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Applicant Number

MPT-1
225

MPT®
Multistate Performance Test

Turner v. Larkin

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Turner v. Larkin

FILE

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FILE

Tan & Singh Law Offices LLC
740 East Broadway, Suite 200
Centralia, Franklin 33402

MEMORANDUM

To: Examinee
From: Elise Tan
Date: February 25, 2025
Re: Peter Larkin—Defense of housing discrimination claim

Our firm has been retained to defend landlord Peter Larkin in a housing discrimination claim brought by Martin Turner. Turner, a single parent with three minor children, applied to rent a two-bedroom apartment from Larkin. Larkin declined Turner's application. Turner claims that Larkin refused to rent to him for discriminatory reasons in violation of the federal Fair Housing Act, 42 U.S.C. § 3601 *et seq*. Larkin claims that he declined the rental application for nondiscriminatory reasons, that he has a long-standing preference for renting to married couples, and that he has a policy of only renting this apartment to a maximum of three people.

Turner filed an administrative complaint with the US Department of Housing and Urban Development (HUD) alleging that Larkin had violated the Fair Housing Act by refusing to rent because of Turner's familial status. The matter has been assigned to an administrative law judge. I attach the factual narrative from Turner's HUD administrative complaint. I also attach a summary of an interview that I conducted with Larkin and a text exchange that Larkin had with a previous prospective tenant for the apartment.

Please draft an objective memorandum to me analyzing the legal and factual arguments that we should raise in Larkin's defense and the legal and factual arguments that Turner may raise in support of his claim. Your memorandum should clearly state the legal test(s) that will be applied to Turner's claims, and you should evaluate the likelihood of success of Larkin's arguments. Do not include a separate statement of facts, but be sure to incorporate the relevant facts, analyze the applicable legal authorities, and explain how the facts and law affect your conclusions.

Excerpt from HUD Administrative Complaint form

February 11, 2025

How were you discriminated against? State briefly what happened: I was moving from San Francisco to Centralia in Franklin so that I could be closer to my parents. My spouse died two years ago, and I am a single parent of three children: Martha, age 16; Maura, age 12; and Max, age 6. On November 6, 2024, I saw an advertisement online for a two-bedroom apartment in downtown Centralia that was close to my parents' place. I am employed as a data analyst, and I can easily afford that apartment on my income. I have a good rental history and good credit. I texted the number listed and asked if the apartment was still available. The landlord texted back, leading to this exchange:

Me:	Hi. I saw the listing for the apartment in Centralia. Is it still available?
Landlord:	Hi. This is Pete Larkin, the landlord. Yes, it is still available. Are you married?
Me:	No, I'm widowed.
Landlord:	Would anyone else be living there?
Me:	Yes, my three kids. Two girls and a boy, ages 6, 12, and 16.
Landlord:	I don't know. I need to think about that. I'll get back to you.

The landlord never got back to me. I'm convinced he wouldn't rent to me because I have kids. I checked back on Craigslist over the next two months. The apartment continued to be listed for rent.

Do you feel that you were discriminated against because of your race, color, religion, sex, national origin, familial status (families with children under 18), or disability? Yes, familial status.

Martin Turner

Martin Turner

Tan & Singh Law Offices LLC

FILE MEMORANDUM

From: Elise Tan
Date: February 24, 2025
Re: Interview with client Peter Larkin

I met with our client Peter Larkin this morning to discuss the Fair Housing Act administrative complaint filed by Martin Turner. Larkin verified that the text exchange described in the complaint is accurate and complete. The following summarizes Larkin's answers to my questions.

Tell me about your experience as a landlord. I've owned rental apartments for about 20 years. I first got into it to supplement my salary as an accountant. I now do it full time. I own seven buildings, all in the Centralia area. This building is one of the larger ones I own. It's a five-floor building with 20 units.

Do you live in the building? No. I live in a townhouse about a mile away.

Where did you place the advertisement for the apartment? What, exactly, did the advertisement say? I placed it on Craigslist. It said this: "Two-bedroom apartment for rent in downtown Centralia. New kitchen appliances. Sunny second-floor walkup. $2,200/month rent, utilities included. Call or text 555-2346."

Why did you say that it would be a problem to rent to Turner? There were two problems. First, he's single. I really don't like to rent to unmarried people because I like to have two incomes for each apartment that I rent. It just makes me feel more comfortable that the rent will be paid on time. Second, I have a policy of renting that particular apartment to a maximum of three people, and with his kids, there would have been four people.

Did you rent the apartment to another person? When? It took me a couple of months, but ultimately I was able to rent the apartment to a married couple.

Can you tell me more about your preference for married people? Again, it is a financial and stability thing. I want to have married couples with two incomes, and I want to reduce the likelihood that one person is going to move out in the middle of the lease. If they are married, it's less likely that only one of the tenants will pay their rent. I've been a landlord for a long time, and I have a bunch of other apartments that I rent

out. Based on my experience, married people are just more stable in their relationships and are more likely to pay their rent on time. They are just more financially stable than single people. I've turned down single people and unmarried couples who have applied for that apartment before.

Did you think that Mr. Turner could afford to rent the apartment? I didn't get to the point of asking him for financial information. He might have had a good job. He might have good credit. I don't have any reason to think otherwise. But as I said, I prefer to rent to married couples because in my experience they are more stable financially. A couple of years ago, I rented to a single guy with a good income. He lost his job and left town, and I was left with no rental income for months. I learned that people who have good jobs sometimes lose them. It doesn't matter how good your credit is if you lose your job. Couples break up. Sure, married people sometimes get divorced, but they are more likely to stay together than unmarried people.

What about your policy of having a maximum of three people in that apartment? It is a pretty small apartment—only 500 square feet. But for me, the major issue is the character of that neighborhood. There are a lot of younger people in their early 20s who live there. It's close to Slate Street, which has a lot of nightclubs. I've had problems with young people cramming four people into a two-bedroom apartment to keep their housing costs down. So for two bedrooms in that area, my policy is to rent to at most three people, ideally including a married couple.

Did you have any problem with Turner having minor children? Not specifically. As I mentioned, I want to rent to married couples for financial reasons, and my policy of having at most three people in that apartment is about the total number of people in the apartment. I wouldn't want four people in there, whether they are adults or children.

Have you rented to married couples with children before? Yes. I do that often. For example, I'm renting an apartment in this same building to a married couple with two children right now. But that's a much bigger three-bedroom apartment on the fifth floor. I wouldn't mind having a married couple with one child in the apartment that Turner wanted to rent.

Have you applied your policy to other potential renters? Yes. I turned down a group of four single people in their 20s for this same apartment two years ago. Here is the text exchange that I had with one of them:

Jake: Hello. My name is Jake. I'm looking for apartments in Centralia. Is the apartment that you listed still available?

Larkin: It is. Tell me about yourself. Are you married? Would it be just you in the apartment?

Jake: I'm single. It would be me and three of my friends.

Larkin: Oh. Sorry. I really prefer to rent to married couples. And I want at most three people in that apartment—it is pretty small.

Jake: You seriously care about whether I'm married?

Larkin: Yes. I've found that married couples pay their rent on time and are less likely to flake out on me.

Jake: That's stupid. But whatever—I'll find another place.

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Excerpts from the United States Fair Housing Act, 42 U.S.C. § 3601 *et seq*.

§ 3602 Definitions

As used in this subchapter . . .

(k) "Familial status" means one or more individuals (who have not attained the age of 18 years) being domiciled with—

(1) a parent or another person having legal custody of such individual or individuals; or

(2) the designee of such parent or other person having such custody, with the written permission of such parent or other person.

The protections afforded against discrimination on the basis of familial status shall apply to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years.

§ 3603 Effective dates of certain prohibitions

. . .

(b) Exemptions. Nothing in [section 3604] shall apply to—

. . .

(2) rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence.

§ 3604 Discrimination in the sale or rental of housing and other prohibited practices

[I]t shall be unlawful—

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

. . .

Excerpt from the Centralia Municipal Housing Code

§ 15 Maximum Occupancy of Dwellings

(A) No dwelling shall be occupied by more than the number of people permitted in this section.

(1) 300 square feet or less: no more than two people.

(2) 301–450 square feet: no more than three people.

(3) 451–700 square feet: no more than four people.

(4) 701–900 square feet: no more than five people.

(5) 901–1,100 square feet: no more than six people.

(6) 1,101–1,300 square feet: no more than seven people.

Karns v. U.S. Department of Housing and Urban Development
(15th Cir. 2006)

Angela Karns filed an administrative complaint with the US Department of Housing and Urban Development (HUD) claiming that property owner Fiona Dickson had violated the Fair Housing Act (FHA), 42 U.S.C. § 3604(a). At issue is whether Dickson's comments to Karns indicated a refusal to rent to Karns on the basis of "familial status." After a hearing, the administrative law judge (ALJ) concluded that Karns had failed to prove that Dickson's statements indicated a refusal to rent on the basis of Karns's familial status. Karns petitioned for review of the ALJ's decision. We hold that Karns proved her claim of discriminatory conduct and therefore reverse.

BACKGROUND

Karns filed an administrative complaint with HUD alleging that Dickson violated 42 U.S.C. § 3604(a) by engaging in discriminatory conduct when she told Karns that she would not rent an apartment to her because Karns was not married and had two children.

At the hearing, Karns testified that, in 1998, she was looking for an apartment for herself and her two children (then ages five and nine) when she saw a newspaper advertisement for a two-bedroom apartment for rent in Smithtown, Franklin. On August 21, Karns spoke by phone to Dickson. Karns wrote detailed notes of the conversation:

Karns: I was calling about the apartment in Smithtown.
Dickson: How many are in your family?
Karns: Three. 1 adult & 2 small children.
Dickson: Are you married?
Karns: No.
Dickson: (Long pause) I don't know. I've got to pay my mortgage. I'll think about it and get back to you.

Dickson never called Karns back. On September 17, Karns noticed another newspaper advertisement for the same apartment that listed the same telephone number. She again called Dickson to inquire about the apartment, but unlike before, Karns stated that she was single and had no children. She again took detailed notes:

Karns: I called about the apartment.
Dickson: How many are in your family?
Karns: One—just me.
Dickson: Do you work?

Karns: Yes, at Smithtown Bank.
Dickson: Well, the apartment has a large dining room, kitchen, two bedrooms. It's on the 1st floor. . . . I can show the apartment on Monday . . .

The ALJ concluded that Karns had failed to show by a preponderance of the evidence that Dickson had violated § 3604(a) because Karns had not proven that the telephone calls with Dickson indicated discrimination based on familial status rather than a concern over financial matters. Karns claims that the ALJ erred.

