

IN THE COURT OF APPEALS OF IOWA

No. 9-123 / 08-1368
Filed April 22, 2009

MICHAEL BURKE,
Plaintiff-Appellant,

vs.

**THE CITY COUNCIL FOR THE CITY OF
EVANSDALE, Including Councilpersons:
DICK DEWATER, RICK HIBBEN, KENNY
LOFTUS, SHELLY SMITH and CARL WYANT,
and JOHN MARDIS, Mayor,**
Defendants-Appellees.

Appeal from the Iowa District Court for Black Hawk County, Jon Fister,
Judge.

City employee appeals adverse decision concerning open records and
open meetings laws. **AFFIRMED AND REMANDED.**

Linda A. Hall of Gallagher, Langlas & Gallagher, P.C., Waterloo, for
appellant.

David E. Schrock and Charles A. Blades of Scheldrup, Blades, Schrock,
Sand, Aranza, P.C., Cedar Rapids, for appellees.

Heard by Eisenhauer, P.J., and Doyle and Mansfield, JJ.

EISENHAUER, J.

Michael Burke, the Evansdale police chief, appeals the district court's dismissal of his petition alleging violations of Iowa's open meetings law and open records act. He further claims the court erred in denying his motion for new trial. We affirm and remand.

I. Background Facts and Proceedings.

On July 26, 2006, the *Courier*, an area newspaper, reported the Black Hawk County attorney had requested an investigation of an Evansdale police officer "according to the Iowa Department of Criminal Investigation." On September 29, 2006, the *Courier* stated Michael Burke, Evansdale police chief, "was investigated and cleared last week of any wrongdoing concerning an abandoned power washer that ended up at his home." Burke was out of town, but responded to the newspaper's e-mail request "to tell his side of the story," and indicated "recent allegations of misappropriation of city property were politically motivated and an attack on his character." The article further explained:

I personally own two power washers and certainly didn't need a third one, Burke said. I welcomed the DCI (Iowa Department of Criminal Investigation) investigation and even encouraged the agent who conducted it.

Once the investigation was complete, it was turned over to Black Hawk County Attorney Tom Ferguson. He referred the case to Acting Dubuque County Attorney Ralph Potter to avoid any appearance of favoritism or impropriety.

Potter decided not to prosecute.

It's just real bad policies. There was no criminal intent, Potter said.

[The mayor] is happy the chief was cleared of any wrongdoing, though he's disappointed an investigation occurred in the first place. He said city policies regarding abandoned and

confiscated property need to be more defined to avoid any appearance of impropriety.

When Burke learned the Potter report would be discussed at the October 3, 2006 city council meeting, he e-mailed the mayor and requested those discussions be held in a closed session. Due to Burke's request, the October 3 agenda stated: "19. Possible Executive Session – Per Iowa Code Chapter 21.5(1)(i) – Personnel issues." At the meeting the council voted to go into a closed session on this agenda item. The minutes of the meeting state:

Chad Deustch [a part-time Evansdale police officer] inquired if this would be an appropriate time to read a prepared statement for Council regarding the proposed closed session. Attorney Linda Hall said that since Chief Burke was unable to be present, he had asked that the closed session be postponed. Councilman Dewater stated that executive session should be convened to establish a basis for decision or action.

Neither Burke nor the DCI investigation was discussed during any part of the open session of the meeting. The minutes did not identify the topic of the closed session.

On October 5, the *Courier* published a story central to this litigation. The headline stated, "Evansdale City Council investigates police chief." Further,

The City Council met in closed session Tuesday to discuss whether it should take any action against Burke, or simply tighten up rules concerning abandoned and seized property.

. . . .
The council reviewed a letter from Potter summarizing the DCI's investigation. No action was taken on the matter following the closed session. Without commenting on the exact nature of the discussions, council member Dick Dewater said there's a strong possibility of future action.

"There was some extreme poor judgment. We need to tighten up policies." Dewater said.

