STATE OF WISCONSIN : CIRCUIT COURT : DANE COUNTY

LAKELAND PRINTING CO., INC.,
d/b/a THE LAKELAND TIMES,
and GREGG WALKER, c/o
THE LAKELAND TIMES,

Plaintiffs,

vs.

Case No.: 2017-CV-1737

WISCONSIN DEPARTMENT OF JUSTICE, et al.,

Case Classification: OTHER EXTRAORDINARY WRIT

Defendants.

Case Code: 30954

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiffs requested disciplinary records from the Defendants, the Wisconsin Department of Justice and its records custodian (collectively, "Defendants" or "the Department").[1] The Defendants provided redacted records. Plaintiffs and Defendants have both filed motions for summary judgment and supporting briefs. Plaintiffs submit the following additional argument in response to Defendants' motion for summary judgment.

[1] As noted in Plaintiffs' prior brief in support of Plaintiffs' motion for summary judgment, Plaintiffs also requested another category of records that were redacted and which were the subject of dispute in this action; however, those records have now been produced to Plaintiffs with the challenged redactions removed. Therefore, the issues concerning all other records, except those identified in the current summary judgment briefing between the parties, have been resolved except as to Plaintiffs' pending attorneys' fees claims. *See also* Argument Section IX, *infra.*

FACTUAL BACKGROUND

The facts of this matter have been previously described in Plaintiffs' Brief in Support of Their Motion for Summary and Declaratory Judgment, including the Plaintiffs' records request, the Defendants' response, and a summary of the redactions that are at issue in this case. Plaintiffs' Brief filed August 28, 2018 at pp. 1-6. In order to avoid unnecessary repetition, those facts are incorporated herein by reference.

However, Plaintiffs take issue with certain statements described as "facts" in Defendants' Brief. First, Defendants claim that the position descriptions for the employees whose disciplinary records were redacted show that they were not "high-profile" employees and that they did not have positions of "power and authority." Defendants' Brief in Support of Motion for Summary Judgment, filed August 28, 2018, at p. 2. As explained in the argument sections below, Plaintiffs do not agree that only "high profile" employees' disciplinary records or those of employees with "power and authority" can be disclosed under the Public Records Law, but Defendants are wrong from a factual standpoint as well. As explained *infra* at pp. 9-12 in chart format, the position descriptions show that the employees all had considerable responsibility and authority within the Department, and in many cases, oversight of others or management responsibilities for programs or departmental functions.

Similarly, the Department claims that a "forensic scientist supervisor" received discipline for something "unrelated to supervision of others." Defendants' Brief in Support of Motion for Summary Judgment, filed August 28, 2018, at p. 2. Again, Plaintiffs' position is that the Public Records Law does not permit the general conclusion that the public's only interest in supervisory employees is their actions in supervision of

others. Moreover, the facts show that the employee was disciplined for releasing confidential crime lab information directly to a third party in contravention of agency policy, which bears on the employee's judgment – a matter that is important in evaluating any supervisor – and on the employee's suitability to maintain employment in an agency that, even according to its own recent public statements, places a great degree of importance on employees' responsibilities to maintain confidential information regarding criminal investigations. *See* discussion *infra* at pp. 14-15.

STANDARD ON SUMMARY JUDGMENT

The Plaintiffs and the Department have each filed motions for summary judgment. However, it should be noted that different standards apply to the parties' motions because of the nature of this action and by operation of the Public Records law. While each party, to prevail, must meet the basic statutory standard that requires that there be no material dispute of fact and that they show that they are entitled judgment under substantive law, *see* Wis. Stats. §802.08, the Plaintiffs are entitled to presumptive access to the complete records that they requested. Wis. Stats. §19.35(1)(a). Defendants bear the burden to overcome this presumptive access and therefore, bear the ultimate burden on summary judgment. *See Transportation Ins. Co., Inc. v. Hunzinger Constr. Co.*, 179 Wis. 2d 281, 291 (Ct. App. 1993). In addition, because Defendants rely on asserted public policy reasons that they claim justify denying access to the information that they redacted, Defendants carry the additional burden to show that the public policy justifications that they raise are legally sufficient to overcome the public interests in access and are supported by facts in the record. *Kroeplin v. Wisconsin Dept. of Natural Resources*, 2006 WI App 227 ¶37 (quotation omitted).

