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 SUPPORT OF MOTION FOR PARTIAL SUMMARY AND DECLARATORY JUDGMENT

INTRODUCTION

Plaintiffs brought this action seeking unredacted copies of records that Defendants Wisconsin Department of Justice and its records custodian, Paul Ferguson (collectively referenced herein as "the Department"), provided in redacted form in response to a Public Records request. As explained below, the Department's reasons for redacting the records fail to overcome the public interests in disclosure of the records.

UNDISPUTED FACTS

Records Request and Response

In approximately January 2017, Plaintiffs Gregg Walker and The Lakeland Times requested in writing that the Wisconsin Department of Justice produce for

inspection "all disciplinary records for Department of Justice employees for the years 2013-2016, including the names of the employees disciplined." Affidavit of Gregg Walker, ¶3; *see also* Compl., ¶5, and Defendants' Answer, ¶5 (reiterating substance of the requests). In the same correspondence, Plaintiffs also requested "the names, disciplinary records, and any other responsive records, including emails, for all law enforcement personnel in the state who was found to have engaged in database abuse between 2013 and 2015, as well as the names and records of those accused or suspected of database abuse involving the Transaction Information for the Management of Enforcement system, or TIME." *Id*.

On or about July 3, 2017, Defendant Paul M. Ferguson, on behalf of the Wisconsin Department of Justice, denied Plaintiffs' request in part. Walker Aff., Ex. 1; *see also* Compl., ¶6 and Defendants' Answer, ¶6. Among other things, the Department (1) redacted records concerning the names of certain employees who were disciplined; and (2) redacted records containing the names of law enforcement personnel who were disciplined for database abuse.

Plaintiffs subsequently brought this action seeking access to the redacted portions of the records that the Department provided. As explained by separate correspondence to the Court, the parties appear to have resolved all or most of the disputes relating to the second category of redactions.[1]

[1] Through counsel, the parties are likewise attempting to resolve the portion of Plaintiffs' attorneys' fees claim that relates to the TIME system records. However, Plaintiffs reserve the right to make a formal motion for and/or including an award of fees relating to the TIME system records if the parties are unable to negotiate a resolution. A formal motion for fees would be premature until the Court decides whether to grant Plaintiffs' request for removal of redactions to the DOJ disciplinary records, which remain at issue and which are presented for resolution through this motion.

The issues presented through this motion[2] therefore have been distilled to challenges to (1) the redactions of the names of certain employees who were disciplined by the Department; (2) the identification of a county in one record in which the employee's name was not redacted; and (3) the name of another employee who was mentioned in a disciplinary letter that was issued to an employee whose name was not redacted.[3]

With respect to the first category of redactions, there are 19 employees whose names have been redacted from disciplinary letters. For ease of reference, below is a chart summarizing the disciplinary records from which the disciplined employees' names were redacted:

Letter Date	**Title**	**Offense/Work Rule Violated**	**Discipline**
February 21, 2013	Forensic Scientist Supervisor	Release of information from crime lab testing directly to victim prior to releasing the information to the requesting law enforcement agency	One-day suspension Notice in personnel file
May 13, 2013	Forensic Program Technician – Senior	Habitual tardiness despite warnings	Official written reprimand
November 13, 2013	Program Planning Analyst – Advanced	Making false or malicious statements concerning other employees, supervisors, or the Department	Formal written reprimand

[2] As noted *supra* at note 1, Plaintiffs' fees claim relating to redactions that are the subject of the pending motions cannot yet be determined. Therefore, this motion has been styled as a motion for partial summary judgment, because it seeks resolution of the remaining disputed substantive issues in the case but leaves the Plaintiffs' attorneys' fees claims for determination at the conclusion of the case.

[3]The dispute between the parties relating to one record that is contained in Exhibit 2 to the Affidavit of Gregg Walker was resolved after Mr. Walker signed the Affidavit. That record is the 8/14/14 letter to Special Agent McBain. The redactions to that letter are therefore no longer in dispute in this case.