Potter's letter . . . criticized the Evansdale Police Department and its policies on abandoned property as "a terrible procedure."

The letter pointed out multiple instances where the policy was either ambiguous or not followed correctly by officers. . . .

“This case is characterized by poor procedure and poor judgment,” Potter said in the letter. “Policies were not followed by anyone. The policies that are in effect are incomplete and limited.”

. . . .

However, Potter said he did not think any criminal charges should be filed against Burke.

. . . .

Burke wasn’t at Tuesday’s City Council meeting due to family issues. However, he submitted an e-mail explaining his actions to city officials. It was the same e-mail provided to the *Courier* for a previous story.

. . . .

Burke said the DCI was never at his home and the power washer wasn’t found there. He thinks the allegations against him were politically motivated, since he has aspirations to become sheriff.

. . . .

Dewater was disappointed law enforcement officials, including Burke, and prosecutors didn’t let the council know an investigation was taking place.

The 4th Ward council member thinks the council will meet in closed session again on the matter.

“I initially thought, ‘Can he keep his job?’” Dewater said. “Was it a bad enough decision to be fired? I certainly thought about it.”

Dewater testified the reporter asked him for his reaction to the Potter report and his comments about whether Burke ought to be fired were based on this topic. Dewater also testified the reporter represented he already knew Burke was the subject of the closed session, but Dewater did not confirm to the reporter that Burke and Burke’s professional competence was the subject of the closed session.

On October 12, 2006, Burke received a letter of reprimand from the mayor informing him of a three-day suspension. The letter was placed in Burke’s personnel file. The next day, Burke filed a petition against the city council and

mayor alleging violations of Iowa's open meetings law and open records act. Burke's simultaneous request for a temporary injunction preventing the disclosure of his personnel information was granted by the district court the same day.

The council met again in closed session on October 17, 2006, at Burke's request. The minutes did not identify the person or topic of the closed session. An October 18 article in the *Courier* stated, Evansdale "has a new acting police chief, but city officials aren't saying why."

By agreement of the parties, the temporary injunction was made permanent on November 9, 2006. After a bench trial in July 2008, the district court ruled in favor of the council members and mayor, vacated the temporary injunction, and subsequently rejected Burke's motion for new trial and motion to amend or enlarge findings. This appeal followed.

II. Scope of Review.

Our scope of review of this law action is for correction of errors at law. Iowa R. App. P. 6.4. We are bound by the district court's findings of fact if supported by substantial evidence. *Id.* 6.14(6)(a).

III. Open Meetings Law.

In Iowa, a city council may hold a closed session by affirmative public vote when evaluating professional competency and "when necessary to prevent needless and irreparable injury to that individual's reputation and that individual requests a closed session." See Iowa Code § 21.5(1)(i) (2005). The Iowa open meetings act further provides the detailed minutes and tape recording of a closed

session shall be sealed and are not available to public inspection without a court order. *Id.* § 21.5(4).

Burke, relying on the October 5 *Courier* article, argues Dewater violated the open meetings law by making statements or even acknowledging to the media that Burke and his professional competence was the subject and content of the closed session. However, Burke does not challenge the factual findings of the district court. We reject Burke's claim of error while adopting the district court's detailed factual resolution of the issue. Therefore, we need not address Burke's allegation the court erred by narrowly interpreting the open meetings law.

The district court ruled:

The second paragraph concerns the closed session . . . and states that the council's purpose was to discuss whether it should take any action against [Burke] or simply tighten up rules concerning abandoned and seized property. This information is not attributed to any of the defendants and the reporter could easily have drawn that conclusion from the prior dissemination of the Potter report, which was not a confidential record, from the announced purpose for which the session was closed, and from the request by [Burke's] attorney before the closed meeting that it be postponed so he could be present.