ARGUMENT

In general, the same arguments supporting Plaintiffs' motion for summary judgment support denial of the Defendants' motion for summary judgment. Therefore, again, in order to avoid unnecessary repetition, the arguments set forth in Plaintiffs' initial brief are incorporated by reference in full, Plaintiffs' Brief filed August 28, 2018 at pp. 9-25, and are only briefly summarized in Section I, below. In Sections II through VII, below, Plaintiffs respond to specific arguments raised by Defendants in the brief that they filed in support of their motion for summary judgment. In Section VIII, Plaintiffs again address the two redactions of information other than disciplined employees' names. In Section IX, Plaintiffs explain that Defendants could not be awarded summary judgment disposing of this case regardless of the determination of the issues presented by the parties' current motions, because Plaintiffs are entitled to attorneys' fees for the records that Defendants produced on the claim that they elected not to contest prior to the summary judgment briefing.

Plaintiffs request that for all of the reasons explained below, the Plaintiffs' motion be granted and the Defendants' motion be denied.

I. Defendants Have Not Provided a Record-Specific or Sufficient "Exceptional" Basis for Overcoming the Public's Right of Access.

As Plaintiffs explained at greater length in their initial brief, there are no blanket "public policy" exceptions to the Public Records Law. Plaintiffs' Brief filed August 28, 2018 at pp. 9-12. This means that arguments against the presumption of public access must be made based on allegedly exceptional, individual characteristics of records rather than based on generic justifications that would apply to entire categories of records. *Id*.

The Courts have likewise explained that these principles apply with equal force to public employee personnel and disciplinary records, so that there is no blanket exception for those records. *See id.* What Defendants attempt to create in this case is a new categorical exception to the Public Records law for all records concerning any public agency's disciplinary records for so-called "lower-level" employees when those employees are disciplined for what Defendants subjectively characterize as work-rule violations that are allegedly not significant. That argument violates the dictates of binding precedent that public policy reasons against disclosure can only be applied on a record-by-record basis and based on a showing that there are exceptional and specific reasons why each individual record should not be released. *See* Plaintiffs' Brief filed August 28, 2018 at pp. 9-12.

As Plaintiffs also explained, reported appellate case law recognizes a strong public interest in access to public employee misconduct and disciplinary records, after the conclusion of the initial investigation. Plaintiffs' Brief filed August 28, 2018 at pp. 9-12. But even with respect to public records generally, it is never the case that there is no public interest in access to the record; rather, there is a presumption in favor of access, which can only be overcome by exceptional reasons against disclosure of a particular record. *Milwaukee Journal Sentinel v. Dept. of Administration,* 2009 WI 79, ¶59.

Plaintiffs reiterate their basic argument that, for all of the reasons explained in their prior brief, Defendants have not identified any specific, exceptional reasons sufficient to deny access to the information that they redacted from the records that are at issue in this case. Rather, as Plaintiffs noted in their prior brief, Defendants have

identified, at best, only what the Court of Appeals has characterized as a "generalized interest" in protecting asserted "reputation or privacy" concerns, which in the balancing analysis, "quickly yields to the greater weight" of the "overriding public interest in obtaining information regarding the activities of public servants." *Local 2489 AFSCME, AFL-CIO v. Rock Co.,* 2004 WI App 210, ¶31.

II. Defendants Cite No Binding or Persuasive Authority That Could Overcome Plaintiffs' Established Right of Access.

Against the weight of reported appellate authority summarized in Plaintiffs' prior brief, Defendants point to two Wisconsin circuit court cases in which the Attorney General's office failed to appeal rulings against the disclosure of employee disciplinary records in other cases. For several reasons, these cases fail to support withholding employee names in this case.