DISCUSSION

Karns Established Her Claim for Discrimination Based on Familial Status.

We apply the three-part burden-shifting test set forth in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), for evaluating claims of discrimination under 42 U.S.C. § 3604(a). First, plaintiffs bear the initial burden of proving a prima facie case of housing discrimination by a preponderance of the evidence. To establish a prima facie case of discrimination under the FHA, plaintiffs must show (1) that they are a member of a protected class, (2) that they applied for and were qualified to rent the dwelling, (3) that they were denied housing or the landlord refused to negotiate with them, and (4) that the dwelling remained available. The term "applied for" is interpreted broadly and includes inquiries into the availability of a dwelling. "Qualified to rent" means that the individual meets such factors as minimum credit score, rental and eviction history, minimum monthly income, landlord and professional references, and criminal background.

Second, if a plaintiff establishes a prima facie case of discrimination, a presumption of illegality arises and the burden shifts to the defendant to articulate legitimate nondiscriminatory reasons for the challenged policies. Finally, if the defendant satisfies this burden, the plaintiff has the opportunity to prove by a preponderance of the evidence that the nondiscriminatory reasons asserted by the defendant are merely pretext for discrimination.

The FHA defines "familial status" as "one or more individuals (who have not attained the age of 18 years) being domiciled with" a parent or someone with an equivalent custodial relationship. 42 U.S.C. § 3602(k).

It is undisputed that at all relevant times, Karns had two children under the age of 18 who resided with her. Karns demonstrated that she was denied housing. She inquired

about renting the apartment and was qualified to rent the apartment. Dickson, the property owner, refused to negotiate with her. The apartment remained available when Karns made her second call on September 17 to inquire about the apartment. Thus, Karns has made a prima facie case of discrimination based on familial status under the FHA.

The ALJ accepted Dickson's argument that she "was clearly more concerned with financial matters than the makeup of Karns's family" because Dickson expressed her need to "pay [her] mortgage." Karns argues that Dickson's financial argument is pretext for discrimination based on familial status. We agree.

Dickson asserts two nondiscriminatory reasons for her refusal to negotiate with Karns: (1) she was concerned about Karns's finances and (2) she was concerned that Karns was unmarried. The evidence shows that both of these asserted reasons are pretextual. Dickson's statements in the August 21 conversation do not support the ALJ's conclusion that Dickson's only concern was Karns's ability to pay the rent. After learning that Karns was an unmarried mother of two small children, Dickson declined to negotiate with Karns for the rental. In fact, that Karns was an unmarried mother of two small children was all that Dickson knew about Karns at that point. Dickson had not asked a single question about Karns's finances (nor did she at any point in the conversation). She possessed no information whatsoever about Karns's income, credit history, assets, or liabilities. For all Dickson knew, Karns could have been a multimillionaire. Under these circumstances, substantial evidence does not support the ALJ's conclusion that Dickson refused to rent to Karns on August 21 because she was concerned about Karns's ability to pay the rent. Rather, Dickson's refusal to rent the apartment armed only with the knowledge that Karns was a single mother of two small children indicates that Dickson assessed Karns's ability to pay rent based on her familial status, not on her financial situation.

Dickson's argument that the August statements indicate a nondiscriminatory reason for denial based only on Karns's *marital* status, not one based on her familial status, is also unsuccessful. The FHA does not include marital status among its protected classifications. *See* 42 U.S.C. § 3604(a) (omitting "marital status" from categories of protected classes under the FHA).

In support of this argument, Dickson points to her question in the August call about Karns's marital status. During the September call, however, Dickson agreed to show the apartment, thinking that Karns was single. The evidence thus demonstrates that in the August conversation it was Karns's representation that she had children, not the fact that she was unmarried, that constituted the reason for Dickson's refusal to rent to her.

Karns has demonstrated that Dickson's asserted reasons for nondiscrimination were pretexts for her refusal to rent to Karns due to her familial status. Accordingly, the ALJ's conclusion that Karns failed to establish a violation of § 3604(a) is not supported by substantial evidence.

Reversed.

Baker v. Garcia Realty Inc.

United States District Court for the District of Franklin (1996)

This matter is before the court on plaintiffs' motion for summary judgment on their housing-discrimination claim, brought pursuant to 42 U.S.C. § 3604. The plaintiffs, Sheldon and Peggy Baker, are a married couple with five minor children. The family decided to relocate to Creekside, Franklin, because Sheldon Baker had been accepted into a graduate program at nearby Aberdeen University. On June 9, 1994, he traveled from Olympia to Creekside to obtain an apartment for his family. Upon his arrival in Creekside, Baker approached employees of defendant Garcia Realty and requested to see an apartment. Soon thereafter, employees of Garcia showed him two apartments located at 632 Hinman Avenue in Creekside. Baker completed an application for Unit 1A, a three-bedroom apartment. In his application, Baker disclosed that he intended that his spouse and five minor children would live with him, for a total of seven people in the unit.

Around June 23, an employee of Garcia informed Baker that his rental application had been rejected. The stated basis was Garcia's occupancy policy, which provided for a maximum occupancy of four people in a three-bedroom apartment. Under Garcia's "bedrooms plus one" occupancy policy, a maximum of three people may occupy a two-bedroom apartment, a maximum of four people may occupy a three-bedroom apartment, and a maximum of five people may occupy a four-bedroom apartment.

DISCUSSION

The Fair Housing Act (FHA) makes it unlawful to "refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of . . . familial status." 42 U.S.C. § 3604(a). "Familial status" refers to the presence of minor children in the household. 42 U.S.C. § 3602(k).

The Bakers are claiming that Garcia's occupancy policy, while facially neutral, had a disparate impact on them because of their familial status. In this type of case, the Fifteenth Circuit applies a three-part disparate-impact analysis: (1) the plaintiff tenant first must make a prima facie showing that a challenged practice caused or will predictably cause a discriminatory effect; (2) if the plaintiff makes this prima facie showing, the burden then shifts to the defendant landlord to prove that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests; and (3) if the

defendant landlord meets the burden at step two, the burden shifts back to the plaintiff, who may then prevail only if they can show that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect. Courts apply this disparate-impact analysis when we are analyzing a facially neutral policy. This analysis resembles, but is distinct from, the *McDonnell Douglas* test that is used to analyze claims that a landlord discriminated against a tenant through specific actions that may be ambiguous.

A. Prima Facie Case

Here the Bakers have established a prima facie case of disparate impact. Garcia's "bedrooms plus one" policy clearly impacts families with minor children more than it does the general population. Minor children frequently share bedrooms, and families with minor children tend to have larger households than families without minor children at home.

B. Nondiscriminatory Reason for Policy

Thus, the burden now shifts to Garcia to articulate one or more substantial, legitimate, nondiscriminatory interests served by its policy. Garcia asserts that its occupancy policy avoids the risk of large groups of Aberdeen students overpopulating units in an attempt to reduce their rental payments. Garcia has articulated a substantial, legitimate, nondiscriminatory interest served by its practice—avoiding renting to groups of college students.

C. Overbreadth and Less Restrictive Means

Accordingly, the burden now shifts back to the Bakers to demonstrate that Garcia's policy is overbroad or that there is a less restrictive means to achieve Garcia's goal of avoiding renting to groups of college students. The Bakers argue that Garcia's policy regarding the number of people living in apartments of various sizes is overbroad because it is far more stringent than the requirements of the Creekside Municipal Code. Like many municipalities, the City of Creekside sets maximum occupancy limits on the number of people who can live in housing units of different sizes. Unlike Garcia's policy, which is stated in terms of number of people per bedroom, the Municipal Code is stated in terms of number of people per square foot of living space. Unit 1A is a 1,700-square-foot, three-bedroom apartment. The Code permits up to eight people to live in an apartment of this size. Occupancy of the unit by the seven members of the Baker family would therefore

be permitted under the Code. In contrast, the Garcia policy states that three-bedroom apartments like Unit 1A can be occupied by a maximum of four people.

The Fifteenth Circuit has held that in cases of alleged familial-status discrimination, a significant mismatch between occupancy limits set by a municipal code and those set by a landlord is evidence that the landlord's limit is overbroad. Although there is no specific mathematical formula, Fifteenth Circuit case law indicates that a significant mismatch would occur, for example, where a landlord limits occupancy to two people in an apartment that, under the applicable local housing code, can be occupied by four people. Here, the number of people permitted to occupy Unit 1A under the Creekside Code—eight—is significantly greater than the number permitted under Garcia's policy—four. The Bakers therefore are correct that this difference constitutes a significant mismatch and provides evidence that the Garcia policy is overbroad.

The Bakers can also show that Garcia could use a less restrictive means of meeting its stated goal of avoiding renting to large groups of college students. Among other things, the Bakers have demonstrated that the information collected by Garcia's rental application easily allows the rental company to tell the difference between a group of college students and a family with minor children protected by the familial-status provisions of the FHA. Garcia offers no explanation for why it applies the occupancy policy regardless of whether those seeking to inhabit its apartments are college students as opposed to families with children far too young to attend Aberdeen University.

The Bakers could have met their burden either by showing that Garcia's "bedrooms plus one" policy is overbroad or by showing that the goals of that policy can be achieved with a less restrictive means. They have shown both. Accordingly, the motion for summary judgment is GRANTED.

MULTISTATE PERFORMANCE TEST DIRECTIONS

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The problem is set in the fictitious state of Franklin, in the fictitious Fifteenth Circuit of the United States. Columbia and Olympia are also fictitious states in the Fifteenth Circuit. In Franklin, the trial court of general jurisdiction is the District Court, the intermediate appellate court is the Court of Appeal, and the highest court is the Supreme Court.

You will have two kinds of materials with which to work: a File and a Library. The first document in the File is a memorandum containing the instructions for the task you are to complete. The other documents in the File contain factual information about your case and may include some facts that are not relevant.

The Library contains the legal authorities needed to complete the task and may also include some authorities that are not relevant. Any cases may be real, modified, or written solely for the purpose of this examination. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if they all were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page references.

Your response must be written in the answer book provided. If you are using a laptop computer to answer the questions, your jurisdiction will provide you with specific instructions. In answering this performance test, you should concentrate on the materials in the File and Library. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.

Although there are no restrictions on how you apportion your time, you should allocate approximately half your time to reading and digesting the materials and to organizing your answer before you begin writing it. You may make notes anywhere in the test materials; blank pages are provided at the end of the booklet. You may not tear pages from the question booklet.

Do not include your actual name anywhere in the work product required by the task memorandum.

This performance test will be graded on your responsiveness to the instructions regarding the task you are to complete, which are given to you in the first memorandum in the File, and on the content, thoroughness, and organization of your response.

