DOJ trying to rewrite records law, Times argues in court

State warns against branding employees with 'scarlet letter'

By Richard Moore
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A Dane County circuit court judge heard oral arguments this week in *The Lakeland Times* public records case against the Wisconsin Department of Justice, pressing the state's attorney to explain why previous case law supporting the release of names of employees disciplined for misconduct should not hold sway.

The DOJ is withholding the names of 19 disciplined employees. The state contends the employees are lower-level workers whose infractions were minor and that, with the rise of the Internet and permanent dissemination of personal information online, release would be tantamount to branding those employees with a modern-day scarlet letter.

The Times, represented by attorney April Rockstead Barker, says the state is attempting to create a new categorical exemption to the

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public-records law that only the Legislature should be able to create through changes to the law.

The Times also rejected the Internet argument, saying those who accept public employment must expect a higher level of scrutiny, not to mention that the Internet existed when the cases cited by the state, Kroeplin and Linzmeyer, were handed down.

Dane County circuit court judge Valerie Bailey-Rihn said she would deliver a written decision, with expectations that the case will be appealed to the appellate level no matter which way it is decided.

The Times' argument

In her argument to the court, Barker said the issue boiled down to a fairly simple matter: The Legislature had provided for exemptions to the public records law for records pertaining to ongoing disciplinary investigations, but consistent interpretations of that law have held that disciplinary records were to be released without redactions once investigations were completed.

"If the Legislature wanted to extend anonymity for a class of employees or for certain types of misconduct, it could have done so and knew how to do so," Barker argued.

Under the balancing test for release of a record, Barker observed, the state must show an exceptional reason exists for denying access, and the state has not demonstrated any such exceptional reasons or even argued that they exist.

What the DOJ has attempted to do instead is create a new categorical exemption, Barker contended.

"The circumstances that the defendants rely on … is that the employees were so-called lower level and their misconduct was so-called minor, but that is the definition of a category," she said.

In other words, rather than individually reviewing records for those "exceptional reasons" that a name should be withheld, the DOJ was trying to carve out an exemption for all "lower level employees," as defined by the agency, whose infractions the records' custodians deemed minor.

Indeed, Barker contended, the state in its briefs had identified no specific circumstances for exempting the names, and so instead the individual review of records boiled down to a determination of whether a record fell into the DOJ's newly defined category.

"They're saying, 'We exercised our discretion and determined whether the characteristics of this category were met — Are they lower level? Is the misconduct minor?' And again, that's in their view and it's a question of who they fit in the category," Barker said. "Do they have the characteristics to wind up in that category?"

Barker also countered the DOJ's argument that because the agency had released the details of the misconduct and the discipline imposed, the names weren't needed. Not true, Barker said, they're important for multiple reasons.

"There are concerns about nepotism and favoritism that you can't screen out if you don't have names," she said.

Redacting the names also can strip the discipline and the infraction of appropriate context, Barker argued.

"For example, if bringing marijuana to the workplace was considered to be lower-level misconduct and that employee's name was redacted, we would never know if that was someone who operated heavy equipment in their job," she said.

Barker also said it would be impossible to determine, without the names, whether employees might have been disciplined more than once for a certain infraction. Redacting names covers up the "repeat offender" problem, she argued.

Barker said some of the infractions did not appear to be minor. In *The Times*' brief, Barker observed that some discipline letters had characterized the misconduct as involving significant harm to the agency's interests.

Finally, Barker said, tax dollars are being used to pay for the jobs and services public employees perform, and so taxpayers deserve to be able to hold them accountable.

"We are entitled to have enough information to ascertain that they are doing a good job," she said. "We need the names to do that."

No new categories

In the DOJ's argument, assistant attorney general Gesina Seilor Carson said the agency had not created a new category of exempt employees but had individually reviewed each record and applied the balancing test.

"These very limited redactions were made based upon an application of the balancing test to each and every record," Carson said.

Carson said the Internet consideration was critically important and weighed heavily on the balancing test consideration.

"We have a concern for a class of employees who may be revealed on the Internet as potentially the modern-day scarlet letter," she said. "These are very easily obtained."