First, circuit court decisions are, at best, persuasive authority, and only to the extent of their stated "reasoning." *See, e.g., Raasch v. City of Milwaukee*, 2008 WI App 54, ¶8, *Brandt v. Labor and Industry Review Comm'n*, 160 Wis. 2d 353, 365 (Ct. App. 1991). They cannot overcome binding reported appellate authority discussed above.

Second, there is no rationale or reasoning expressed in the Lincoln County judgment that was submitted; the Circuit Court utterly failed to explain its decision. Therefore, even if it were a reported appellate opinion, it would have no precedential effect because summary decisions provide no guidance for future courts to apply. *See, e.g.,* 21 C.J.S. Courts §232 (September 2018 update). "Questions that merely lurk in the record are not resolved, and no resolution of them may be inferred." *Id.* Further, summary decisions must be interpreted "as applying principles established

by prior decisions," *id.* – *i.e.,* the reported appellate decisions discussed in Plaintiffs' initial brief.

Moreover, issues that were "neither brought to the court's decision nor decided are not considered as having been so decided" with respect to any prior decision, whether issued on a summary basis or otherwise. 21 C.J.S. Courts §215 (September 2018 update). Therefore, the arguments raised in this case cannot be considered to have been addressed in prior litigation as to which this Court has been provided no facts. The proffered decision contains no discussion of the issues considered or how any legal principles were applied. And the Dane County decision that Defendants cite is described as sealed, so again, it provides no guidance that can be applied in this case.

Third, no facts are described with respect to either of these decisions, and again, even reported appellate decisions would be binding only to the extent that they are applied to similar factual situations. 21 C.J.S. §216 (September 2018 update). Based on the little information supplied with respect to the cases that Defendants mention, we know virtually nothing about the specific facts underlying these decisions. What were the individuals' positions? What misconduct were they asserted to have committed? How many times were they disciplined? The Defendants' citations therefore provide no help to the Court or to anyone in applying the balancing test in this case.

Fourth, the fact that the Attorney General's office provided two decisions out of "numerous" cases that it claims to have handled strongly suggests that it engaged in cherry-picking to favor its position in this case. In contrast, Plaintiffs' counsel is attaching to her response affidavit two examples of decisions in which defendants have

been provided copies of "lower-level" employee disciplinary records through public records actions. In the first case, a circuit court judge rejected arguments for protection of the records of "paraprofessionals" or "aides" who were asserted to be "lower-level" employees, *Bartelt v. Appleton Area School Dist.,* Oneida County Case No. 12-CV-1318, Barker Aff., Ex. 1, pp. 1, 3-4. In the second case, School District produced records relating to a teaching aide during litigation after asserting in the denial letter that the balancing test allowed the District to withhold them due to public interest in "preserving the confidentiality of certain employee personnel records." *See* Barker Aff., Ex. 2.[2]

Finally, a more sound description of the principles that must govern the analysis in this case can be found in the Attorney General's own words in an opinion issued by the agency and that was quoted and endorsed by the Court of Appeals:

> [T]he main purpose of the public records law is to enable the citizenry to monitor and evaluate the performance of public officials and employes [*sic*]. If information relating to a settlement and the underlying personnel dispute are kept confidential, the public is deprived of this ability.

Journal/Sentinel, Inc. v. School Bd. of School Dist. of Shorewood, 186 Wis. 2d 443, 459 (Ct. App. 1994) (quoting 74 Op.Att'y Gen. 14, 16 (1985)). As the Court of Appeals further explained, "***All*** officers and employees of government are, ultimately, responsible to the citizens, and those citizens have a right to hold their employees accountable for the job they do." *Id.* (emphasis added). It is important to note that the Court of Appeals did not state that only high-level officers and employees of

[2] Although these both involved school employees, and positions involving students have been recognized as subject to public scrutiny, Courts have recognized that law enforcement agencies' staff members are likewise more subject to disclosure and public review of their conduct even when they are not commissioned police officers. *See Local 2489,* 2004 WI App 210, ¶26.

government are accountable to the public; the Court stated that the public has a right to hold all officers and employees of government accountable. The Defendants' arguments contradict this direction and the words of the agency's own prior opinions and therefore should be rejected.