1)

Tan & Singh Law Offices LLC

740 East Broadway, Suite 200

Centralia, Franklin 33402

Memorandum

To: Elise Tan

From: Examinee

Date: February 25, 2025

Re: Peter Larkin - Defense of housing discrimination claim

I have been tasked with drafting a memorandum setting out the applicable tests and how they relate to Mr. Larkin's defense against this discrimination claim. Below I will go through each of the tests covered by the relevant authority and apply them to the facts of Mr. Larkin's case. There are two different tests recognized in the circuit that could be applied to Mr. Larkin's case, each will be discussed in turn.

The Fair Housing Act (FHA) provides protections for certain purposes trying to obtain housing. Certain statuses will be granted extra protections. Here, **Familial status** (FS) is the asserted status. FS means the presence of one or more minor children in the domicile with a parent or custodial designee, the FHA definition also applies to persons who are pregnant or are attempting to secure legal custody. (FHA). Relevant here, the FHA specifically makes it unlawful to refuse to negotiate or otherwise make unavailable or deny a dwelling because of a protected status, such as FS. There are two tests applied in an FHA discrimination claim which are applied to Mr. Larkin's facts below.

<u>The McDonnel Douglas test</u>

This burden-shifting test is used in discrimination claims when specific actions may be ambiguous. (Karns v. US HUD) The test has three steps:

Step 1: Plaintiff (P) bears the burden of proving a prima facie housing discrimination claim by a preponderance of the evidence. This is shown by 1) that P is a member of a protected class, 2) P applied for and was qualified to rent the dwelling, 3) Defendant (D)

denied housing or the landlord (LL) refused to negotiate with the P and 4) the dwelling remained available after P's inquiry.

Step 2: If P meets their burden by a preponderance of the evidence, a **presumption of illegality arises;** the burden then shifts to D to **articulate legitimate nondiscriminatory reasons** for the challenged policies.

Step 3: If D satisfies their burden, P has the opportunity to prove by a preponderance of the evidence that the nondiscriminatory reasons asserted by the Defendant are **merely pretext for discrimination.**

Step 1 analysis

For our analysis we will start with step 1, P's burden. Here, Turner must make out a prima facie housing discrimination claim, Turner will likely be able to show that they are a member of a protected class. Turner is a single parent of three minor children (Same as Karns in Karns v. US HUD, where Karns was a single parent of two children). Recall that FS means the presence of one or more minor children in the domicile with a parent or custodial designee, Turner is thus a member of a protected class. Next Turner inquired about the dwelling (which in Karns inquiring and talking to LL about the advertisement constituted applying, such as we have here) and was qualified to rent the dwelling. When determining whether someone is qualified to rent, the Karns court looked at a list of factors about financial background, history, present income, references and criminal background. Turner will argue he was qualified to rent the dwelling, in the HUD Complaint Turner explained that they are employed as a data analyst, meaning they can easily afford the rent, they have a good rental history as well as good credit. Larkin could argue that one inquiry without a follow up does not meet the level of applying for the apartment, but this argument would likely fail. Next, P must show that D denied housing or refused to negotiate with the P, here we see a request for the apartment, a conversation where Turner explains they are not married and have children, and that Larkin never responds. Finally under step 1 the dwelling must have remained available afterwards - Larkin admits it took a couple of months to find a couple to rent to, a married couple.

Step 2 analysis

It is likely that Turner has met their initial burden by a preponderance of the evidence and the burden now shifts to Larkin. There is now a presumption of illegality, Larking must **articulate legitimate nondiscriminatory reasons** for the challenged policies. The nondiscriminatory reasons here include preferring married couples because of their financial stability inn having two incomes and the limit on the number of people in the apartment because of the 20 year olds in the area who attempt to crowd the apartments to keep rents down. How do we tell if the reasons are legitimate? Larkin should argue that marital status is not a protected classification under the FHA and that the number of residents was the concern, not that the residents were children (which is a protected class). Larkin should point to the municipal code that recommends no more than four people for a 500 square foot apartment (like the one in this case). Turner will argue that only after hearing there were kids involved did Larkin not get back to Turner. It is likely that

Larkin has met their burden.

Step 3 analysis

Finally, Turner has the final burden to prove by a preponderance of the evidence that the nondiscriminatory reasons asserted by the Defendant are **merely a pretext for discrimination.** In discerning whether there was a mere pretext, we can look to the amount of information available to Larkin at the time he decided not to rent to Turner. Here, Turner saw the listing for the apartment, Larkin asked whether Turner was married and who else would be living there. Turner responded by saying they were widowed and had three minor children - Larkin never got back to Turner.

Larkin will argue that those questions and the information provided were consistent with their preferences of married and no more than three people in the apartments. Turner will argue that once it was explained that children would live there, Larkin did not respond and in effect rejected Turner's application. Overall, this case is similair to Karns where the court found that the stated reasons were pretextual. If Larkin really cared about married couples because they have more financial stability then he would likely have asked some questions about financials - he will argue that a good job can be lost and that he cares about two incomes for the stability. Larkin can also show that a similiar incident occured in the past where he did not rent to jake and three others for the very same apartment because Jake was not married and there would be four people in that apartment. In the end a court is likely to find that these facts represent a similair case as in Karns and find that the stated reasons were pretextual and that there was discrimination under the McDonnel Douglas test.

Disparate Impact analysis

This test set out in Baker v. Garcia looks at whether 1) P first makes a prima facie showing that the challenged practice **caused or will predictably cause a discriminatory effect**, 2) if P makes that showing, the burden then shifts to D LL to prove the challenged practice is **necessary to achieve one or more substantial, legitimate, nondiscriminatory interests**, and finally 3) if D LL meets burden the burden then shifts to P to show that substantial, legitimate, nondiscriminatory interests supporting challenged practice could be served by **another practice that has a less discriminatory effect.** (Baker v. Garcia).

Here, Turner makes a prima facie showing that LLs policy of not renting to unmarried persons and no more than three people in that apartment caused or will predictably cause a discriminatory effect - as explained in Baker, a restrictive policy based on bedrooms will disproportionately effect families with minor children more than the general population because minor children frequently share bedrooms and families with minor children generally have larger households. (Baker). This analysis can be applied to square feet rather than just a bedroom count - Turner will succesfully set out a prima facie case.

Next, Turner will then have the burden to show that the challenged practice is **necessary to achieve one or more substantial, legitimate, nondiscriminatory interests.** As was successfully done in Baker, Larkin will successfully argue that his policy had the legitimate nondiscriminatory purpose of limiting the number of people to avoid large groups of young adults in the area from overcrowding the apartments in an effort to reduce rental payments.

Finally, the burden then shifts back to Turner to show that the **substantial, legitimate, nondiscriminatory interests**, could be served by another practice that has a less discriminatory effect. In Baker, the court broke that analysis down into two more specific questions: 1) is the policy overbroad and 2) is there a less restrictive means to achieve the desired result. An overbroad analysis will look at whether there is a significant mismatch between municipal code and landlord's policy. The relevant municipal code in Centralia is Maximum occupancy of dwellings, for 451-700 square feet, no more than four people. The apartment involved in this case is 500 sq ft. Here, Larkin will argue that the policy about the number of people is not overbroad because compared to Baker, where the policy allowed for a number of persons that was only half as much as allowed by municpal code (and was found overbroad), the restriction Larkin has for that apartment is only one person less than the municipal code states (three rather than four person), which Larkin can argue is not overbroad.

As for whether there is a less restrictive means of obtaining the same result, we can look at the amount of info requested by the LL. Larkin only really asked whether Turner was married and who would be living with him. Turner will argue that Larkin did not attempt to learn more about his financials or rental history, if he did he could perhaps see that he had enough money in the bank that even a loss of job would not effect his ability to pay on time. Additionally, he could have a number of occupants policy that takes into account, and perhaps matches the municpal code rather than undercutting it, whether there are minor children involved rather than all young adults. Larkin will have trouble arguing that there is no less restrictive means of obtaining his desired, non-discriminatory effect and will likely not prevail in his defense under the disparate impact test.

Conclusion

Overall, Larkin will be able to make sound arguments under both of the tests recognized under these FHA claims, however the nature of the protections provided likely tips the scales toward finding Larkin in violation of the FHA.

END OF EXAM

Applicant Number

MPT-2
225

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Multistate Performance Test

In re University of Franklin

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In re University of Franklin

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University of Franklin
Office of University Counsel
Howler Hall
10 Campus Drive, Ste. 100
Franklin City, Franklin 33701

MEMORANDUM

To: Examinee
From: Loretta Rodriguez, General Counsel
Date: February 25, 2025
Re: Professor Eugene Hagen matter

We have been asked to advise regarding an Inspection of Public Records Act (IPRA) request for records relating to Professor Eugene Hagen. The purpose of IPRA is to allow inspection of records that are normally maintained by public entities in order to provide transparency and insight into public operations and functions. Fr. Civil Code § 14-1 *et seq*. The University of Franklin (UF) is subject to IPRA requests as a public institution. We were contacted by Cheryl Williams, Dean of the UF School of Law, and Chip Craft, Chief of Police of the UF Campus Police Department. They were copied on the request.

Professor Hagen has taught at the law school since 2012. Last fall, the Faculty Misconduct Review Committee (FMRC) conducted a faculty peer hearing. The FMRC suspended Professor Hagen from UF for one year without pay, pursuant to UF disciplinary policy C07, which allows for suspension of a faculty member for "illegal use of drugs or alcohol." Professor Hagen was suspended based on a conviction for driving under the influence (DUI) and a positive test for cocaine.

The suspension of Professor Hagen has received a fair amount of attention from the academic community and the media. The requestor, Paul Chen, is a student reporter at the UF student newspaper, *The Daily Howl*. Mr. Chen has already published one article (see attached) about Professor Hagen.

Please write a memorandum to me addressing whether we must produce each of the requested documents. Do not include a separate statement of facts, but be sure to incorporate the relevant facts, analyze the applicable legal authorities, and explain how the facts and law affect your conclusions.

The Daily Howl
The Independent Voice of the University of Franklin Since 1922

What Is UP with Professor Eugene Hagen?

By Paul Chen, staff writer

September 19, 2024

Once-beloved University of Franklin (UF) law professor Eugene Hagen will face UF's Faculty Misconduct Review Committee this Friday. A confidential source reports that Hagen is scheduled to appear before the committee on charges that he violated UF's disciplinary policy C07, which allows for suspension of a faculty member for "illegal use of drugs or alcohol." Hagen was arrested by the Franklin City Police on May 25, 2024, for driving under the influence (DUI). At the time of arrest, Hagen tested positive for cocaine. Hagen was convicted of DUI on September 17, 2024, in Franklin City municipal court.