January 14, 2014	IS Technical Services Specialist	Insubordination, disobedience or refusal to carry out written or verbal assignments Negligence or Inattentiveness	Formal written reprimand
April 4, 2014	Operations Program Associate	Failed to forward six case reports after entering cyber tips into the DOJ's system	Five-day suspension without pay
October 7, 2014	IS Technical Services Specialist	Insubordination, disobedience or refusal to carry out written or verbal assignments, directions, or instructions Negligence or inattentiveness in performance of assigned duties	Suspension for three days without pay
November 6, 2014	Education Consultant	Falsifying records or giving false, misleading or deceptive information to DOJ staff, other state agencies or private organizations or to employees responsible for record keeping Leaving work during assigned hours	Official written reprimand
August 5, 2014 letter;	Business Automation Consultant	Failure to exercise good judgment or being discourteous	Step 2 Grievance report reduces discipline from

November 11, 2014, Grievance report		in dealing with fellow employees, supervisors or the public or other conduct unbecoming of a state employee	unpaid one-day suspension in light of voluntary resignation
January 26, 2015	IS Technical Services Consultant	Unexcused absenteeism Failure to report properly Failure to notify supervisor	Suspended without pay for one day
May 1, 2015	Controlled Substance Analyst – Advanced	Insubordination, disobedience, refusal to carry out written or verbal assignments, directions, or instructions	Written reprimand
January 7, 2016	Forensic Program Technician – Senior or Office Associate	Unexcused or excessive absenteeism	Written reprimand
January 7, 2016	Forensic Program Technician – Senior or Office Associate	Unexcused or excessive absenteeism	Written reprimand
January 26, 2016	License Permit Program Associate	Failure to comply with Department policies, rules and regulations Unauthorized or improper use of state resources	Written reprimand
February 11, 2016	Forensic Program Tech – Senior	Unexcused absence of excessive absenteeism Failure to notify supervisor of	One-day suspension without pay

		unanticipated absence or tardiness	
February 23, 2016	Office Associate	Unexcused absence / excessive absenteeism Failure to notify supervisor of absences	Three-day suspension
May 20, 2016	Office Associate	Failure to report promptly at start of shift or leaving before ending shift	One-day suspension without pay
June 30, 2016	Education consultant	Making false or malicious statements regarding other employees Failure to exercise good judgment, being discourteous in dealing with fellow employees, supervisors, or the public, or other behaviors unbecoming of a state employee	Official reprimand Training
August 2, 2016	IS Technical Services Specialist	Insubordination, disobedience or refusal to carry out written or verbal assignments, directions or instructions	One-day suspension without pay
December 14, 2016	Office Associate	Failure to carry out written agency policies or procedures	

Walker Aff., Ex. 2; Affidavit of April Rockstead Barker, Exs. 1, 3.

LEGAL STANDARDS IN PUBLIC RECORDS CASES

I. THE PRESUMPTION IS THAT THERE IS COMPLETE ACCESS TO PUBLIC RECORDS.

The statutes collectively referenced as Wisconsin's Public Records Law serve "one of the basic tenets of our democratic system by providing an opportunity for public oversight of the workings of government." *Nichols v. Bennett*, 199 Wis. 2d 268, 271 (1996) (citing *Newspapers, Inc. v. Breier*, 89 Wis. 2d 417, 433-34 (1979)). A presumption of access to public records is incorporated in each and every section of the law:

> [Sections] 19.32 to 19.37 shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business. The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.

Wis. Stats. §19.31.

The Public Records Law supports public participation in government by ensuring "that the public is entitled to the greatest possible information concerning the official acts of its elected officials and government." *Nichols*, 199 Wis. 2d at 275. It is an integral part of a records custodian's job to facilitate access to public records and provide information about that official's own acts, as well as those of other government officials and employees. *Id.* The Public Records Law rests on the basic premise that the public is entitled to see how government officials handle their responsibilities. *Id.*

A Court must therefore begin a public records inquiry with the presumption that the public has a right to inspect the records. O*shkosh Northwestern Co. v. Oshkosh Library Bd.,* 125 Wis. 2d 480, 482 (Ct. App. 1985). It is never the case that there is no public

interest in the release of a government records. *Milwaukee Journal Sentinel v. Wisconsin Department of Administration*, 2009 WI 79 ¶59.