III. The Employees Whose Discipline is At Issue Are Do Not Hold "Low-Level" Positions.

As Plaintiffs explained in the brief supporting their motion for summary judgment, Defendants' characterization of the positions as "low-level" is not consistent with the position descriptions for the employees whose information was redacted. Plaintiffs' Brief filed August 28, 2018 at pp. 19-22. Rather, to DOJ's credit, the agency appears to provide opportunities for oversight and management to a wide breadth of the employees serving the agency, if the sample reflected in the records at issue in this case is a representative indication. The position descriptions for the employees whose discipline is at issue bear this point out as follows:

Letter Date	**Title**	**Position Description Details (Referencing Page Nos. in Carson Aff., Ex. 5)**
February 21, 2013	Forensic Scientist Supervisor	Position requires "Supervisory Duties," including recommending hiring, assignment, reclassification, transfer, layoff, recall and promotion of personnel; conducting annual and probationary evaluations of personnel; recommending discipline of personnel; supervising, coordinating and reviewing work of forensic scientist sand others; and planning and conducting training and orientation (019-022)
May 13, 2013	Forensic Program Technician – Senior	Position requires managing the evidence used by the Department and providing court testimony regarding handling the evidence. (013-018)

November 13, 2013	Program Planning Analyst – Advanced	Position is "responsible for overall management of the federal Violence Against women Act (VAWA) program in Wisconsin," and "making policy program and funding recommendations" concerning grants, and is to strive to establish "effective working relationships with individuals in federal, state and local agencies" among other program-related contacts. (051-053).
January 14, 2014	IS Technical Services Specialist	Position includes "General Responsibilities" in "Operational Management," assessment of customer-end-user means and "independent judgment decisions"; position also must be able to create documentation/standard operating procedures for internal Departmental use. (025-035)
April 4, 2014	Operations Program Associate	Position works under "minimal supervision" and provides "investigative and analytical support" to the Internet Crimes Against Children Task Force of the Division of Criminal Investigation. Position is responsible for "presenting Internet training sessions to statewide law enforcement agencies, educators, parents, and children." The position also "manages the CyberTipline, an online resource for reporting of child exploitation." Responsibilities include "writing affidavits, subpoenas and search warrants, analyzing and interpreting subpoena results, and creating reports detailing the investigative process." Goals include internet training/workshops to be presented to "educators, parents, students and various other community members throughout Wisconsin," to "law enforcement, school resource officers, and educators." Also conducts trainings to affiliate agencies and other law enforcement personnel and provides information at safety informational

		booths and manages WILENET site. (DOJ 047-050)
October 7, 2014	IS Technical Services Specialist	See entry above, January 14, 2014.
November 6, 2014	Education Consultant	Position provides "statewide leadership' and training and "includes developing necessary standards and policies" and oversight of the Department's testing program. (DOJ – 006-008)
August 5, 2014 letter; November 11, 2014, Grievance report	Business Automation Consultant	Position is to provide "department-wide project management services," position "is directly responsible for providing direction to technical and developmental staff" and "coordinating the work of the task forces and committees," and providing "leadership and direction to project team members." Position is to "[e]ffectively lead development." (025-027)
January 26, 2015	IS Technical Services Consultant	Position is to be the "agency expert" on specified technical matters, serve as administrator for "systems and security" platforms and "recommend new standards and guidelines" and policies and communicate with "all levels of management." Position is also to research and manage issues relating to "system-wide security concerns" and to "[l]ead other staff" with respect to security status of DOJ devices and networks and recommend modifications. (DOJ – 028-031)
May 1, 2015	Controlled Substance Analyst – Advanced	Must testify in Court and represent the Crime Laboratory publicly at events, meeting and public speaking engagements. (002-003)
January 7, 2016	Forensic Program Technician – Senior or Office Associate	See Forensic Program Technician description above at May 13, 2013 entry or Office Associate description below at February 23, 2016 entry.
January 7, 2016	Forensic Program Technician – Senior or Office Associate	See Forensic Program Technician description above at May 13, 2013 entry or Office Associate description below at February 23, 2016 entry.
January 26, 2016	License Permit Program Associate	Position reviews concealed carry weapons applications, verifies identify

