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' RESPONSE BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

This case is about whether the public interest supports disclosing the names of public employees who have faced workplace discipline. It is not about whether the public has a right to public employee disciplinary records: it does, and the DOJ has provided records detailing the work rule violations, the conduct that lead to the work rule violations, the procedure provided to the affected employees, and the discipline imposed. (*See* Defendants' exhibits 1-4.) With disclosure of these records, the public has a complete picture of how the Wisconsin Department of Justice manages employee discipline.

In this case, the records custodian redacted certain names and identifying information under the public policy balancing test, as described in the letter denying access to the redacted information. (*See* Exhibit to the Complaint.) The Plaintiff's lengthy brief does not explain how the public at large benefits from knowing the names of civil servants subject to workplace discipline, and while there is a presumption of openness, this general statement does not outweigh the significant public harm that will accompany release of employee names. Disclosing such information about employees who do not hold significant positions of public trust will do nothing to shed light on the workings of government, but it will brand those employees with a modern-day scarlet letter that can negatively impact their ability to succeed in their current employment and obtain future employment, among many other potential harms that follow someone whose name is forever on the Internet in conjunction with their workplace discipline. (*See, e.g.,* Defendants' exhibit 8.)

The personal stigma that accompanies persons whose names are on the internet in conjunction with employee discipline cannot be understated. This goes far beyond concerns over reputational interests expressed 16 years ago in *Linzmeyer* and 12 years ago in *Kroeplin*. If names of all employees who receive workplace discipline are released, managers responsible for enforcing work rules will be reluctant to investigate and issue discipline at all. (*See* denial letter, p. 2.) *Democratic Party* case. *Democratic Party of Wisconsin v. Wisconsin Dep't of Justice*, 2016 WI 100, ¶ 10, 372 Wis. 2d 460, 888 N.W.2d 584 (citing *Hempel v. City of Baraboo,* 2005 WI 120, ¶ 62, 284 Wis. 2d 162, 699 N.W.2d 551) ("the legislature entrusted the

records custodian with substantial discretion" in performing the public policy balancing test).

With the public's ability to obtain volumes of records related public employees and publish them forever on the internet, public servants are at a significant disadvantage in comparison to non-public employees, whose mistakes, lapses in judgment, and occasional tardiness are not broadcast throughout the nation. The reality of the world in the social media and internet age necessarily alter the balance of interests; what may have been fleeting moments of embarrassment 15 years ago are now easily accessible, permanent records that can cause far more detriment to public employees now than ever before. Thus, relying wholly on case law analyzing a public employee's privacy and reputational interests from ten or more years ago ignores the impact that disclosure can have in contemporary times.

But the cases the Plaintiff sites are inapplicable for a more obvious reason: they involved whether an authority must release records related to a particular disciplinary investigation at all. Unlike the present case, those cases did not simply seek to keep names confidential. In *Kroeplin v. DNR,* the plaintiff was a DNR Warden with law enforcement powers who was disciplined for running an unlawful license plate check for personal purposes. 2006 WI App 227, ¶¶ 1-5, 44, 297 Wis. 2d 254, 725 N.W.2d 286. The DNR agreed to release some records and denied access to others. Kroeplin sought to enjoin release of the records pursuant to Wis. Stat. § 19.356(4) and the Lakeland Times newspaper, the requester, filed a mandamus action to obtain all of the records.

Granting mandamus, the court of appeals noted Kroeplin's position as a law enforcement officer was one of significant public trust warranting greater public scrutiny. *Id.*, ¶¶ 43, 44. Also of significance was that Kroeplin sought to enjoin release of documents that would have informed the public "both of the potential misconduct by law enforcement officers and of the extent to which such misconduct was properly investigated." *Id.* ¶ 46. This, *Kroeplin* was not merely about whether the public was entitled to know Kroeplin's name, it was about whether the public was entitled to records detailing potential misconduct by a law enforcement officer and the manner in which the DNR investigated that misconduct.

Unlike in *Kroeplin*, DOJ release the requested records, nearly in full, with only names and other personally identifying information redacted. Public disclosure of the employee's names will not provide the public with any additional information about employee misconduct or how that conduct was investigated. Also unlike in *Kroeplin*, the redacted employee names are not law enforcement officers with significant powers over the public. The DOJ's release of disciplinary records with certain names redacted does not implicate the same public interests at issue in *Kroeplin*.

Local 2489, AFSCME, AFL-CIO, et al, v. Rock County, et al is similarly inapplicable to the present case. 2004 WI App 210, 678 Wis. 2d 208, 689 N.W.2d 644. Like *Kroeplin*, that case was brought by employees and their union seeking to enjoin release of disciplinary records via Wis. Stat. § 19.356(4). The *Local 2489* employees, all Rock County Sheriff's department staff, were disciplined for viewing

inappropriate content on their work computers. *Id.* at ¶ 5. Following a public records request from the press, the Sheriff decided to release the disciplinary records *with names and identifying information redacted*. *Id.* The court, in analyzing whether the public interest in protecting the privacy and reputations of public employees outweighed the public interest in disclosure, stated,

> We note as well that, although the union discounts the protection afforded, the sheriff proposes to release the reports of his completed investigation with the names of the disciplined employees redacted, a measure which in itself will afford some protection to the asserted interests.