II. THE DEPARTMENT IS BOUND BY ITS RESPONSE LETTER.

When a governmental agency denies a request for public records, it must state specific reasons for the refusal to disclose the records. *Wiredata, Inc. v. Village of Sussex*, 2007 WI App 22 ¶38, *overruled in part on other grounds*, 2008 WI 69. "Thereafter, a court will not consider reasons for withholding … that were not asserted by the custodian." *Id.; accord, Oshkosh Northwestern Co.*, *supra,* 125 Wis. 2d at 486.

III. ONLY SPECIFIC AND EXCEPTIONAL REASONS CAN OVERCOME THE PUBLIC'S RIGHT OF ACCESS.

When, like the Department in this case, a government agency relies on a public-policy balancing reason for denying access to records, the agency must first prove that its denial letter described a sufficient public policy ground for refusing access to the records. *See, e.g., Portage Daily Register v. Columbia Co. Sheriff's Dept.,* 2008 WI App 30, ¶14. If it fails that step, the law requires that the agency release the records. *See id.*, ¶12.

If the agency can survive this step and prove that it asserted specific and potentially credible grounds for denying access, it must next prove that public policy requires that the Court make an exception to the strong presumption of access. *Id.* This second step is also a two-prong process. First, the trial Court must make a factual determination supported by the record whether the documents implicate the asserted public interest in secrecy. *Kroeplin v. Wisconsin Dept. of Natural Resources*, 2006 WI App 227 ¶37 (quotation omitted). If the governmental actor satisfies the Court that the facts support

the secrecy interest, then the Court must balance that interest against the overriding public interest in access, denying access only if "exceptional" reasons justify it. *Id.*

Therefore, even if the Department's asserted public policy reasons for denial are found to be facially credible in this case, the Department still must prove that applying those reasons here creates "exceptional" circumstances that overcome the public interests in favor of disclosure. *Id*.

ARGUMENT

I. THE DEPARTMENT'S RESPONSE IMPROPERLY ATTEMPTS TO CREATE A NEW "BLANKET EXCEPTION" TO THE PUBLIC RECORDS LAW.

It is established that under the Public Records law, a denial that is based on the application of the public policy balancing test must be applied "to each individual record." *Milwaukee Journal Sentinel v. Wisconsin Department of Administration,* 2009 WI 79, ¶56. A custodian must therefore demonstrate that there is an exceptional reason against disclosure for each individual record. *Id*. As a corollary to this requirement, it is axiomatic that courts cannot make new, judicially-created public policy exceptions that allow custodians to withhold whole categories of records or information in lieu of individual analysis tailored to each record. *Id.*

Similarly, it is settled that "the public records law does not provide a blanket exemption for public employee personnel records … in the custody of a public custodian." *Kailin v. Rainwater*, 226 Wis. 2d 134,144 (Ct. App. 1999) (citing *Woznicki v. Erickson*, 202 Wis. 2d 178 (1996)). It is therefore insufficient for a custodian to refuse to release a record based on an asserted reason for nondisclosure that would apply to all personnel or disciplinary records or to certain subcategories of those records. *Kroeplin*

v. Wisconsin Dept. of Natural Resources, 2006 WI App 227, ¶43. Instead, the custodian must show that there is something particularly egregious about the disclosure of each record that is sought to be released. *Id.* at ¶44.

From the outset, the Department's reasons for refusing to release records fail these standards, because the reasons cited in its response letter are not specific to individual records or redactions. Rather, the Department's denial letter attempts to make arguments against releasing, generally, the names of all employees who are, according to the Department, "not highly placed DOJ personnel" and who were sanctioned for "work rule violations" rather than "criminal or other serious misconduct." Walker Aff., Ex. 1, p. 2. According to the Department, the release of information relating to "not highly placed" employees' violations of work rules would:

- Run counter to the employees' reputational and privacy interests;
- "embarrass" employees and cause employees to refuse to correct their behavior, and
- deter supervisors from investigating possible employee misconduct and imposing discipline to avoid having to publicly release the names of disciplined employees.

