STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 8

LAKELAND PRINTING CO., INC., D/B/A THE LAKELAND TIMES,

Plaintiff,

v. Case No. 17CV1737

WISCONSIN DEPARTMENT OF JUSTICE AND PAUL FERGUSON,

Defendants.

DEFENDANTS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Defendants Wisconsin Department of Justice (DOJ) and AAG Paul Ferguson, provided records in response to Lakeland Printing Co.'s (Lakeland) public records request for all disciplinary records for DOJ employees from 2013 to 2016. The records were produced largely in unredacted form. DOJ redacted certain employee names and sensitive law enforcement information pursuant to a careful application of the balancing test to the individual documents.

STATEMENT OF FACTS

On January 13, 2017, Lakeland issued a public record request asking for "all discipline records for Department of Justice employees for the years 2013-2016,

including the names of the employees disciplined." (Compl. ¶ 5.) DOJ reviewed its files and identified records responsive to the request. (Compl. Ex. 1 at 1.) Pursuant to the Wis. Stat. 19.35(1)(a) balancing test, DOJ redacted the names of individuals who were the record subjects. (*Id.*; Carson Affidavit Ex. 1-4.) The positions held by these records subject and the positions descriptions demonstrate these are not high-profile employees in positions of power and authority. (Ex. 5; Ex. 7 at 1.) The sole supervisor in the group, a forensic scientist supervisor, received discipline for something completely unrelated to supervision of others. (Ex. 5 at 1; Ex. 1 at 1-2.)

The remaining records were provided with names unredacted, but may have had substance redacted. Plaintiff is challenging the redactions made to two of those records. (Carson Aff. Ex. 6, filed under seal for *in camera* review).

STANDARD OF REVIEW

Where no statutory or common law exceptions to the public records law apply, the court must determine whether the public interest in disclosure of the requested records outweighs the public interest in non-disclosure. *Seifert v. Sch. Dist. Of Sheboygan Falls*, 2007 WI App 207, ¶ 30, 305 Wis. 2d 582, 740 N.W.2d 177 (citing *Linzmeyer v. Forcey*, 2002 WI 84, ¶ 11, 254 Wis. 2d 306, 646 N.W.2d 811). When a record custodian's decision is challenged, the court must make its own independent decisions regarding the application of the law, including conduction the balancing test. *Hempel v. City of Baraboo*, 2005 WI 120, ¶ 21, 284 Wis.2d 162, 699 N.W.2d 551; *John K. MacIver Institute for Public Policy, Inc. v. Erpenbach*, 2014 WI App 49, ¶ 14, 354 Wis.2d 61, 848 N.W.2d 862. The application of undisputed facts to

is a question of law which courts review *de novo*. *Woznicki v. Erickson*, 202 Wis. 2d 178, 192, 549 N.W.2d 699 (1996).

ARGUMENT

I. DOJ Complied With Wisconsin Public Records Law.

A. Public Records Law, Generally.

Wisconsin's Public Records Law provides that "[e]xcept as otherwise provided by law, any requester has a right to inspect any record," Wis. Stat. § 19.35(1)(a). The Wisconsin Supreme Court has characterized access to public records as one of the strongest declarations of policy found in the Wisconsin statutes. *Zellner v. Cedarburg Sch. Dist.*, 2007 WI 53, ¶ 49, 300 Wis. 2d 290, 731 N.W.2d 240; *Linzmeyer v. Forcey*, 2002 WI 84, ¶ 14, 254 Wis. 2d 306, 646 N.W.2d 811. The review of a custodian's decision to release records in response to a public records request starts with the statutory presumption of complete public access and the corollary mandate that only in an exceptional case may access be denied. Wis. Stat. § 19.31.

While strong, the presumption favoring disclosure is not absolute. *Hempel v. City of Baraboo*, 2005 WI 120, ¶ 28, 284 Wis. 2d 162, 699 N.W.2d 551. In some instances, disclosure is limited by statute or other law. Wis. Stat. § 19.35(1) ("[e]xcept as otherwise provided by law, any requester has a right to inspect any record."); Wis. Stat. § 19.36(1) (application of other laws). The public records law itself contains exemptions, as do many other laws, such as medical privacy laws, and laws related to public employee trust fund records, certain records pertaining to

juveniles, and intercepted wire, electronic, or oral communications obtained during criminal proceedings. Other than the exemptions contained within Wis. Stat. § 19.36(10), there are no blanket exemptions from disclosure of public employee personnel records. *Kroeplin v. Dept. of Natural Res.*, 2006 WI App 227, ¶ 34, 297 Wis. 2d 254, 725 N.W.2d 286.