The UF School of Law community is still shocked by Hagen's arrest and subsequent conviction for DUI. "Professor Hagen was my favorite professor 1L year. I can't believe this happened. He's brilliant," said Susan Ellwood. "I actually enjoyed getting cold-called by Professor Hagen," said Thomas Kennedy. However, another student, 3L Kate Rogers, noted that her mother had written a letter complaining about Hagen to UF Law School Dean Cheryl Williams. Rogers added, "I thought there was something wrong with Hagen. I thought that he was a drunk. How was I supposed to know that he was using cocaine?" Pamela Rogers, Kate Rogers's mother, echoed her daughter's statement and said, "Last year I wrote a letter to Dean Williams complaining about Professor Hagen, and I wrote, 'that man has a substance abuse problem and should not be teaching our children.'"

UF's Faculty Misconduct Review Committee has a reputation for being strict. We will keep you informed as the Eugene Hagen story continues to unfold.

The Daily Howl
University of Franklin
30 Campus Drive
Franklin City, Franklin 33701

February 24, 2025

Custodian of Records
University of Franklin
Howler Hall
10 Campus Drive
Franklin City, Franklin 33701

Re: Professor Eugene Hagen, Inspection of Public Records Act request

Dear UF Custodian of Records:

I am a student reporter at *The Daily Howl*. I am writing to request records pursuant to the State of Franklin's Inspection of Public Records Act. The requested items concern the UF School of Law and Professor Eugene Hagen.

I intend to write and publish a follow-up article about Professor Hagen. The public and the UF community have a right to know whether the university knew about Professor Hagen's drug use prior to his DUI arrest.

The requested items are

1. Professor Hagen's annual performance reviews completed by the Dean of the UF School of Law from 2019 to the present.
2. Any complaints about Professor Hagen submitted by members of the public to the UF School of Law.
3. A chart containing the names of anyone (faculty, staff, students, or members of the public) who has made a complaint about Professor Hagen.
4. Any records involving Professor Hagen in the possession of the UF Campus Police Department.

Sincerely,

Paul Chen

Paul Chen, staff writer

cc: Dean Cheryl Williams
Chief of UF Campus Police Chip Craft

From: Dean Cheryl Williams
Sent: February 25, 2025, 8:15 a.m.
To: General Counsel Loretta Rodriguez
Subject: PRIVILEGED AND CONFIDENTIAL – IPRA request re: Eugene Hagen

Dear Loretta,

The university received the attached IPRA request from Paul Chen at *The Daily Howl*. He is asking for records from Professor Eugene Hagen's personnel file. I need your advice. As you know, Professor Hagen was suspended for one year without pay on September 20, 2024, under disciplinary policy C07 for "illegal use of drugs or alcohol" related to his September 17, 2024, conviction for driving under the influence (DUI).

Eugene's last two annual performance reviews, which I completed, were mixed. His teaching is strong, and he's a popular teacher. That said, he hasn't been showing up for faculty or committee meetings or his office hours, and I did note concerns about these absences in his annual review both this year and last year. I also referenced Eugene's student course evaluations in his annual reviews. There are a lot of negative comments in the student course evaluations from the past two years to the effect that Eugene has been late for classes and has been moody and erratic in class. Students have noted that Eugene often misses office hours and doesn't respond to students' emails. The student course evaluations themselves are not attached to the annual performance reviews.

The annual performance reviews contain a lot of general information—what classes Eugene taught, the quality of his teaching, the committees he served on, what publications he completed, and the quality of his publications. While Eugene has tenure, annual reviews are still required so that we can assess his ongoing performance as a faculty member.

While I have received several complaints from students about Eugene, I have only received one complaint from a member of the public. It is a letter from Pamela Rogers, the mother of a current law student. I placed the letter in Eugene's personnel file.

We don't have a chart containing the names of people who have made a complaint about Eugene. It would take some time to make one, but we can do it.

Honestly, we knew that something was off about Eugene, but we didn't know what it was until his DUI arrest. I want to ensure that we comply with the law in producing records pursuant to this IPRA request, but I'd also like to protect as many documents as possible from disclosure.

Thanks so much for your help with this.
Cheryl

Cheryl Williams
Dean and Professor of Law, UF School of Law

From: Chief of UF Campus Police Chip Craft
Sent: February 25, 2025, 9:05 a.m.
To: General Counsel Loretta Rodriguez
Subject: PRIVILEGED AND CONFIDENTIAL - IPRA request

Dear Counselor Rodriguez,

I am writing to request your advice regarding the attached IPRA request that the university received yesterday from a student reporter at *The Daily Howl*.

We are aware that Professor Eugene Hagen was arrested by the Franklin City Police for DUI last May. We do not have any records related to that arrest. Those records are kept by the Franklin City Police Department.

However, we do have records here at the UF Campus Police Department related to a recent arrest of Professor Hagen for possession of marijuana. Just two weeks ago, on February 11, 2025, we received a confidential tip that Professor Hagen was smoking marijuana in his office. UF Police Officer Sharla Marx was at the UF School of Law and went immediately to Professor Hagen's office to investigate.

Officer Marx found Professor Hagen and another UF law professor, Hope Sykes, smoking marijuana from a bong in Professor Hagen's office. Officer Marx discovered 8 ounces of marijuana in the office. She then called the Franklin City Police Department, which sent an officer to apprehend Professor Hagen. The District Attorney's office has charged him with possession of marijuana. Professor Sykes was not arrested because, while she was smoking, she was not in possession of a sufficient amount of marijuana to be charged with a crime. While Professor Hagen was suspended at the time of the incident, he was not barred from being on campus or using his office.

In our records, we have only three items: an incident report and two photographs. The incident report contains details about the incident including the time, the date, the location, and the name of the confidential source. It also includes a description of what Officer Marx observed in Hagen's office and the statements made by Hagen and Sykes to Officer Marx. The two photographs are "selfies" showing both Hagen and Sykes with the bong in Hagen's office on the night in question.

Our investigation and the Franklin City Police Department's investigation are ongoing. What, if anything, do I need to produce in response to the request?

Thanks for your help with this.

Chip

Chip Craft
Chief of Police
University of Franklin Campus Police Department

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FRANKLIN INSPECTION OF PUBLIC RECORDS ACT
Franklin Civil Code § 14-1 *et seq*.

§ 14-1 Definitions

(a) "Public records" means all documents, papers, letters, books, maps, tapes, photographs, recordings, and other materials, regardless of physical form or characteristics, that are used, created, received, maintained, or held by or on behalf of any public body and relate to public business, whether or not the records are required by law to be created or maintained.

. . .

§ 14-2 Right to inspect public records; exemptions

(a) Every person has a right to inspect public records of this state except

(1) records pertaining to physical or mental examinations and medical treatment of persons confined to an institution;

(2) letters of reference concerning licensing or permits;

(3) letters or memoranda that are matters of opinion in personnel files;

(4) portions of any law enforcement record that reveal confidential sources or methods or that are related to individuals not charged with a crime, including any record from inactive matters or closed investigations to the extent that it contains the information listed in this paragraph;

(5) trade secrets, attorney-client privileged information, ...

. . .

§ 14-5 Procedure for requesting records

(a) Any person wishing to inspect public records shall submit a written request to the custodian.

(b) Nothing in this Act shall be construed to require a public body to create a public record.

§ 14-6 Procedure for inspection

(a) Requested public records containing information that is exempt and nonexempt from disclosure shall be separated by the custodian prior to inspection, and the nonexempt information shall be made available for inspection.

. . .

Fox v. City of Brixton
Franklin Court of Appeal (2018)

Plaintiff Robert Fox made a written request to the City of Brixton pursuant to the Franklin Inspection of Public Records Act (IPRA) asking to inspect and copy all citizen complaints filed against John Nelson, a police officer employed by the City. The City denied the request on the ground that the information sought consisted of "letters or memoranda that are matters of opinion in personnel files" under § 14-2(a)(3) and were therefore exempt from disclosure. Fox then sued the City of Brixton, alleging that it had violated IPRA by denying his request. The district court granted summary judgment to the City, finding that there were no material facts in dispute and that the citizen complaints requested were not subject to inspection. The sole issue on appeal is whether the district court erred when it held that Fox was not entitled to inspect citizen complaints concerning the on-duty conduct of a police officer.

Franklin courts have long recognized IPRA's core purpose of providing access to public information, thereby encouraging accountability in public officials. A citizen has a fundamental right to have access to public records. The public's right to inspect, however, is not without limitation. IPRA itself contains narrow statutory exemptions. In ruling that the City was not required to provide Fox with access to the requested citizen complaints, the district court relied on § 14-2(a)(3), which states that "letters or memoranda that are matters of opinion in personnel files" are exempted from disclosure under IPRA. Interpreting this provision requires us to determine what the legislature intended to include within "matters of opinion in personnel files." We agree with the district court's assessment that the location of a record in a personnel file is not dispositive of whether the exemption applies; rather, the critical factor is the nature of the document itself. To hold that any matter of opinion could be placed in a personnel file, and avoid disclosure under IPRA, would violate the broad mandate of disclosure embodied in the statute.

Construing § 14-2(a)(3) in a manner that gives effect to the presumption in favor of disclosure, we conclude that the legislature intended to exempt from disclosure "matters of opinion" that constitute personnel information of the type generally found in a personnel file, i.e., information regarding the employer/employee relationship such as internal evaluations;

disciplinary reports or documentation; promotion, demotion, or termination information; or performance reviews. The purpose of the exemption is to protect the employer/employee relationship from disclosure of any letters or memoranda that are generated by an employer or employee in support of the working relationship between them.

This interpretation is also consistent with *Newton v. Centralia School District* (Fr. Sup. Ct. 2015). In *Newton*, a journalist sought access to all nonacademic staff personnel records held by the Centralia School District that were not specifically exempt from disclosure under IPRA. The journalist sought a ruling from the court that no portion of the personnel records of the employees was exempt from disclosure. The court held that the exemption applies to "letters of reference, documents concerning infractions and disciplinary action, personnel evaluations, opinions as to whether a person would be rehired or as to why an applicant was not hired, and other matters of opinion." The documents listed by the *Newton* court are all documents generated by an employer or employee in support of the working relationship.

Here, Fox argues that the citizen complaints at issue are not personnel information within the meaning of the exemption because the complaints arise from the officer's role as a public servant, not from his role as a city employee. Fox asserts that as a public servant, the officer has a statutory duty to conduct himself in a manner that justifies the confidence of the public. The City, on the other hand, argues that the citizen complaints are in fact personnel information because they relate to the officer's job performance, and the subject matter of the complaints might lead to disciplinary action against Officer Nelson.