Walker Aff., Ex. 1, p. 2.

The Department's arguments for non-disclosure, as summarized above, would apply to any and all employees who are "not highly placed" in the Department (or with respect to any other public employer) and who are sanctioned for "work rule violations" rather than criminal-level misconduct. None of the arguments made by the Department are specific to any considerations that are unique to the employees' specific disciplinary letters. Therefore, it is manifestly apparent that Department is improperly attempting to create a new "blanket" exception to disclosure that would apply to *all* so-called "not-

highly placed" employees' work-rule violation records. As the Wisconsin Supreme Court has explained, this is not permissible. *Milwaukee Journal Sentinel, supra,* at ¶56.

The Court of Appeals has likewise explained that public policy arguments that would apply to any similarly situated employees' records, rather than arguments that are specific to the records withheld, fail to present valid public policy reasons against disclosure. *Kroeplin v. Wisconsin Dept. of Natural Resources*, 2006 WI App 227. In *Kroeplin*, the defendant claimed that misconduct investigation records should be withheld in order to facilitate "open and frank" discussions between management and public employees. The Court of Appeals noted that this was "a proffered reason that would apply generally to all disciplinary records" and which therefore "missed the mark" under the balancing test. *Id.* at ¶43. The Court further explained that the defendant was required to show that the information contained in the specific records that were withheld would "so far exceed the norm in cases involving employee-management communication" that it would reach the point of outweighing the "strong public interest in the disclosure of such information." *Id.*

Because the Department proffers a new purported categorical exception to the records law that is allegedly grounded in public policy considerations, its rationale for denying access contradicts governing Wisconsin Supreme Court precedent. *Milwaukee Journal Sentinel,* ¶56. Therefore, the Department has failed to identify a sufficient public policy ground for refusing access to the unredacted records. *See, e.g., Portage Daily Register v. Columbia Co. Sheriff's Dept.,* 2008 WI App 30, ¶14. The records should therefore be ordered released without redactions on this basis alone, because the Department's failure to identify a sufficient public policy ground for denying

access ends the need to further analyze its attempts to justify the denial of access. *See id.,* ¶12.

II. PUBLIC EMPLOYEES' MISCONDUCT RECORDS ARE SUBJECT TO REVIEW AFTER CONCLUSION OF AN INVESTIGATION, IF ANY.

Wisconsin public records precedent specifically recognizes that "disciplinary records may contain information of great interest and value to the public." *Kroeplin v. Wisconsin Dept. of Natural Resources, supra,* 2006 WI App 227, ¶22. Surveying prior records decisions, the Court of Appeals noted in *Kroeplin*, "This line of cases plainly demonstrates the great importance of disclosing disciplinary records of public **employees** and officials where the conduct involves violations of the law **or significant work rules**." *Id.* at ¶28 (emphasis added). The Public Records statutes are accordingly construed to promote Wisconsin's longstanding tradition of "providing public oversight over misconduct investigations once the investigations have concluded." *Kroeplin*, 2006 WI App 227 at ¶31; *see also* Wis. Stats. §19.31 (describing the law's purpose as providing the public with the "greatest possible information regarding the affairs of government and the official acts of those officers ***and employees*** who represent them") (emphasis added).

As the Court of Appeals explained in *Kroeplin*, public oversight of misconduct involving public officials and employees "is critical in helping ensure that public employers … conduct thorough and meaningful investigations." 2006 WI App 227, ¶52. "Openness and disclosure are conducive to better accountability." *Id.* Likewise, in *Kailin v. Rainwater, supra*, the Court of Appeals acknowledged the public interest in ensuring that employees receive fair and impartial treatment when investigated and disciplined for their alleged misconduct. 226 Wis. 2d at 150, 152 (adopting circuit court's opinion in part).

III. THE REASONS ASSERTED AGAINST DISCLOSURE ARE NEITHER EXCEPTIONAL NOR SUFFICIENT TO OVERCOME THE PUBLIC INTERESTS IN DISCLOSURE.