In the days of going to the library and looking up records on microfiche, it took a lot of time and effort, Carson said, and those days are long past.

"It is that concern that is causing the records custodian to tip in favor of redacting the names of employees who have lower-level positions and more of a garden-variety kind of discipline," she said. "The records on the Internet last basically forever."

Carson said the concern was that such information could render an entire class of employees unemployable, and that public employees would be uniquely disadvantaged compared to their private-sector counterparts.

The judge said she could see how, in withholding information such as a home address, the public interest in avoiding having public employees stalked or harassed could dovetail with the personal interests of the employee, but she wanted to know how the privacy interests of withholding names would comport with the public interest of being able to hold individual public employees accountable.

"The public has a substantial interest in having everyone who wants to be employed be employable," Carson replied. She cited the U.S. Supreme Court in saying there was a substantial public interest "in avoiding a welfare-type state."

"The more information that's on the Internet, which is readily accessible to any employer, there becomes a large group of people that becomes larger with every disclosure that can't simply be employable," she said.

The Kroeplin exception

The judge wanted to know how posting the names of disciplined employees on the Internet would differ from the Wisconsin circuit court database, known as CCAP, where the names of most people arrested and charged with crimes appear, even those not ultimately convicted of a crime.

"How is that different from CCAP, where every traffic violation, every record is already out there?" Bailey-Rihn asked. "We are living in a society where there is a lot of information already accessible, and it seems to me that under the balancing test I am only able to deny access if exceptional reasons apply, and the fact that somebody might potentially have embarrassment or not get a job interview, which frankly I think that would be significant, how does that constitute an exceptional circumstance?"

Carson replied that exposing names could mean a supervisor might not impose discipline to avoid the release of names.

"It could have a counter-effect," she said. "The more this information is disclosed, the less there will be discipline and (fewer) people will be willing to do interviews and provide information. It's not in the public's best interest to have a counter-effect of disciplining an employee such that a supervisor may not take the initiative to do what they should do out of concern over the release of everybody's names for minor violations by lower level employees."

But, Bailey-Rihn asked, wasn't that the very argument rejected in the Kroeplin case?

"It seems to me that I am bound by (Kroeplin), a published appellate opinion, and the court went through in clear detail that these types of records are something that should be available," she said.

Carson said the case was different because the balancing test applied to a law enforcement officer and a violation by someone in a position of power.

"One of the factors that a records custodian is considering during that balancing test is precisely that," she said. "It is the difference between the position of power and the fact of Kroeplin's acts versus someone who is not in that position of power. That's why the balancing test tips a different way when you have a different type of employee and a different allegation."

But what about cases in which the records and names of teachers were released, the judge wanted to know.

"Teachers are not in a position of power, and if anybody is going to lose their jobs, having teachers' names on the Internet might be a concern," Bailey-Rihn said.

But Carson said a teacher would be along the lines of a supervisor, and the teacher does have authority over a large classroom of children. The specific facts make all the difference, she argued, saying there is a big difference between a teacher viewing pornography at school and an office worker getting a written reprimand for tardiness.

But the judge countered again, saying some of the names withheld by the DOJ appear to involve what she would consider serious infractions, including the mishandling of cyber tip information that resulted in a five-day suspension without pay.

"But what you are saying is that in all these 19 cases, these are minor suspensions and minor discipline for minor level employees," the judge said.

And, she said, what about the other argument: What about an issue that could be considered minor on a single occasion but becomes progressively worse? No one would know that, the judge said, because no one knows what the name is.

At what point is it no longer a minor infraction? Bailey-Rihn asked.

Again, Carson reiterated, that is a custodian's decision based upon the specific facts in a balancing test, custodian by custodian.

Barker closed by quoting the DOJ in one of its own prior opinions, namely, that one of the main missions of the public records' law is to hold individual employees accountable.

"(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)," the DOJ opined in Journal/Sentinel, Inc. v. School Bd. of School Dist. of Shorewood.

The performance of those employees is impossible to monitor and evaluate when their names aren't known, Barker argued.

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