		and eligibility of firearms dealers, contacts law enforcement agencies, prosecutors, courts and others to determine eligibility, conducts required criminal background checks, and approves or denies CCW applications. Also manages license renewal processes and interacts with the general public including by providing counsel to applicants, potential applications, and firearms dealers. Must have knowledge of pertinent state laws, administrative code, and administrative practices and procedures. (036-040)
February 11, 2016	Forensic Program Tech – Senior	See May 13, 2013 entry above.
February 23, 2016	Office Associate	Position "requires knowledge of specific state statutes, laboratory policies and procedures, and Department of Justice guidelines" concerning "agencies, offenses, confidentiality and chain of custody." Works under only "limited direction and supervision" and "is required to exercise daily independent judgment." Schedules and cancels court appearances in coordination with "federal, state, local court officials and analysts." Must maintain confidentiality and handles Confidential Report of Laboratory Findings as part of job duties. (044-046)
May 20, 2016	Office Associate	See description for this position immediately above.
June 30, 2016	Education consultant	See above description for this position (November 6, 2014 entry)
August 2, 2016	IS Technical Services Specialist	See above description for this position (January 24, 2016 entry)
December 14, 2016	Office Associate	See above description for this position (February 23, 2016 entry)

Affidavit of Gregg filed August 28, 2018, Ex. 2; Affidavit of April Rockstead Barker filed August 28, 2018, Exs. 1, 3; Affidavit of Gesina Carlson, Ex. 5.

It is also important to note that the serious consequences that the agency sustained or could have sustained because of the misconduct of these employees is a testament to the significant responsibility that these employees' positions entail. In Plaintiffs' brief in support of their motion for summary judgment, they included a chart that listed some of these very serious consequences. Plaintiffs' Brief filed August 28, 2018, Chart at pp. 21-23.

IV. The Discipline At Issue Was Not Imposed For Insignificant Infractions.

As also noted in Plaintiffs' brief supporting their motion for summary judgment, the infractions for which the employees were disciplined are not trivial matters, and the work rules that they were found to have violated cannot be described as trivial, insignificant, or minor. Plaintiffs' Brief filed August 28, 2018 at pp. 20-23. Rather, the offenses include false or malicious statements against other employees or supervisors, providing false or deceptive information, unauthorized use of state resources, and insubordination, among others. *See* Chart, Plaintiffs' Brief filed August 28, 2018 at pp. 3-6.

As Plaintiffs also noted in their prior brief, many of the disciplinary records were issued to individuals who had previously been orally reprimanded, often for the same or similar misconduct, and several of the disciplinary records were issued to individuals who had previously received formal written reprimands. *See* Walker Aff., Ex. 2, 5/1/15 letter; 2/23/16 letter; 5/20/16 letter; 12/14/16 letter. The disciplinary letters all imposed forms of significant discipline, ranging from formal written reprimands to suspensions without pay. *See* Chart, Plaintiffs' Brief filed August 28, 2018 at pp. 3-6. Many of the

employees were warned that further infractions could lead to further discipline, including termination. *See, e.g.,* Walker Aff., Ex. 2, 10/7/14 letter at p. 2.