Even without considering the particularly high public interest that is recognized as attaching to records relating to public employee misconduct, the Department would still be required to establish an "exceptional" reason to overcome the presumptive access that every public record is accorded. *See* discussion *supra* at pp. 7-9. The Department has failed to identify any allegedly exceptional reason for nondisclosure, instead relying on garden-variety arguments that have been rejected time and again.

A. Because the Department Would Exempt Records of All "Non Highly Placed" Employees Who Violate Work Rules, It Does Not Describe Reasons That are "Exceptional."

As the Wisconsin Supreme Court explained in *Milwaukee Journal Sentinel v. Department of Administration,* alleged concerns that apply to public employees in general fail the "exceptional reason" requirement for denying access when the alleged concerns are not different from those faced by other public employees – all of whom "have the potential to incur the wrath of disgruntled members of the public." 2009 WI 79 at ¶63. As the Court further noted, all public employees "may be expected to face heightened public scrutiny; that is simply the nature of public employment." *Id.*

In *Milwaukee Journal Sentinel*, the Court rejected safety concerns that corrections employees asserted required that their names be redacted from records that had been requested by media. The Court rejected the arguments as generic, vague and unsupported – even with respect to claimed safety concerns – in the absence of specific facts articulating any individual danger. *Id*. at ¶65. The Court further noted that even police officers' records are generally subject to disclosure under the records

law. *Id.* at ¶64. Accordingly, the Court concluded, "the public policy favoring disclosure is not overcome here by a more compelling public policy favoring non-disclosure." *Id.* at ¶65.

Here, the Department does not describe anything remotely rising to the level of alleged safety concerns, and the concerns that it does raise have been previously rejected as grounds for denying access to public records, as explained below. *See* discussion *infra* at Sections III.B.-D.

B. There Is No Requirement That Public Misconduct Rise to the Level of Criminal Misconduct Before Records Can Be Released.

As noted above, the Court of Appeals explained in *Kroeplin* that Wisconsin public records authority affirms "the great importance of disclosing disciplinary records of public employees and officials where the conduct involves violations of the law **or significant work rules."** *Kroeplin* at ¶28 (emphasis added). This language directly contradicts the suggestion in Department's denial letter that the public has an interest in public employees' job-related misconduct only if it involves criminal or comparable misconduct. *Cf.* Walker Aff., Ex. 1, p. 2. Moreover, as explained in Section IV, below, the work rules that were violated by the employees whose records are at issue are "significant" and "serious" under any reasonable view of the employment relationship.

It is also important to note that the courts have frequently described the public's especially high interest in release of information relating to egregious misconduct, but the courts have not declared that the public has no interest in records relating to allegedly "less serious" misconduct. Nor could a court have made any such proclamation, because, as noted above, the public has a presumptive interest in every public record. *See Milwaukee Journal Sentinel* at ¶59.

The Department's contrary position starts from an error in logic that assumes that if one proposition is true, the opposite must also be true. According to the Department's theory, because criminal misconduct is of interest to the public, misconduct that does not implicate criminal or nearly-criminal conduct must be of little or no interest to the public. This is a basic logical fallacy that is termed as a "false dichotomy" – an attempt to push all information into one of two categories, when there is no valid reason why all information must fall into one category or the other.

This attempted distinction was, moreover, expressly rejected in *Kroeplin*. As the Court of Appeals explained:

> Kroeplin appears to include a third argument. He acknowledges that the public has a strong interest in accessing records relating to employee discipline where the employee is charged with a crime or with a serious work rule violation. However, he asserts, because he was not charged with a crime or because, at least in his view, the DNR did not accuse him of serious misconduct, the public's interest in the disclosure of his documents is slight. We reject this argument. . . . . Here, we view it as serious that Kroeplin was alleged to have violated an important work rule . . . .