We note that Fox is not requesting information regarding the City's investigative processes, disciplinary actions, or internal memoranda that might contain the City's opinions in its capacity as Officer Nelson's employer. The complaints in question were not generated by the City or in response to a City query for information; rather, these documents are unsolicited complaints about the on-duty conduct of a law enforcement officer, voluntarily generated by the very public that now requests access to those complaints. While citizen complaints may lead the City to investigate the officer's job performance and could eventually result in disciplinary action, this fact by itself does not transmute such records into "matters of opinion in personnel files" for purposes of § 14-2(a)(3).

The City also argues that police officers are "lightning rods for complaints by disgruntled citizens" and that, therefore, information in a complaint may be untrue or have no foundation in fact. This argument is unavailing. The fact that citizen complaints may bring negative attention to the officers is not a basis under this statutory exemption for shielding such records from public disclosure. City of Brixton police officers are without question "public officers," and the complaints at issue concern the official acts of those officers in dealing with the public they are entrusted with serving. It would be against IPRA's stated public policy to shield from public scrutiny as "matters of opinion in personnel files" the complaints of citizens who interact with city police officers. Accordingly, the citizen complaints requested by Fox are not protected from disclosure under § 14-2(a)(3).

We conclude, therefore, that citizen complaints regarding a police officer's conduct while performing his or her duties as a public official are not the type of "opinion" material the legislature intended to exclude from disclosure in § 14-2(a)(3).

Reversed.

Pederson v. Koob
Franklin Court of Appeal (2022)

This appeal is brought under Franklin's Inspection of Public Records Act (IPRA). Nancy Pederson appeals from an order denying her petition to compel the Franklin Livestock Board, a public agency, to make available for inspection an investigative report concerning one of its employees. Pederson claims that the court erred in concluding that the report in its entirety is exempt from disclosure under IPRA § 14-2(a)(3), the exemption for "letters or memoranda that are matters of opinion in personnel files." We affirm.

BACKGROUND

Pederson filed a complaint with the Franklin Livestock Board (the Board) alleging that Kenneth Larson, who was employed by the Board as a livestock inspector (a law enforcement position), had engaged in timesheet fraud by billing the Board for his time while working at a second job. The Board retained an outside firm to investigate whether the Board's rules on the billing of time had been violated, to investigate Larson's general job performance and compliance with the Board's rules of conduct, and to advise the Board on whether disciplinary action should be taken. After the investigation had been completed, Pederson sent an IPRA request to the Board's custodian of records, Julie Koob, asking for a copy of "the Investigation Report pertaining to Kenneth Larson [the Larson Report]."

The Board denied Pederson's request, stating that the report was exempt from disclosure under § 14-2(a)(3). Pederson filed a complaint in district court seeking a court order compelling the Board to produce the Larson Report. The district court granted the Board's motion for summary judgment, finding that "the undisputed evidence shows that the Larson Report concerns a potential disciplinary action against Larson, an employee of the Board" and concluding that "evidence is sufficient to shield the Larson Report from disclosure" under IPRA § 14-2(a)(3). This appeal followed.

DISCUSSION

Pederson argues that the Board's custodian of records was required to divide the Larson Report into "factual matters concerning misconduct by a public officer related to that officer's role as a public servant" and "matters of opinion constituting personnel information" that are related to the officer's role as an employee. Pederson agrees that

the "matters of opinion" concerning discipline are exempt from disclosure under IPRA § 14-2(a)(3) but claims that "matters of fact" must be disclosed. We disagree.

In *Newton v. Centralia School District* (Fr. Sup. Ct. 2015), the Franklin Supreme Court described this IPRA exemption as applying to letters or memoranda *in their entirety*. It reasoned that the legislature intended the phrase "letters or memoranda that are matters of opinion in personnel files" to include items such as "letters of reference, documents concerning infractions and disciplinary action, personnel evaluations, opinions as to whether a person would be rehired or as to why an applicant was not hired, and other matters of opinion." The court characterized these documents as a whole as "opinion information," a reading that is consistent with the plain language of the exemption.

Moreover, the full document exemption under § 14-2(a)(3) overrides the requirement in § 14-6 that nonexempt matter in that document be disclosed. Thus, Pederson is incorrect in asserting that, even if § 14-2(a)(3) applies to "letters or memoranda" in their entirety, under § 14-6(a) the Board must separate "matters of fact" from "matters of opinion" and produce the matters of fact for inspection. Section 14-6(a) requires the custodian of records to separate exempt records from nonexempt records. When an exemption applies only to certain portions of a document, such as the § 14-2(a)(4) exemption related to *portions* of law enforcement records, then separating the exempt from nonexempt material demands redaction of the exempt material in that document. However, when an exemption applies to a document *as a whole*, as § 14-2(a)(3) does, the entire document is exempt from disclosure and matters of fact in that document do not have to be separated from matters of opinion and disclosed.

We agree that under IPRA the entire Larson Report is exempt from disclosure. Affirmed.

Torres v. Elm City
Franklin Supreme Court (2016)

Section 14-2(a)(4) of the Franklin Inspection of Public Records Act (IPRA) creates an exemption from inspection for certain law enforcement records. Plaintiff James Torres filed an IPRA enforcement action against Elm City after it denied his request for records related to his sister's arrest on the ground that the records were part of an ongoing investigation. The court granted summary judgment to Elm City, finding that the requested records were exempt from disclosure under IPRA, and dismissed Torres's IPRA enforcement action. The Court of Appeal affirmed. Torres filed a petition for a writ of certiorari, which we granted.

Francine Ellis was arrested by Elm City police officers for aggravated assault on March 5, 2015. On April 1, 2015, Ellis's brother James Torres sent a written IPRA request to Elm City seeking various records relating to the arrest. Elm City responded 14 days later, agreeing to produce a primary incident report and one subpoena. But Elm City denied production of all other pertinent records in its possession, citing § 14-2(a)(4), which exempts from the general IPRA disclosure requirement "portions of any law enforcement record that reveal confidential sources or methods or that are related to individuals not charged with a crime." Elm City stated that its police department was investigating the crime and therefore "release of the requested information posed a demonstrable and serious threat to that ongoing criminal investigation" and that the requested records would be released "when the release of such records no longer jeopardized the law enforcement investigation." Elm City claims that, in enacting § 14-2(a)(4), "the legislature intended that records pertaining to ongoing investigations remain sealed until the investigation is complete."

DISCUSSION

As declared by our legislature, the purpose of IPRA "is to ensure . . . that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of public officers and employees." § 14, *Declaration of Policy*. The legislature has limited this general rule by providing specific exemptions to the right to inspect public records. *See* § 14-2(a)(1–8). Central to this case is § 14-2(a)(4), which provides certain exemptions for law enforcement records.

Nowhere does § 14-2(a)(4) exempt *all* law enforcement records relating to an ongoing criminal investigation. Rather, the plain language of § 14-2(a)(4) indicates that the legislature was not concerned with the stage of the investigation as such: "[L]aw enforcement record[s] that reveal confidential sources or methods or that are related to individuals not charged with a crime" are exempt, even if the law enforcement records relate to "*inactive matters or closed investigations*" (emphasis added). Contrary to the conclusion of the district court, the plain language of § 14-2(a)(4) indicates that the ongoing Elm City investigation was not, of itself, material to whether the requested records could be withheld. Instead of focusing on whether there was an ongoing investigation, the legislature was concerned with the specific content of the records. The district court seems to have required only that the requested records relate to an ongoing criminal investigation, or perhaps that inspection of the records would "interfere" with an ongoing investigation. Either standard is untethered from the plain language of § 14-2(a)(4).

Section 14-6(a) provides that requested law enforcement records containing both exempt and nonexempt information cannot be withheld in toto. Rather, when requested public records contain a mix of exempt and nonexempt information, the "exempt and nonexempt [information] . . . shall be separated by the custodian prior to inspection, and the nonexempt information shall be made available for inspection." § 14-6(a); *see Wynn v. Franklin Dept. of Justice* (Fr. Sup. Ct. 2011) (Attorney General's audio recording relating to financial investigation required to be made available for inspection after redacting 90 seconds related to confidential informant information). Read together, the plain language of §§ 14-2(a) and 14-6(a) provides that Elm City was required to review the requested law enforcement records, separate information that did not "reveal confidential sources or methods or that [did not relate] to individuals not charged with a crime" from that which did, and provide the nonexempt information for inspection. By contrast, and incorrectly, the district court allowed Elm City to broadly withhold law enforcement records simply because there was an ongoing criminal investigation. Such an interpretation is overbroad and incongruent with the plain language of § 14-2(a)(4). *See Dunn v. Brandt* (Fr. Ct. App. 2008) ("The exemptions to IPRA's mandate of disclosure are narrowly drawn.").

We now examine whether the district court was correct to find that the records were exempt from inspection pursuant to § 14-2(a)(4). It is undisputed that there is an

ongoing law enforcement investigation; however, Elm City did not present evidence that any of the specific records that it refused to produce revealed "confidential sources or methods or [were] related to individuals not charged with a crime." § 14-2(a)(4). Nor did Elm City present any evidence that, as required pursuant to § 14-6(a), it had reviewed the requested records to separate exempt from nonexempt information, or that it had provided any nonexempt information. For these reasons, the district court incorrectly determined that the requested records were exempt from inspection pursuant to § 14-2(a)(4).

Reversed and remanded for further proceedings.

MULTISTATE PERFORMANCE TEST DIRECTIONS

You will be instructed when to begin and when to stop this test. Do not break the seal on this booklet until you are told to begin. This test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.

The problem is set in the fictitious state of Franklin, in the fictitious Fifteenth Circuit of the United States. Columbia and Olympia are also fictitious states in the Fifteenth Circuit. In Franklin, the trial court of general jurisdiction is the District Court, the intermediate appellate court is the Court of Appeal, and the highest court is the Supreme Court.

You will have two kinds of materials with which to work: a File and a Library. The first document in the File is a memorandum containing the instructions for the task you are to complete. The other documents in the File contain factual information about your case and may include some facts that are not relevant.

The Library contains the legal authorities needed to complete the task and may also include some authorities that are not relevant. Any cases may be real, modified, or written solely for the purpose of this examination. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if they all were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page references.

Your response must be written in the answer book provided. If you are using a laptop computer to answer the questions, your jurisdiction will provide you with specific instructions. In answering this performance test, you should concentrate on the materials in the File and Library. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.

Although there are no restrictions on how you apportion your time, you should allocate approximately half your time to reading and digesting the materials and to organizing your answer before you begin writing it. You may make notes anywhere in the test materials; blank pages are provided at the end of the booklet. You may not tear pages from the question booklet.