B. Balancing Test.

Even where no statutory exception forbids disclosure, the public interest in keeping certain records confidential may override the public interest in accessing the record. *Hathaway v. Joint Sch. Dist. 1*, 116 Wis. 2d 388, 396-97, 342 N.W.2d 682 (1984)). An authority faced with a public records request must determine what is better, on balance, for the public. "[T]he balancing test must be applied with respect to each individual record." *Milw. Journal Sentinel v. Wis. Dept. of Admin.*, 2009 WI 79, ¶ 56, 319 Wis. 2d 439, 768 N.W.2d 700 (citing *Wis. Newspress, Inc. v. Sch. Dist. Of Sheboygan Falls*, 199 Wis. 2d 768, 780, 546 N.W.2d 143 (1996)). Every records request—even when made to the same agency—is unique, and whether the public interest in disclosure outweighs the public interest in non-disclosure is a case-by-case determination. *Id.* (citations omitted).

The identity of crime victims and their families is entitled to protection from disclosure pursuant to the balancing test. The Wisconsin Constitution Article I, Section 9, requires that crime victims be treated with "fairness, dignity, and respect for their privacy." Related Wisconsin statutes recognize that this right belongs to

family members as well and must be vigorously honored by law enforcement agencies. Wis. Stat. §§ 950.01 and 950.02(4)(a).

The public interest in protecting the reputation and privacy of citizens may also be a factor that favors non-release. This public interest arises from the public effects of the failure to honor an individual's privacy interests and not the individual's concern about embarrassment. *Woznicki*, 202 Wis.2d at 187, 549 N.W.2d 699; *Breier*, 89 Wis.2d at 430, 279 N.W.2d 179; *Youmans*, 28 Wis.2d at 685, 137 N.W.2d 470. The disclosure of certain public records might result in fewer qualified applicants for public positions where their privacy would be regularly intruded upon. *Vill. of Butler v. Cohen*, 163 Wis.2d 819, 831, 472 N.W.2d 579 (Ct. App. 1991). The public interest in what was once an individual's privacy interest is becoming more important to the balancing test, given the pervasive use of internet and social media and the permanence of information that is placed into that realm. (*See, e.g.,* Carson Decl. Ex. 8.)

Two important considerations to the balancing test include the position of the subject and the workplace conduct committed. Discipline records involving employees, officials, or agents holding positions of authority or power, along with serious misconduct can tip the balance in favor of disclosure of the name of the discipline subject. *Zellner*, 2007 WI 53, 300 Wis. 2d 290, 731 N.W.2d 240 (teacher reviewing pornography on district-owned computer); *Linzmeyer*, 2002 WI 84, ¶ 14, 254 Wis. 2d 306, 646 N.W.2d 811(possible inappropriate interactions between teacher and students)*; Kroeplin*, 2006 WI App 227 (DNR officer obtaining driver's

license information for non-law enforcement purpose); *Wisconsin Newspress,* 199 Wis. 2d at 787, 546 N.W.2d 143 (discipline records of school district administrator); *State ex rel. Journal/Sentinel, Inc.*, 558 N.W.2d 670, 672, 207 Wis. 2d 496 (use of force by Milwaukee police officers); *Hagen v. Board of Regents of Univ. of Oshkosh*, 2018 WL 3088907 (Ct. App. 2018)(complaint against university professor)(decision attached).

Conversely, there are certain non-supervisory employment positions that lack the power and authority over others as well as workplace actions that are relatively minor that tip the balance in favor of non-disclosure. DOJ has handled numerous cases filed by employees seeking to enjoin release of discipline records pursuant to Wis. Stat. § 19.356. DOJ's redactions of records in this case are consistent with the decisions in these Wis. Stat. § 19.356 cases upholding employee challenges to release of discipline records and enjoining release. *Thompson v. Wis. Dept. of Natural Resources*, Dane County Case. No., 15-CV-465 (Court granted petitioner's motion for injunction - DNR was enjoined from releasing record (case sealed); *Taves v. Ourada*, Lincoln County Case No. 15-CV-44 (Court granted petitioner's motion for injunction - DOC was enjoined from releasing record.)(*See* Carson Decl. Ex. 9, Order).