2006 WI App 227, ¶51, n. 5.

The Department's argument further fails in this setting, because the privacy rights that public employees cede by virtue of their employment, and the public scrutiny to which they are subject, is "especially" applicable to public employees who are employed in "a law enforcement capacity." *Local 2489, AFSCME, AFL-CIO v. Rock Co.*, 2004 WI App 210, ¶26. In *Local 2489*, the Court of Appeals explained that even though the employees whose records were at issue were not police officers, as sheriff's department employees, they were "nonetheless public employees of a law enforcement agency

whose expectations regarding privacy and public scrutiny [the Court regards] as similar." *Id.*

The employees whose records remain at issue in this case are all employees of state's top law enforcement agency, the Wisconsin Department of Justice. As the unredacted portions of the disciplinary letters demonstrate, all of these employees' actions have the potential to affect the ability of that agency to pursue its critical mission to protect public safety by investigating violations of the law. *See* chart *infra* at pp. 21-23. The public interest in these records is therefore high, while the corresponding asserted privacy interests, if any, are significantly reduced. *Local 2489,* 2004 WI App 210, ¶26.

It is also important to note that the statutory public records scheme as a whole is inconsistent with Department's assertion that employee misconduct records can be withheld for whole swaths or categories of employees. Wisconsin Statutes Section 19.36(10)(b) provides that a records custodian may withhold "[i]nformation relating to the current investigation of a possible criminal offense or possible misconduct connected with employment by an employee ***prior to disposition of the investigation***." Wis. Stats. §19.36(10)(b) (emphasis added).

As the language of the section suggests, it is established Wisconsin law that records that have been withheld under Subsection 19.36(10)(b) can only be withheld during the period prior to conclusion of the employee misconduct investigation, after which they must be released. Wis. Stats. §19.36(10)(b); *see also Local 2489*, 2004 WI App 210, ¶15; *Kroeplin, supra*, ¶32. The statute contains no exception that protects so-called "not highly placed" employee misconduct records from release, yet the

Legislature could easily have inserted such protections for certain categories of employees if had wanted to do so. Likewise, the statute describes investigations of "possible misconduct connected with employment" in addition to investigations of criminal misconduct, which contradicts the Department's suggestion that the public records law applies only to records of criminal or nearly-criminal misconduct investigations, but excludes records relating to other work-rule violations. Again, the creation of any such categorical exemptions are the province of the Legislature and cannot be judicially created through the public policy balancing test. *See Milwaukee Journal Sentinel, supra,* at ¶56.

C. The Court of Appeals Has Rejected as Unfounded The Argument That Supervisors Will Be Deterred From Investigating Misconduct.

As noted above, the Department also asserts that release of the names of the disciplined employees would deter supervisors from investigating employee misconduct. But the Court of Appeals has already rejected this argument, as well.

In *Kroeplin,* the Court rejected an argument based on alleged concerns that supervisors of public employees would be less likely to investigate misconduct "if they feared that their appraisals might be available for public inspection." *Id.* at ¶50. The Court of Appeals held that the argument "lacks merit," adding:

> We are not persuaded that a conscientious and motivated supervisor would act in any other way than in the employer's best interest, even if that supervisor was aware that information gathered from investigating possible employee misconduct and regarding the disciplinary action taken would be subject to public disclosure.
>
> . . . .
>
> . . . . If public employers know that the investigations they perform are subject to public review, common sense dictates

> that they will be more diligent in ensuring that charges of potential misconduct are thoroughly investigated, and that the appropriate discipline is imposed, than they would be if they were not so held accountable to the public.

Id. ¶¶51-52. These passages in *Kroeplin* demonstrate that the Court of Appeals has already directly rejected the Department's argument that secrecy is required in order to motivate supervisors to pursue misconduct investigations in public employment.

D. Employees' Generalized Reputational and Privacy Interests Do Not Overcome The Public Interest in Disclosure of Disciplinary Records.

Also as in *Kroeplin,* the Department asserts that redaction protects the public's interests in reputational or privacy interests of employees. Again, in *Kroeplin,* the Court of Appeals rejected those arguments, holding that employees' asserted interests in reputational privacy do not outweigh the strong public interest in the disclosure of completed misconduct investigation records involving public employees. *Kroeplin,* ¶46.