Do not include your actual name anywhere in the work product required by the task memorandum.

This performance test will be graded on your responsiveness to the instructions regarding the task you are to complete, which are given to you in the first memorandum in the File, and on the content, thoroughness, and organization of your response.

2)

Mrs. Rodriguez,

As §14-6 Procedure for Inspection lays out, any public record containing information that is exempt and nonexempt from disclosure shall be separated by the custodian prior to the inspection and the nonexempt information shall be made available for inspection. Included below are the four documents to requested for disclosure and an analysis as to which documents are able to be disclosed in full, part or fully exempt per the statute.

Requested Items:

1. Professor Hagen's annual performance reviews completed by the Dean of the UF School of Law from 2019 to the present.

Professor Hagen's annual performance reviews completed by the Dean of the UF School of Law would be exempted in part from disclosure. Under §14-2(a)(3) requires that when an exemption applies to a document as a whole, the entire document is exempt from disclosure and matters of fact in that document do not have to be separated from matters of opinion and disclosed. Here, the annual performance reviews would be characterized as personnel evaluations and other matters of opinion based on the language provided by *Newton v. Centralia School District*. In *Newton* the Franklin Supreme Court described the "matters of opinion" IPRA exemption to include documents concerning infractions, personnel evaluations, and other matters of opinion. It is likely that the annual performance review could be distinguished into matters of fact and matters of opinion but would not because the document was written and performed by Dean Cheryl Williams as a personnel evaluation. The Dean confirmed that the annual review had notes of concern made by the Dean which would be matter of opinion, however, there were also matters of fact stated within the review such as general information including what classes Hagen taught, the quality of his teaching, the committees he served on, and publications he completed along with their quality. The statute intended to exempt the document as a whole when the document is "letters or memoranda that are matters of opinion in personnel files" therefore the exemption would most likely apply to the document as a whole and matters of fact would not have to be separated from matters of opinion. Concluding that Professor Hagen's annual performance reviews would be exempted from disclosure under IPRA to Paul Chen.

2. Any complaints about Professor Hagen submitted by members of the public to UF School of Law.

To analyze whether the complaints about Professor Hagen should be produced to Paul Chen the case of *Fox v. City of Brixton* best explains whether these documents should be produced. *Fox* argued that citizen complaints are not personnel information within the meaning of the exemption under § 14-2(a)(3) matters of opinion because the complaints arise of the role as a public servant rather than a city employee. Further, the complaint

made against Professor Hagen was submitted by a member of the public rather than by the institution of UF School of Law or the City. The conclusion in *Fox* would support the production of these documents because the complaints may lead to the School investigating Hagen's job performance the complaint itself does not equal a record of "matters of opinion in personnel files". Further, although the complaint against Hagen may bring negative attention to Hagen, it is not a basis under §14-2(a)(3) for exemption from public disclosure. Therefore, the complaint/s about professor Hagen is not opinion material the legislature intended to protect from disclosure and should be granted for production to Paul Chen.

3. A chart containing the names of anyone (faculty, staff, students, or members of the public) who has made a complaint about Professor Hagen.

A chart containing the names of anyone who has made a complain about Professor Hagen would does not have to be created for production to Paul Chen. §14-1 provides the definition of a "Public Record" meaning all "documents . . . created, received, maintained, or held by or on behalf of any public body and relate to public business, whether or not the records are required by law to be created or maintained." Further, §14-5(b) writes "Nothing in this Act shall be construed to require a public body to create a public record." Here, there is no record currently held or made containing a chart with the names of persons who made a complain about Professor Hagen. Although it would be possible to make a chart, it has not previously been done so as a business record and the Dean is not required by the act to do so in order to produce the document under IPRA. Paul Chen will likely be provided with all the names of persons who made a complaint and then is free to make his own chart but the statute does not require that a chart be made a produced to him as a business record. Therefore, because this chart does not already exist as a business record created or maintained it does not have to be produced to Paul Chen under IPRA.

4. Any records involving Professor Hagen in the possession of the UF Campus Police Department.

The record involving Professor Hagen in the possession of the UF Campus Police Department is the incident report from February 11, 2025. This record will be subject to production with redactions of exempted material. The letter from Chief of UF Campus Police Chip Craft states the incident of marijuana use and possession on campus from February 11 is still undergoing investigation. However, *Torres v. Elm City* provided judgement that even though an ongoing investigation exists, they are not able to withhold the law enforcement record in its entirety. Specifically §14-2(a)(4) does not exempt all law enforcement records relating to an ongoing criminal investigation but rather exempts "law enforcement records that reveal confidential sources or methods or that are related to individuals not charged with a crime." Here, the Campus Police Department will be able to redact information regarding the confidential informant and Hope Sykes involvement per the exemption under the statute. Further, the two photographs in the departments records are also exempt from disclosure as they disclose Hope Sykes involvement as a party not

charged with a crime that is exempt under the statute. Therefore, the information contained in the records involving Professor Hagen, the crime charged, the date and time are all available martial for disclosure to Paul Chen as public record.

END OF EXAM

MEE Question 1

Bill and Nancy recently opened a gym, "Comet Fitness," that they operate as a general partnership. Three blocks from the gym is a sporting-goods store that is having a "going-out-of-business sale" with signs in the store's windows stating that "all sales are final." Bill and Nancy are acquainted with the store owner. Last week, Bill called the store owner and said, "I hope you've got some nice treadmills; the gym could use one or more. I'll try to get over there to check them out."

The next day, Bill and Nancy ran into Kim, one of Nancy's friends, at a party. Kim is a personal trainer. Nancy had not seen Kim for several months. Nancy told Kim that she and Bill had opened a gym and that Kim should consider coming to work for them as a personal trainer. Kim said that she would think about it and let Nancy know. While Kim was walking away, she heard Bill say to Nancy, "You know, the gym has only five treadmills, but I sure wish it had two more," and heard Nancy reply, "I agree. We desperately need to buy one or two more."

The day after the party, Kim, thinking that she might be interested in the trainer job and hoping to impress Bill and Nancy with her initiative, went to the sporting-goods store. Telling the store owner that she was acting on behalf of Comet Fitness, Kim purchased a treadmill and directed the store owner to send the treadmill to Comet Fitness, along with the invoice for the purchase. The store owner agreed to do so.

Later that day, Nancy went to the sporting-goods store and purchased two treadmills for the gym. Unlike the treadmill Kim had purchased, these treadmills had built-in video touchscreens and were similar to the ones that Nancy had previously purchased for Comet Fitness. Nancy told the store owner to have the treadmills delivered to Comet Fitness along with an invoice for the purchase. When Nancy returned to the gym, she told Bill that she had bought two treadmills for the business. Bill became furious and said, "You had no right to do that without first consulting me. You should have made sure that I was with you when you bought them to make sure I'd like what you were buying. I'll return them tomorrow after they arrive unless I like what I see."

The following day, three treadmills arrived at the gym. When Bill and Nancy saw the treadmill purchased by Kim, they told the delivery person, "Take that one back. There must be a mistake—we never bought this." When Bill saw the two treadmills Nancy had bought, he told the delivery person, "Take them back, too; they're nice but not the same color as our other treadmills, and they just won't fit in." Nancy objected and told the delivery person to leave the two treadmills.

The delivery person immediately called the store owner, who said, "Leave them all at the gym. All sales are final. Tell them to pay me what they owe me."

1. Was Kim an agent of Comet Fitness when she purchased the treadmill? Explain.

2. Assuming that Kim was an agent of Comet Fitness,
   (a) did she have actual authority to purchase the treadmill for Comet Fitness? Explain.
   (b) did she have apparent authority to purchase the treadmill for Comet Fitness? Explain.

3. Did Nancy have the authority to bind Comet Fitness to the contract to purchase the two treadmills with the video touchscreens? Explain.

1)

1. Under partnership law, Kim was not an agent of Comet Fitness when she purchased the treadmill because she is not a partner in Comet Fitness and neither Bill nor Nancy held Kim out to the sporting goods store as theiragent.

An general partnership is created when two or more people associate to carry on a business for profit. General partners are agents of the partnership and can bind the partnership through actual or apparent authority. An agency relationship is created when a party consents to have another act on his behalf and under his control, and the other so consents to act. Actual authority exists in a general partnership when the majority of partners agree to routine transactions of the kind for that business. Actual authority exists for an agent of the business based on the agent's reasonable belief that he has the express or implied authority to act based on the manifestations of the principal. Extraordinary transactions require unanimous agreement. When there is an even split between two partners, there can be no majority and one partner may prevent the other from having actual authority. Apparent authority is the authority that a third partyreasonably believes the person has based on the partnership's holding out of that person as a partner or other agent of the business. When there is apparent authority, the partnership is bound. There can be no apparent authority unless the partnership holds out the person as an agent.

Here, the facts indicate that only Bill and Nancy are general partners who operate Comet Fitness, so Kim is not an agent of Comet Fitness by virtue of being a partner. The conversation that Bill and Nancy had with Kim at the party did not create an agency relationship between Bill and Nancy as principals and Kim as a purported agent because neither Bill nor Nancy asked Kim to take any action on behalf of the Comet Fitness, so Kim was not an agent by agreement. Even though the sporting goods business will argue it was reasonable to believe Kim, because only Kim held herself out to be an agent of Comet Fitness, the business is not bound on the contract (but Kim is).

Thus, under partnership law, Kim was not an agent of Comet Fitness when she purchased the treadmill.

2a. Under agency, assuming Kim was an agent of Comet Fitness, Kim did not have actual authority to purchase the treadmill for Comet Fitness because she was not an agent of Comet Fitness and neither Bill nor Nancy told her to purchase the treadmill.

See rules above.

Here, assuming Kim was an agent of the business, Kim had no actual authority because

the "should consider coming to work for them" comment was insufficient to create a reasonable belief in Kim's mind that Bill and Nancy wanted Kim to buy a treadmill.

Similarly, an overheard conversation and Kim's purpose to impress Bill and Nancy in hopes of being hired is not a reasonable basis to believe she had implied actual authority.

Thus, nder agency, assuming Kim was an agent of Comet Fitness, Kim did not have actual authority to purchase the treadmill for Comet Fitness.

2b. Under agency, assuming Kim was an agent of Comet Fitness, Kim did not have apparent authority to purchase the treadmill for Comet Fitness because only Kim held herself out as an agent to the sporting goods store.

See rules above.

As discussed above, neither bill nor Nancy held Kim out to the sporting goods store as their agent, only Kim held herself out as an agent. Even if the sporting goods store knew that Kim was a trainer, that is insufficient to form a reasonable belief that Kim had the authority to purchase the treadmill.