It is also important to note that even the offenses that the Defendants are most likely to downplay, such as absenteeism and habitual tardiness, are infractions for which employees can be denied unemployment compensation benefits. *See, e.g., Wisconsin Dept. of Workforce Development v. Wisconsin Labor and Industry Review Commission*, 2018 WI 77, ¶24 (finding that nurse was terminated for "misconduct" within the meaning of the unemployment compensation law when she missed an entire shift in violation of the employer's attendance policy); *Charette v. State of Wisconsin Labor and Industry Review Commission*, 198 Wis. 2d 956, 962-63 (tardiness after prior warnings was misconduct disqualifying employee from receiving unemployment compensation benefits). As anyone who has ever litigated them well knows, the unemployment compensation laws are interpreted favorably to employees in order to promote the policies of providing compensation to the unemployed. Therefore, the fact that the offenses described in the letters at issue would suffice to deny compensation to unemployment claimants means that they cannot be considered trivial.

As another example, one of the offenses for which an employee was disciplined involved a breach of confidentiality concerning an investigation. *See* discussion *supra*, p. 2. The DOJ has just recently stressed in comments to media its position that it is important that employees keep confidential law enforcement information confidential. *See* Barker Aff., Ex. 3 (https://madison.com/news/state-regional/wisconsin-attorney-general-requiring-nondisclosure-agreement/article_b7c8a903-d99c-5589-8f03-e992dcc9f771.html). The agency is attempting to plead its case to the public that

employees' responsibilities to keep confidentiality regarding ongoing investigations is not a trivial issue. It should not now be heard to tell this Court otherwise.

V. Public Policy, Including Policies Recognized By DOJ, Demonstrate That Public Employees' Employment Histories Have Too Often Been Concealed.

Defendants also argue that it is unfair for individuals to potentially lose employment opportunities because of prior disciplinary offenses. But again, the Department has recently touted public efforts to address the problems that arise when employers help employees cover up their prior disciplinary offenses, especially in public positions, such as law enforcement, which can enable employees to engage in the same misconduct in new positions because new employers or the public may be oblivious to the employees' prior histories of misconduct. *See, e.g.,* Barker Aff., Ex. 4 (Jonathan Anderson, "How Wisconsin is weeding out bad cops," Wausau Daily Herald, April 14, 2017; https://www.wausaudailyherald.com/story/news/2017/04/14/how-wisconsin-weeding-out-bad-cops/98867530/); *see also* Ex. 6 (Megan Cassidy, "Arizona officers under scrutiny at one agency often move to others," The Republic, updated December 8, 2017); https://www.azcentral.com/story/news/local/arizona/2017/12/07/arizona-officers-under-scrutiny-one-agency-often-move-others/820139001/. The Department recently announced that it has created a database to combat this problem. *See* Barker Aff., Ex. 4, at p. 1.

The Department's database and similar moves to disclose misconduct findings against employees to future employees in the University of Wisconsin system are geared toward providing that information to employers, *see* Barker Aff., Ex. 5, Colleen

Flaherty, "No More Passing the Harasser," Inside higher Ed, September 25, 2018), https://www.insidehighered.com/news/2018/09/25/u-wisconsin-system-proceeds-plan-disclose-misconduct-findings-against-employees, but agencies unfortunately do not always make decisions that pay due regard to such information when they have it. *See, e.g.,* "The Internal Revenue Service Continues to Rehire Former Employees With Conduct and Performance Issues," Treasury Inspector General for Tax Administration, July 24, 2017, available at https://www.treasury.gov/tigta/press/press_tigta-2017-17.htm. Therefore, it is not credible for agencies to contend that public oversight is not necessary. Moreover, the Public Records Law exists because the Public is entitled to that oversight, whether agencies believe that it is necessary or not.

Further, with respect to misconduct on matters such as serial sexual harassment, it is evident that an employee need not be characterized as "high level" to cause significant harm within an organization. Again, however, it is important to note that all of the misconduct that is at issue in this case is misconduct that would likely be significant when determining whether the employees are suitable for promotions, transfers, or new positions; otherwise, the DOJ would not have taken the trouble to documents these infractions in the employees' personnel files.