C. DOJ has provided all records responsive to Lakeland's January 2017 public records request; the limited redactions were made through a proper use of the balancing test.

1. The balancing test weighs in favor of redacting information that could lead to identification of a victim

and individuals who provided information used in discipline.

DOJ disclosed hundreds of pages of unredacted records. Two discipline records which disclosed the subject name contained information that required redaction pursuant to the balancing test. (Carson Aff. Ex. 6, filed under seal.) During review of the records, DOJ discovered a record that contained information that could lead to the discovery of the identity of a victim. The strong constitutional right to privacy of a victim tipped the scale in favor of redaction of the subject county. (Id. at 4.)

DOJ redacted names of others who may have been tangentially involved or who may have provided information. Disclosure would negatively impact cooperation by employees in personnel matters regarding co-workers. The public interest in this cooperation far exceeds the public interest in obtaining the name of a corollary person who may have provided information. (*Id.* at 5.)

2. The balancing test weighs in favor of redacting the subject names in the DOJ discipline records at issue.

DOJ determined that the public interest in oversight of DOJ employee discipline was sufficiently served through disclosure of the contents of the disciplinary letters. DOJ further determined that disclosure of the names of certain disciplined employees, other identifying information, and others collaterally mentioned was outweighed by the public interest in non-disclosure.

First, the subject employees were sanctioned for work rule violations, not criminal conduct or serious misconduct. The records provided to Lakeland details the rule violations and the outcome of the investigation. (*See* Carson Decl. Exs. 1-4.) The detailed letters demonstrate that the conduct involved minor disciplinary infractions and rule violations, which tips the balance in favor of disclosure. *See Zellner, Linzmayer, Kroeplin, supra.*

Second, the subject employees were not acting in supervisory roles or asserting power and authority over others. *See Wisconsin Newspress, Inc., Hagen, State ex rel. Journal/Sentinel, Inc., Kroeplin, supra.* They were not highly-placed DOJ personnel or leadership that would garner significant public interest. The employee's position together with their position descriptions demonstrate these employees are not supervisors or were not acting in a supervisory capacity and are performing largely administrative and ministerial functions. (*See* Carson Decl. Exs. 1-4, 5, 7.)

Third, the strong public interest in recruiting and retaining public employees tips the balancing test in favor of redaction of the DOJ employee names. The State needs to attract competent, hard-working employees and applicants to keep it running. The prospect of having your name and discipline records released and publicized, regardless of the severity, puts the State at a huge disadvantage to the private sector. *See Vill. of Butler, supra.* Moreover, the disclosure could have a chilling effect on a supervisor's willingness to give honest, thorough evaluations, feedback following an investigation, and even take less disciplinary actions. The

public interest in the supervisors performing their duties as they should substantially outweighs the public's interest in receiving the names of the disciplined employees.

Finally, there is no reason for the disclosure of the subject names other than to publicly identify these DOJ employees to harass, intimidate, and create long-term potential problems gaining employment. There is a strong public policy interest in keeping citizens who are willing and able to work, employed. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 544, 105 S. Ct. 1487, 1495, 84 L. Ed. 2d 494 (1985)(A governmental employer has an interest in keeping its citizens usefully employed rather than taking the possibly erroneous and counterproductive step of forcing employees onto the welfare rolls.)

The articles published by Lakeland remain in the public domain, perhaps forever. (*See* Carson Decl. Ex. 8, articles from 2007, 2010, and 2012 available and retrieved on June 6, 2018.) In reality, the only utility that publishing names and making them readily accessible on the internet is that these people may very well have a difficult time being employed given employers penchant for conducting "google" searches before interviewing or hiring anyone. There is a significant public interest in Wisconsin in making sure everyone who is willing and able to work can do so, without the fear of a decade-old minor employment issue raising its ugly head time and again.

CONCLUSION

Based upon the foregoing, Defendants request the Court grant their motion for summary judgment.

Dated: August 29, 2018.

Respectfully submitted,

BRAD D. SCHIMEL
Wisconsin Attorney General

Electronically signed by:
s/Gesina S. Carson
GESINA SEILER CARSON
Assistant Attorney General
State Bar #1055162

ANNE M. BENSKY
Assistant Attorney General
State Bar #1069210

Attorneys for Defendants

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-9451 (Bensky)
(608) 266-1672 (Carson)
(608) 267-8906 (Fax)
benskyam@doj.state.wi.us
carsongs@doj.state.wi.us