Thus, under agency, assuming Kim was an agent of Comet Fitness, Kim did not have apparent authority to purchase the treadmill for Comet Fitness.

3. Under agency restrictions, Nancy had the authority to bind Comet Fitness to the contract to purchase the two treadmills with the video touchscreens because at the time of her purchase, she did not know that Bill would insist on going with her to approve of the purchase.

See rules above. When a partner is unaware of a restriction and acts in good faith, his acts will bind the partnership. When a partner knows he is restricted but the seller does not, and the partner forms a contract, the partnership is not bound, but the partner who made the contract will be bound.

Here, Bill's comment to the sporting goods store that he would "try to get over there to check them out" did not expressly or impliedly inform Nancy that Bill would not approve of her treadmill purchase unless Bill accompanied her. Because Nancy did not know Bill would object, Nancy had implied actual authority as a partner to purchase the treadmills. Because actual authority existed at the time of the purchase, Bill's later objection is ineffective to prevent Comet Fitness from being bound on the contract.

Thus, Under agency restrictions, Nancy had the authority to bind Comet Fitness to the contract to purchase the two treadmills with the video touchscreens.

END OF EXAM

MEE Question 2

Brenda, a trauma surgeon, was on her way to perform emergency surgery at the hospital. As she drove through her neighborhood, a school bus stopped ahead of her, flashed its red lights, and extended its side-mounted stop sign. The law prohibits passing a stopped school bus under these circumstances. Brenda slowed, considering whether she should pass the bus because of the medical emergency.

Alan was driving a dump truck behind Brenda's car and also saw the bus's extended stop sign. Impatient, he swerved around Brenda's car and the bus. As he did so, his truck's bumper scraped a gash into Brenda's driver's-side doors.

Alan drove out of the neighborhood and onto the four-lane divided highway. Brenda did so also, intent on reaching the hospital quickly. She changed to the left lane and sped past Alan. This angered Alan. He saw Brenda's personalized license plate, "MED DOC." He muttered, "A self-important physician, probably headed to bandage a scraped knee." Alan accelerated and dangerously tailed Brenda's car as both vehicles traveled at 15 miles per hour (mph) above the speed limit. As Alan repeatedly honked his horn, Brenda feared that Alan's truck would hit her car.

Brenda signaled to change from the left lane to the right lane so that she could exit the highway, but Alan positioned his truck beside Brenda's car, matching her speed. Brenda slowed to allow Alan to pull ahead, but Alan slowed also, lowered his window, and yelled, "Oops! Don't miss the exit to the clinic!" Because Alan blocked Brenda from changing into the right lane, she missed the exit for the hospital.

Brenda accelerated more and pulled ahead of Alan into the right lane. She continued 10 miles further at nearly 90 mph, with Alan still close behind. She left the highway at the next available exit intending to double back toward the hospital, but she saw that Alan had followed her off the highway. Brenda pulled into a gas station lot, ran into the restroom, and locked the door. Alan pounded on the restroom door, shouting, "Come out so you and me can have a talk, if you know what I mean!" Brenda shouted back, "I'm not coming out until you leave." Alan yelled back, "I've got all day, so get comfortable." After two minutes, Alan got into his truck and left.

Brenda waited in fear inside the restroom for 20 minutes, after which she peeked out and saw that Alan was gone. She drove to the hospital, using only back roads to make sure that the truck was not following, adding more time to her drive. She finally arrived at the hospital one hour later than she would have arrived if Alan had not prevented her from exiting the highway. The patient had died moments before she arrived. If Brenda had arrived 15 minutes sooner, she would have arrived in time to perform the surgery and the patient likely would have survived.

Brenda sued Alan, asserting two common-law claims. Alan has admitted to all the facts described above. In Brenda's lawsuit, she alleged that Alan "damaged her car as he violated the school-bus law" and that he then "detained her in a public restroom against her will." The patient's family sued Alan for "negligence causing wrongful death."

The jurisdiction expressly allows common-law negligence actions despite the death of the injured party. The jurisdiction's rules mirror the Federal Rules of Civil Procedure.

1. In a negligence action against Alan, can Brenda establish that Alan breached his duty of care based solely on his violation of the school-bus law? Explain.

2. Can Brenda establish Alan's liability based on Alan's allegedly detaining her against her will? Explain.

3. Is Alan's admission sufficient for the patient's family to prevail in a motion for partial summary judgment establishing that Alan is liable on the family's wrongful-death claim? Explain.

February 2025
MEE 2
Representative Passing Answer

The Board of Bar Examiners did not select a representative passing answer for this question.

MEE Question 3

Coach is a high school basketball coach who currently lives and works in State A, where she is domiciled. One year ago, Coach visited Hometown, in State H, for her high school reunion. During the reunion, she got into an argument with Fran over which of them was the better athlete in high school. Fran lives in State H, where she is domiciled.

A week after the reunion, when Coach had returned to State A, she learned that Fran was spreading rumors about her. In particular, Fran was telling people that Coach had used illegal drugs with students during her visit to State H.

A newspaper in State A learned of the allegations about Coach and published them, along with quotations from Fran, who had repeated her allegations to a news reporter who had visited Fran in State H. The newspaper story led to a public outcry against Coach, and she was fired. She was unable to find another job for many months.

Coach sued Fran in a state court in State A, alleging that Fran had defamed her under state law. Coach's complaint sought damages in the amount of $74,999. In a sworn affidavit attached to the complaint, Coach asserted that she had lost $130,000 in wages due to Fran's defamatory statements, but she stipulated that she would not seek or accept damages in excess of the amount sought in her complaint. That stipulation is binding under State A law.

A process server handed Fran a summons and a copy of the complaint when Fran was attending a basketball game in State A. That was the first time Fran had ever been in State A, and she was there for less than a day. She had no other connection with State A. Statutory law in State A authorizes its courts to exercise personal jurisdiction over persons who are served with process while physically present in the state, without regard to whether they have any other connection with the state.

Ten days later, before filing any answer or responsive motion, Fran filed a notice of removal and the case was removed from state court to the federal district court for the District of State A. The notice of removal asserted that the amount in controversy was $130,000, the alleged amount of Coach's lost wages.

Coach has moved the federal district court to remand the case to the state court in State A, arguing that the federal court lacks subject-matter jurisdiction over the case.

Fran has moved the federal court to dismiss the case for lack of personal jurisdiction over her and for improper venue.

1. Should the federal court remand the case to the state court in State A on the ground that the federal court lacks subject-matter jurisdiction? Explain.

2. Assuming that the case is not remanded for lack of subject-matter jurisdiction, should the federal court dismiss the case for lack of personal jurisdiction over Fran? Explain.

3. Assuming that the case is not remanded and is not dismissed for lack of personal jurisdiction, should the federal court dismiss the case for improper venue? Explain.

February 2025
MEE 3
Representative Passing Answer

The Board of Bar Examiners did not select a representative passing answer for this question.

MEE Question 4

Based on the following facts, David has been charged with knowingly obtaining money under the control of a financial institution (Bank) by means of false or fraudulent representations.

David entered Bank on April 18, 2024. After stopping at the counter where pens and banking slips were located, David presented to the teller a check that appeared to be drawn by Customer on her account at Bank and payable to the order of "David" in the amount of $1,000. Before cashing the check, the teller asked David to produce photo identification (ID), which David did. The teller examined the ID, confirming that it was David's and bore his picture. The teller then returned the ID and gave $1,000 to David, who left Bank.

Customer received a notification on her banking app, alerting her that a $1,000 check had just been charged to her account. Customer promptly called Bank to complain. She was transferred to a fraud investigator and immediately exclaimed, "I didn't write that $1,000 check that you just charged to my account!" Customer was noticeably frustrated and angry.

The investigator began an investigation. First, he compared the signature on the check with Customer's signature in Bank's records and concluded that Customer's signature had been forged on the check. He then reviewed the original video recording of the lobby, counters, and tellers, taken by Bank's security cameras on April 18, 2024. Based on that review, the investigator determined that an individual, later identified as David, had presented a $1,000 check purportedly drawn on Customer's account and that the teller had cashed it. The investigator wrote a report detailing Customer's complaint, describing the video recording, and attaching copies of the check at issue and a copy of Customer's signature from Bank's records.

In a statement to law enforcement, David denied visiting Bank that day. He has pleaded not guilty. The case is now scheduled for trial in federal court. Neither Customer nor the teller is available to testify. However, Bank's investigator, who is a 10-year employee of Bank and works in an office next to Bank's lobby, is available and will testify.

Evaluate the admissibility of the following evidence if it is offered during the testimony of Bank's investigator in the government's case-in-chief. (Do not discuss constitutional issues.)

1. Bank's original video recording of its lobby, counters, and tellers from April 18, 2024, which shows David stopping at the counter in the lobby and interacting with the teller. Explain.

2. The investigator's testimony as to Customer's oral complaint to the investigator. Explain.

3. The investigator's written report, if the investigator testifies that he is unable to recall both the details of the investigation and writing the report. (Assume that the report is relevant and not admissible as a business record.) Explain.

February 2025
MEE 4
Representative Passing Answer

The Board of Bar Examiners did not select a representative passing answer for this question.

MEE Question 5

Six years ago, Alice properly created a trust naming a local bank as the sole trustee and naming herself as the sole beneficiary of the trust income. The trust provided that upon Alice's death, the trust principal would be distributed to her niece, Shirley. Alice and Shirley had a very close relationship, although they lived far apart. The trust also directed the trustee to invest trust assets only in "prudent investments." The trust was silent as to whether it was revocable or irrevocable.

When Alice created the trust, she also properly executed a durable health-care power of attorney naming John, her friend and next-door neighbor, as her agent to make health-care decisions for her. This power was expressly conditioned upon Alice's being unable to make health-care decisions for herself.

Four weeks ago, before she left for a vacation in Europe, Alice had separate telephone conversations first with Shirley and then with John. In both conversations, Alice mused about her wishes if "something should ever happen to me." Alice said to Shirley, "If something should happen to me, I don't want to be connected to a life-support system." In her later conversation with John, Alice told him, "In no event do I ever want to be connected to a life-support system if there is little or no hope of my recovery."

Three weeks ago, Shirley found out that the trustee had imprudently invested 30% of the trust's assets in the stock of a company that later went bankrupt, resulting in a significant loss to the trust. Furious, Shirley immediately contacted the bank officer overseeing the trust. After hearing Shirley's complaints, the trust officer responded truthfully that Alice had approved the investment knowing that it was imprudent. He also accurately told Shirley that Alice was fully competent when she approved the investment. The trust officer then told Shirley, "I guess you win some and you lose some."