The remainder of the article, including quotes attributed to defendant Dewater, makes no reference at all to the closed session. They are entirely confined to the Potter report and defendant Dewater's reaction to it. There is not one word in the article about what any person in attendance at the closed session said about [Burke's] job performance or whether any disciplinary action should be taken against him.

The simple fact is that the *Courier* reporter had nothing to support his headline [Evansdale City Council investigates police chief] except the mere fact that a closed session had been held, so he fleshed out the article by falling back on the Potter report.

It is reasonable to assume that the reporter knew that neither the mayor nor the members of the city council could comment on the closed session so he focused his inquiry on one of the council member's reaction to the investigative report. It is also likely that the reporter knew that if he asked members of the council about

what was discussed in the closed session they would have refused to comment and that is all he would have been able to report.

As ultimate facts, the court finds that neither defendant Dewater, the former mayor, nor any of the other members of the Evansdale City Council disclosed anything that occurred during the [October 3] closed session . . . to anyone, including but not limited to the reporter who wrote the [October 5] article. . . .

IV. Open Records Act.

Although the injunctions issued on October 13 and November 9 broadly prohibited discussion and disclosure of all matters concerning Burke discussed in closed session, Burke's argument focuses on the letter of reprimand issued by the mayor. The district court vacated the temporary injunction and ruled Iowa Code section 22.8 "only applies to the examination and copying of public records." The court also found Burke had never claimed the mayor ever intended to provide his letter of reprimand for examination and copying. While the court's ruling vacated the earlier, temporary injunction, the permanent injunction agreed to by the parties was not vacated. Whether this was an oversight by the court is not clear. The appellees suggest the issue is now moot and the appellant believes the injunction remains in effect. We conclude the proper solution is to remand the matter to the trial court for clarification.

V. Motion for New Trial.

Burke filed a motion for new trial claiming irregularity in proceedings. See Iowa R. Civ. P. 1.1004(1). Our scope of review depends on the grounds raised in Burke's motion. See *Clinton Physical Therapy Serv., P.C. v. John Deere Health Care, Inc.*, 714 N.W.2d 603, 609 (Iowa 2006). If the motion for new trial is

based on a discretionary ground, we review for abuse of discretion. *Id.* However, we review on error if the motion is based on a legal question. *Id.*

First, Burke argues the court erred in holding he had the burden of proof under Iowa's open meetings law. We review on error and conclude this argument is without merit. The statute's enforcement section provides once plaintiff Burke demonstrates the defendants are subject to the open meeting laws and have held a closed session, "the burden of going forward shall be on [the defendants] to demonstrate compliance with the requirements of this chapter." See Iowa Code § 21.6(2). Burke admits the trial court, at the start of the proceedings, indicated the defendants had the burden of going forward with the evidence. The Iowa Supreme Court has explained: "[T]his section changes the burden of going forward with the evidence rather than shifting the burden of proof from plaintiffs to defendants." *KCOB/KLVN, Inc. v. Jasper County Bd. of Supervisors*, 473 N.W.2d 171, 177 (Iowa 1991); see also *Gavin v. City of Cascade*, 500 N.W.2d 729, 731-32 (Iowa Ct. App. 1993). We find no error in the denial of a new trial because, under Iowa's open meetings law, plaintiff Burke has the burden of proof. See *id.*

Second, Burke argues the court should have granted him a new trial due to error in not conducting a hearing on his motion for discovery sanctions before commencing trial. When reviewing a district court's ruling on a discovery matter, we afford the district court wide latitude. See *Martin v. B.F. Goodrich Co.*, 602 N.W.2d 343, 345 (Iowa 1999). We will reverse only for an abuse of discretion.

Exotica Botanicals, Inc. v. Terra Int'l, Inc., 612 N.W.2d 801, 804 (Iowa 2000).

After our review of the record, we find no abuse of discretion.

IV. Conclusion.

We affirm the court's rulings on the open meetings law and motion for new trial. On the issue of the open records law and the injunction, we remand. We do not retain jurisdiction.

AFFIRMED AND REMANDED.