Public employers can decide to hire employees despite prior disciplinary infractions. But the Public Records law is there to ensure that the public is entitled to know what prior infractions are being disregarded when public employees are hired. Ultimately, it is the public that must "watch the watchers" in order to avoid the problems that arise when employees' disciplinary histories are intentionally buried. The

Department's argument is essentially that they would prefer to make these decisions in secret, which is precisely what the Public Records Law has been designed to prevent.

VI. The Internet, Which Has Been Around For More Than 25 Years, Provides No Excuse For Withholding Public Records.

The Defendants also claim that the Court should deny access to the redacted information because the internet makes the information available more widely and potentially for a longer period of time.

This rationale has been rejected when other government agencies have tried to use it. For example, a federal district court held that if a record would not have been otherwise exempt from production under the Federal Freedom of Information Act, "The sophistication of online search engines should not be cited by the Government as a justification to withhold information . . . ." *Dayton Newspapers, Inc. v. Department of Veterans' Affairs*, 257 F. Supp.2d 988, 1002 (S.D. Ohio 2003). The Court noted that if it accepted the government's argument, "agencies could use this slippery slope rationale to stop disclosing information altogether." *Id.* Accordingly, the Court noted, any new limitations to be imposed on disclosure "is an issue for legislatures, not courts, to address." *Id.*

It should also be noted that, contrary to Defendants' suggestion, the internet is not a new consideration. The WorldWideWeb was launched in 1989. *See* Barker Aff., Ex. 8. The term "surfing the internet" is recognized as having been popularized by 1992. *Id*. This is not some recent phenomenon that makes precedent set in cases like *Kroeplin*, decided in 2006, or *Milwaukee Journal Sentinel v. Dept. of Administration,* decided in 2009, somehow obsolete. The internet existed at the time of those decisions. And before that, newspapers that sought information through public records

requests still had the ability to publish them to a wide circulation. *See, e.g., Milwaukee Journal Sentinel v. Dept. of Administration* (One of plaintiffs was Milwaukee Journal Sentinel; in 2012, the Milwaukee Journal Sentinel's daily circulation was more than 200,000, and its Sunday paper circulation was more than 300,000. https://en.wikipedia.org/wiki/Milwaukee_Journal_Sentinel, n. 14.)

Further, the premise of this argument is simply illogical. Wisconsin Courts have explained that when information is in the public domain, it makes no sense to try to "un-ring the bell." *See Kailin v. Rainwater*, 226 Wis. 2d 134, 148 (Ct. App. 1999). Here, Defendants are essentially arguing that it is okay for some information to be released if the bell is rung softly, so that perhaps only a few people hear it. But because public records are considered public and the requests and responses are themselves public records, there has never been any limit to the potential for any public record to be widely distributed. The internet does not change that fact.

If anything, the internet contains such a glut of data that it is difficult to find information now even when people are looking for it, due to the sheer volume of competing search results produced through search engines. For example, a Google search for "John Smith" performed by counsel this week produced "931,000,000 results" in .57 seconds. Barker Aff., ¶10. Just as in the days preceding the internet, for most individuals, only someone who is trying to find information about them will be able to locate it, and only those who are truly interested are likely to bother to review it in light of the increased competition for their attention from all the other information that is available online.

VII. The Public is Entitled to the Names of Disciplined Employees Under Governing Authority, and For Good Reason.

Defendant also claims that the only reason to release the employees' names would be to "harass" and "intimidate" these employees. Defendants' Brief in Support of Motion for Summary Judgment, filed August 28, 2018, at p. 9. However, as explained above the Wisconsin Supreme Court rejected vague concerns about harassment and intimidation as reason for refusing to release employees' names in *Milwaukee Journal Sentinel v. Dept. of Administration.* 2009 WI 79 at ¶¶63-65.