The next day, Shirley called Alice, who was still vacationing in Europe, to express her anger about the investment. Alice responded, "We can talk about this when I get home in two weeks."

The day after Alice returned home, she had a stroke and was rushed to the hospital. Three hours later, Alice was connected to a life-support system. Her doctor determined that the stroke had left her unable to make her own health-care decisions. The doctor contacted John and Shirley and told them, "It is unclear whether she will survive or, if she survives, what kind of life she will have. We should know much more in a week or so." Shirley believed that the life-support system should be removed immediately and told the doctor to do so at once. John disagreed and told the doctor to keep Alice on the life-support system.

Ten years ago, the jurisdiction adopted the Uniform Trust Code and a health-care power of attorney act.

1. Is the trust revocable or irrevocable? Explain.

2. (a) Does Shirley have an interest in the trust? Explain.
(b) Assuming that Shirley has an interest in the trust, how is this interest characterized? Explain.

3. Assuming that Shirley has an interest in the trust, does she have a claim against the bank for making the imprudent investment? Explain.

4. Between Shirley and John, who has the legal authority to direct the doctor whether to remove Alice from the life-support system? Explain.

5)

1. Under state law, the trust is revocable because the state adopted the Uniform Trust Code ten years ago.

Under common law, a trust that is silent as to revocability is irrevocable, but under the Uniform Trust Code, a trust that is silent is revocable.

Here, the facts indicate that Alice's trust instrument was silent as to whether it was revocable or irrevocable, and that the state adopted teh Uniform Trust Code ten years ago. Because Alice's trust was formed in a UTC jurisdiction and it is silent as to revocability, her trust is revocable.

Thus, under state law, the trust is revocable.

2a. Under the UTC, Shirley has an interest in the trust because she is a qualified beneficiary.

Under the UTC a qualified beneficiary is any current beneficiary and any first line remainder beneficiary. A qualified beneficiary has rights to enforce the trust.

Here, because Alice is a living settlor of her own trust, she is the current beneficiary and has a life estate. Because Shirley will receive the trust principal after Alice dies, Shirley is a first line remainder beneficiary, making her a qualified beneficiary.

Thus, under the UTC, Shirley has an interest in the trust

2b. Under estate law, assuming Shirley has an interest in the trust, her interest is an indefeasibly vested remainder because there are no other possible takers who can divest her interest.

See rules above. The interest that follows a life estate is either a contingent or vested remainder. The remainder is contingent if the beneficiaries are not fully and completely ascertained at the time of creation of the interest. A remainder is vested if the beneficiaries are in existence at the creation of the interest. A vested remainder is subject to defeasance if part or all of his interest can be depleted, e.g., part of a class which could obtain more members over time, making his share smaller at distributuion. A remainder is indefeasibly vested if the interest created will go to a one or more ascertained beneficiaries in existence at the time the interest was created and no others.

Here, Shirley has an indefeasibly vested remainder because 1) her interest follows Alice's life estate, 2) at its creation, Alice's gift of the trust principal after her death was to a single,

living, ascertained beneficiary (Shirley).

Thus, under estate law, assuming Shirley has an interest in the trust, her interest is an indefeasibly vested remainder.

3. Under the duty of prudence, assuming that Shirley has an interest in the trust, she does not have a claim against the bank for making the imprudent investment because Alice directed the investment.

See rules above. A trustee owes fiduciary duties to the settlor and all beneficiaries. A trustee has a duty to invest prudently, with care, skill, and caution, and to diversify holdings to make the estate productive. When the settlor is alive and the trust is revocable, the trustee owes his duties solely to the settlor until the trust becomes irrevocable (usually at the settlor's death). A trustee must follow the living settlor's instructions for the revocable trust property, and will not be liable for doing so if the instructions are reasonable.

Here, the trustee Bank did not breach its duty of care or prudence because Alice is alive, the trust is revocable, and Alice ordered the investment at issue. Because Shirley is a qualified beneficiary, she has the right to enforce the terms of the trust and sue for breach of duty, but because Alice made the decision to invest unwisely, Shirley has no calim against the trustee Bank.

Thus, under the duty of prudence, assuming that Shirley has an interest in the trust, she does not have a claim against the bank for making the imprudent investment.

4. Under the health care power of attorney act, John has legal authority to direct the doctor whether to remove Alice from the life support system because his authority is in writing.

Generally, a valid health care power of attorney must be in writing, signed by a grantor with capacity to assign his rights. Between a properly executed written healthcare power of attorney and later oral statements, the written power of attorney should prevail. The holder of a healthcare power of attorney should consult others who may have more current information, but is not bound by the additional information except to the extent that he has been granted authority to substitute his judgement for the grantor's.

Here, the facts indicate that John has a "properly executed" durable health care power of attorney naming him as her agent to make health care decisions for her only once Alice was unable to make health care decisions for herself, but the power is not specific with regard to life sustaining care. The conversations between Alice and Shirley and Alice and John were slightly different because Alice flatly told Shirley, "I don't want to be connected to a life-support system" while her statement to John was qualified by "if there is little or not hope of my recovery." John should consult Shirley, but he retains the authority to make the decision for Alice because he has a written healthcare power of attorney.

Thus, under the health care power of attorney act, John has legal authority to direct the doctor whether to remove Alice from the life support system.

END OF EXAM

Indian Law Question

February, 2025

James Wilson ("James") is a non-Indian. He is married to Rita Johnson ("Rita") and lives with Rita and her two children (Charles and Sophia) from previous relationships. Rita and Charles are also non-Indian but Sophia's father is an enrolled member of the Sisseton-Wahpeton Sioux Tribe and Sophia is a tribal member.

The blended family lives in tribal housing on trust land located within the former boundaries of the Lake Traverse Reservation which was disestablished in 1975. Rita left James to care for the children while she went away for a month to tend to her dying mother. The children are both under the age of 10 and, while in James' care, neighbors became concerned about their well-being. Finally, someone called the South Dakota Department of Social Services who notified the Sisseton-Wahpeton Department of Child Welfare. The two organizations conducted a joint investigation and determined that both children were severely malnourished and neglected. Reports were filed by both organizations with the State of South Dakota, the Sisseton-Wahpeton Sioux Tribe, and the U.S. Attorney's office.

The prosecutors from all three jurisdictions reviewed the reports and met via Zoom to decide who has jurisdiction to charge James. All three prosecutors agree that James should be charged with felony level neglect but they can't agree on which courts have jurisdiction. Discuss whether the Federal, State and/or Tribal courts have jurisdiction to charge James with criminal neglect of Charles and Sophia.

6)

The issue is determining which sovereign--Federal, State, and/or Tribal, has jurisdiction over the crimes committed by James (non-Indian), against Charles (non-Indian) and Sophia (Indian).

Federal Jurisdiction

The federal government has concurrent jurisdiction over James' criminal neglect against Sophia under the General Crimes Act. The federal government does not have jurisdiction over James' crimes against Charles, however.

Under the General Crimes Act (GCA), the federal government has jurisdiction in Indian country for crimes committed by a non-Indian against an Indian and for crimes committed by an Indian against a non-Indian. Indian country is defined at Section 1151 of title 25 of the U.S. code as trust lands within the former or existing boundaries of an Indian reservation. Essentially, land held in trust by the federal government for the benefit of Indians, either within or within the exterior boundaries of the reservation, is considered Indian country for purposes of the statute.

Here, the land at issue is trust land located within the former boundaries of the Lake Traverse Reservation and is thus Indian country. James is a non-Indian and Sophia is an Indian that is enrolled in the Sisseton-Wahpeton Sioux Tribe. As such, under the GCA, because James' criminal neglect occurred in Indian country by a non-Indian against an Indian, the federal government has jurisdiction to pursue the crime. It does not matter that the crime is not a major crime under the Major Crimes Act because, notably, the MCA applies to Indian-on-Indian crimes. Thus, even though the MCA is inapplicable, the GCA applies and the federal government can charge James.

As described below, the federal government does not have jurisdiction to prosecute a crime that occurred in Indian country by a non-Indian against a non-Indian, and therefore cannot prosecute against James for the crimes against Charles. *See Oliphant*.

State Jurisdiction

The state has concurrent jurisdiction over James' crimes against Charles and Sophia. The Supreme Court has long pronounced that the state has jurisdiction to pursue crimes against non-Indians against non-Indians that occur in Indian country. *See McBratney*; *see also Oliphant* (holding that because the federal government and tribes do not have jurisdiction over non-Indians for crimes against non-Indians in Indian country, the state does). Here, James is a non-Indian that committed crimes against Charles, a non-Indian. Because the federal government and the tribe is without jurisdiction to prosecute this crime, and because the crime happened by a non-Indian against a non-Indian, the state

has sole jurisdiction to prosecute this offense.

The state likewise has concurrent jurisdiction to pursue charges against James for his criminal neglect of Sophia. In Castro-Huerta, the Supreme Court held that states have concurrent jurisdiction with the federal government to prosecute crimes committed by a non-Indian against an Indian for crimes occurring in Indian country. Here, James is a non-Indian that committed crimes against Sophia, an Indian, in Indian country (see above). Under *Castro-Huerta*, the state has concurrent jurisdiction over this crime.

Tribal Jurisdiction

The tribe has concurrent jurisdiction over James' crimes against Sophia under the Violence Against Women Act (2022) assuming that the tribe has committed to VAWA's predicate requirements. Ordinarily, tribes do not have jurisdiction over any crimes committed by non-Indians against Indians in Indian country. *See Oliphant*. But the Supreme Court has stated that Congress' power in Indian affairs and Tribal relations is plenary, meaning that Congress has the power to add back certain inherent authority that tribes have delegated over the years. Under VAWA, Congress provided back to tribes the power to prosecute certain crimes committed by non-Indians against Indians. Those certain crimes include, among others, crimes against minor children by a non-Indian adoptive parent or boyfriend. If the tribe adheres to the specific requirements set out under VAWA (e.g., protecting certain fundamental rights, right to an attorney, etc.), the tribe can prosecute such crimes against non-Indians.

Here, James, a non-Indian, committed crimes against Sophia, an Indian, in Indian country. Normally, the tribe lack jurisdiction over such cases. But the facts here fall directly into the ambit of VAWA because James committed criminal neglect against the Indian child, Sophia, of his Indian girlfriend. Presuming that the tribe has instated the prerequisite requirements to protect the non-Indians right to due process, the tribe can prosecute James for his crimes here.

Relatedly, the tribe does not have jurisdiction to prosecute James' crimes against Charles because VAWA does not extend to crimes by a non-Indian against a non-Indian in Indian country.

END OF EXAM