As the Court of Appeals also explained in *Local 2489*, in most cases, a "generalized interest" in protecting asserted "reputation or privacy" concerns "quickly yields to the greater weight" of the "overriding public interest in obtaining information regarding the activities of public servants." 2004 WI App 210, ¶31.

The Wisconsin Supreme Court has further clarified that "an individual's personal interest in protecting his or her own character and reputation" is not a factor that can be considered as favoring nonrelease of a public record. *Linzmeyer v. Forcey*, 2002 WI 84, ¶31. Only a specifically identified effect on the *public* interest that is asserted to result from the release of information affecting an individual's privacy or reputation can be considered in a public policy balancing test analysis. *Id.* The individual's personal

embarrassment or concern about damage to his or her reputation is not a relevant consideration. *Id.* at ¶35.

In this case, the Department cites only a generic alleged reputational and privacy interests of its "not highly placed" employees and describes no unique effect on the public interest. Therefore, the balance here weighs heavily in favor of the "overriding public interest in obtaining information regarding the activities of public servants." *Local 2489*, 2004 WI App 210, ¶31.

E. The Records Do Not Implicate Exceptional Employee Concerns.

Finally, none of the records concern accusations of anything particularly sensitive, such as alleged sexual misconduct. Despite the fact that the matters for which the employees were disciplined would be considered "serious" infractions in any employment relationship – or else obviously, they would not have been asserted as a proper basis for formal discipline – there is nothing "exceptional" about the disciplinary letters that warrants anonymity or that overcomes the presumption of public access to the records.

IV. THE RESPONSE LETTER'S CHARACTERIZATION OF THE RECORDS IS ALSO FACTUALLY UNSUPPORTED.

As noted above, the Department asserts that its redactions are proper because the disciplined employees are "not highly placed" employees, and it characterizes their infractions as essentially trivial. Walker Aff., Ex. 1, p. 2. These generalized descriptions of the employees' job positions and of their misconduct is not borne out by the unredacted portions of the records or by the information provided in discovery in this case.

For example, many of the disciplinary letters were issued to supervisors or employees whose titles characterize them as "senior" or "advanced" employees or as

specialists or consultants. *See chart, supra* at pp. 3-6 (2/21/13 letter to "Forensic Scientist Supervisor"; 5/13/13 letter to "Forensic Program Technician – Senior"; 11/13/13 letter to "Program Planning Analyst – Advanced"; 1/14/14, 10/7/14 and 8/2/16 letters to "IS Technical Services Specialist"; 11/6/14, 11/11/14, and 1/26/15 letters to consultants; 5/1/15 letter to "Controlled Substance Analyst – Advanced"; 2/11/16 letter to "Forensic Program Tech – Senior") (summarizing data from Walker Aff., Ex. 2 and Barker Aff., Ex. 1).

Further, the infractions were "serious" under any reasonable employment standard. 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. As could be expected, the disciplinary letters all imposed forms of significant discipline, ranging from formal written reprimands to suspensions without pay. *See* chart, *supra,* 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. Also unsurprisingly, all of the disciplinary letters cite work-rule infractions that can only reasonably considered significant rule violations, such as insubordination, disobedience, or excessive absenteeism. *See* chart, *supra,* pp. 3-6.

In addition, the Department's letters characterized several of the infractions as threatening the mission and reputation of the Department or as causing significant harm to the Department or the public. These include, among others, the following:

