the general public is not protected by § 12-21-3.1(b)."); *see also* Mo. Rev. Stat. § 610.100.1(4), (5) (distinguishing between investigative reports and incident reports). The cited law does not further our analysis, as Iowa's statute also makes this distinction, albeit not in the same words.

As noted, section 22.7(5) authorizes the disclosure of "the date, time, specific location, and immediate facts and circumstances surrounding a crime or *incident.*" (Emphasis added.) There is no dispute that the department disclosed these specifics early on in a letter to Neer. Neer has cited no authority that would additionally require disclosure of all or parts of the department's investigative file to comply with this requirement. Were we to impose such a requirement, we believe the "incident" disclosure exception would swallow the provision holding "investigative reports" confidential.

The district court did not err in concluding that the requested materials were confidential as a matter of law pursuant to Iowa Code section 22.7(5). Accordingly, we affirm the court's grant of the State's motion for summary judgment.

AFFIRMED.

Vogel, J., concurs; Sackett, C.J., concurs specially.

SACKETT, C.J. (concurring specially)

I concur specially without opinion.