Moreover, particularly in the employee disciplinary context, there are important reasons why employees' names must be released. Unless the names are released, there is no way to tell if departments are maintaining or rehiring unsuitable employees, because it is impossible to tell, with the names redacted, if the disciplined employees were the same ones disciplined previously. Moreover, even public employees who engage in publicly-known misconduct in one position would not be able to be identified as having perpetrated the same misconduct in their new positions, because their misconduct records would be concealed. The ability of the public to learn and detect when bad apples are passed from department to department would be completely frustrated and thwarted, which would in turn stymy the public accountability and oversight that the Wisconsin Court of Appeals has recognized as "critical" to the effectiveness of the Public Records Law. *See Kroeplin,* 2006 WI App 227, ¶52.

VIII. Defendants Fail To Assert Exceptional Reasons for Nondisclosure With Respect to the Two Additional Redactions At Issue.

A. Employee Names Cannot Be Redacted From Public Records As a Matter of Course.

As noted in Plaintiff's prior brief, with respect to the 3/25/14 letter to Lori Phillips, Walker Aff., Ex. 2, the Department appears to take the position that an employee who is mentioned in a public record, other than the employee who was disciplined, has a privacy right that transcends the public's right of access to the unredacted record. In addition to the improper "blanket exception" that this position would create under the public records law, *see* Section I, *supra*, the position is at odds with the requirement that a custodian must show an "exceptional" reason for nondisclosure of information, *Kroeplin,* ¶37, and the longstanding and repeatedly-recognized principle that public employees surrender many expectations of privacy when they accept public employment. *Milwaukee Journal Sentinel v. Department of Administration,* ¶¶63-64. Therefore, Plaintiffs request an order direction the removal of the redaction of a co-worker's name from this letter.

B. The Name of a County Involved in A Public Corruption Investigation Should Not Be Redacted.

The Department also redacted the name of a County that was subject to what is described as an investigation of allegations of public corruption, the results of which a special agent allegedly disclosed to a "family" and the "defense" prior to conclusion of the investigation. Walker Aff., Ex. 2, letter to Agent Bradley Kust dated 4/8/14. Given that the investigation has now apparently concluded, information about the investigation does not appear to be appropriately maintained as a secret. Therefore, the redaction of the County's name does not appear to be supported by any exceptional reason

against disclosure. While the Department has asserted that this redaction is necessary to avoid disclosing the name of a victim, the Department has not to date explained how this alleged disclosure would result from the identification of the County in which the investigation occurred.

IX. Plaintiffs Are Entitled to An Award of Attorneys' Fees For Other Records Produced With Challenged Redactions Removed, Regardless of the Outcome of Defendants' Motion.

Defendants' motion for summary judgment also ignores the fact that Defendants have produced TIME misuse records that were also the subject of Plaintiffs' claims in this case, *see* Complaint at ¶5, Barker Aff., ¶11 and Ex. 9, and therefore, Plaintiffs are entitled to an award of attorneys' fees for the release of those records as demanded in the Complaint, Wis. Stats. §19.37(2)(a); *WTMJ, Inc. v. Sullivan*, 204 Wis. 2d 452, 462 (Ct. App. 1996) (holding that requester is entitled to fees even if defendant produces them in lieu of continuing to defend litigation as to challenged denial of access) regardless of the outcome of the Defendants' motion with respect to the remaining records.

CONCLUSION

For the reasons explained above, Plaintiffs respectfully request that the Court grant their motion for partial summary and declaratory judgment and deny the Defendants' motion in its entirely. Moreover, regardless of the outcome of the pending motions for summary judgment, Plaintiffs request that the Court set the matter for a hearing after decision of the motions with respect to the attorneys' fees to be awarded the Plaintiffs, because the Defendants have already produced during the litigation a substantial portion of the records that were sought through this action.

Dated this 28th day of September, 2018.

Respectfully submitted,

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