Id. at ¶ 27. Thus, the court of appeals recognized the public interest can be satisfied by disclosing employee disciplinary records with names redacted while respecting the public interest in protecting the privacy and reputations of public employees. As in *Kroeplin*, but unlike the current case, *Local 2489* was about whether the public was entitled to know what public employees were doing and how they were being managed. Here, the DOJ disclosed that information. There is no public benefit in releasing the names of the disciplined employees, and neither *Kroeplin* nor *Local 2489* hold otherwise.

The redactions here do not create, nor do they attempt to create, a blanket exception to public access to personnel records. A blanket exception is when access is denied to a particular category of records regardless of content. In *Milwaukee Journal Sentinel v. Wisconsin Department of Administration*, the court explained an improper blanket denial occurred when the Department denied access to a list of

employee names[1] because those employees were members of a collective bargaining unit, whereas the Department granted access to the same records for employees who were not. 2009 WI 79, ¶ 5, 319 Wis. 2d 439, 768 N.W.2d 700.

The issue was whether the collective bargaining agreement, which mandated confidentiality for employees, amended the public records law. *Id.* ¶ 8. The court held it did not. *Id.* ¶¶ 12-13. Turning to the balancing test, the court noted that it was a fact-intensive inquiry and must be applied to each individual record. This simply means that the four-corners of the record itself—the record's content—dictates the factors to be considered when performing the balancing test. In other words, the law prohibits arbitrary classifications inapplicable to particular records and it disfavors using extrinsic information to determine whether a particular record should or should not be released. *See Id.*, ¶ 56 (collecting cases). In *Milwaukee Journal Sentinel*, the court of appeals criticized the circuit court for applying "the balancing test to the WSEU members as a group." *Id.* ¶ 57. That classification, however, was arbitrary, because it had no legal or factual significance with respect to the balancing test. The classification was also not "fact intensive" because it was based on extrinsic information unrelated to the contents of the withheld record.

That is not what DOJ did. DOJ's records custodian reviewed all of the records individually and balanced interests based upon the nature of the allegations and the relative position of public trust that the employee held. Following the

[1] The press asked for a list of employees who had been deactivated from the list of those permitted to drive state-owned vehicles. This case was consolidated with another case, wherein the press asked

custodian's fact-intensive, record-by-record review, the custodian determined that records containing similar content warranted similar treatment under the balancing test. This is not unlawful categorization or creation of a blanket exception. That is common sense. Had DOJ treated records containing similar content completely differently, it would have acted in an arbitrary manner. The Plaintiff's argument that an authority creates an unlawful "blanket exception" when it denies access to similar records for the same reason should be disregarded.

In this case, the custodian's denial letter and the records speak for themselves. The public records mandamus procedure allows a circuit court to review the custodian's decision *de novo*. No amount of briefing, case law, or argument can take the place of the court's task at hand: 1) reviewing the denial letter to be sure the rationale sufficiently informs the requester why access to all or part of a record was denied, and 2) reviewing the records themselves to determine whether the court agrees with the custodian's redactions. Wis. Stat. § 19.35(4)(b); *Newspapers, Inc. v. Breier*, 89 Wis. 2d 417, 428, 279 N.W.2d 197 (1979). By the Plaintiff's own argument related to blanket exceptions, how other courts have treated other records has little application here.

Review of the documents demonstrate DOJ released all requested records that explain the disciplinary actions DOJ took, the basis upon which they were taken, the procedure afforded to the affected employee, and the discipline issued. (Defendants' exhibits 1 – 4.) The custodian determined release of the names of certain affected employees is not in the public interest. The employees whose names were redacted did

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the DNR for a list of salary information for DNR employees. 319 Wis. 2d 439, ¶ 6.

not engage in criminal conduct or serious misconduct, there is a public policy interest in protecting the reputations and privacy interests of public employees, and the employees were not highly placed and therefore had a higher expectation of privacy than those with significant authority (such as appointed officials). The records custodian explained the purpose of discipline is to improve the employment relationship, not make it worse, and public release of names would be detrimental to the public interest of encouraging public employees to correct their behavior. Finally, the custodian explained releasing names will likely deter supervisors from disciplining non-serious conduct. As for the records disclosed with names *un*-redacted, (but other information redacted), the custodian determined minimal redaction was necessary avoid revealing the identity of a victim as well as to protect the privacy of persons tangentially involved in employee disciplinary matters. There is no public benefit to public disclosure of this information.

This court should deny the Plaintiff's mandamus request and dismiss this case.

Dated: September 28, 2018.

Respectfully submitted,

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