Letter Date/Title	Offense/Work Rule Violated and Harm/Potential Harm	Discipline
February 21, 2013 Forensic Scientist Supervisor	Release of information from crime lab testing directly to victim prior to releasing the information to the requesting law enforcement agency The letter suggests that the employee knew the victim personally, as it cites the conflict-of-interest policy involving persons known by an employee related to an investigation The offense is described as causing a "substantially adverse affect [sic] on the reputation" of the Department and states "the reputation of the Department has been affected" Letter states, "as a supervisor, you are held to a higher standard"	One-day suspension Notice in personnel file
May 13, 2013 Forensic Program Technician – Senior	Habitual tardiness despite warnings Employer brazenly told supervisor on one occasion that even though the employee was already in the parking lot, since she was going to be written up anyway, she would take another half hour before coming in Letter characterizes this as "irresponsible" and "unacceptable" behavior for a DOJ employee and states that it "demonstrates a lack of respect for [her] supervisor and DOJ policies."	Official written reprimand
November 13, 2013 Program Planning Analyst – Advanced	Employee made false and malicious statements about another employee Letter states, "Your conduct had the potential of causing damage" to the Department's relationships with individuals and organizations who "have a direct impact on our ability to meet our critical mission of serving crime victims" and, consequently, had the potential to cause damage "to the mission of OCVS in the Department of Justice."	Formal written reprimand
April 4, 2014	Employee failed to forward six case reports after entering cyber tips into the DOJ's system.	Five-day suspension without pay

Operations Program Associate	The outcome was that case information was too stale to act upon. The employee was also accused of being misleading in explaining the misconduct. Letter states that "In a number of the cases you mishandled, the outcome was such that the case information was too stale to act upon by the time it was received by DCI agents. . . . **We will never know in these cases whether agents might have brought guilty parties to justice. In one case we note that a young person was sexually assaulted before agents took the defendant into custody.** The level of discipline applied when violations of policy occur must correlate to the significance of the impact on public safety and on the mission of the organization. To do otherwise would betray the public trust . . . . (Emphasis added)	
November 6, 2014	Falsifying records or giving false, misleading or deceptive information to DOJ staff, other state agencies or private organizations or to employees responsible for record keeping Leaving work during assigned hours Investigation of key card use showed "a pattern of extended lunch periods and unauthorized break periods," during which time employee was being paid. Employee was paid for more than 36 hours of time not worked. A misleading statement was also allegedly made in connection with the investigation; the evidence contradicted employee's claim that his schedule was adjusted to make up for hours lost.	Official written reprimand
May 1, 2015	Insubordination, disobedience, refusal to carry out written or verbal assignments, directions, or instructions	Written reprimand

Controlled Substance Analyst – Advanced	Previously disciplined on two separate occasions for similar work rule violations. During a presentation to high school students, showed improper case examples to students despite a specific direction not to show graphic or gory photos to them and in a subsequent presentation, showed students files "containing graphic photos that are normally shown to law enforcement personnel [in connection with a] death investigation . . . ." Employee acknowledged previous instruction not to show graphic photos to students.	
January 26, 2016 License Permit Program Associate	Failure to comply with Department policies, rules and regulations Unauthorized or improper use of state resources – *i.e.,* surfing the internet on Netflix, etc.	Written reprimand

After issuing formal discipline to employees for all of the infractions, it is difficult to understand how the Department could characterize them as "insignificant." Certainly, taxpayers who work in the private sector – business owners and employees alike – would take offense at the notion that in the public sector, these forms of employment-related misconduct can be disregarded as insignificant.

V. THE REMAINING REDACTIONS ARE UNSUPPORTED.

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

With respect to the 3/25/14 letter to Lori Phillips, Walker Aff., Ex. 2, the Department also 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.

Mention of public employees who are doing various jobs or functions in public documents is a staple of the information that enables oversight of government through access to public records. The fact that a record mentions the names of public servants through whom government does its business cannot reasonably considered an "exceptional" ground for withholding that information. 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.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court grant partial summary and declaratory judgment that the Plaintiffs are entitled to have

the records provided by Defendants without the redactions of disciplined employee names and to have the substantive redactions removed from the disciplinary letters issued to Lori Phillips dated 3/25/14, and to Bradley Kust, dated 4/8/14.

Dated this 28th day of August, 2018.

Respectfully submitted,

/s/ April Rockstead Barker
April Rockstead Barker
State Bar #: 1026163
Attorneys for Plaintiffs
SCHOTT, BUBLITZ & ENGEL s.c.
640 W. Moreland Blvd.
Waukesha, WI 53188
(262) 827-1700
(262) 827-1701-Fax
abarker@sbe-law.com