DOJ releases names of disciplined employees

Agency decides not to appeal *Times*' court win

By Richard Moore
OF THE LAKELAND TIMES

The Wisconsin Department of Justice released to *The Lakeland Times* this week all but two of the 19 names of disciplined employees that a Dane County circuit court judge ordered released late last year, deciding to forgo an appeal of the court's decision.

In the case, pursuant to a request by the newspaper, the agency had released the disciplinary files of disciplined employees and law enforcement officers, including details of the infractions and the discipline imposed, but withheld certain names for various reasons.

The agency subsequently reversed course and released the names of law enforcement officers disciplined for abuse of the state's TIME (Transaction Information for the Management of Enforcement) system between 2013 and 2015, but still withheld the names of DOJ employees it claimed were lower-level workers who had committed only minor infractions.

The Times continued to seek the names of those employees. After hearing oral arguments last Nov. 13,

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Dane County circuit judge Valerie Bailey-Rihn ordered the rest of the names released.

Those employees still had Woznicki rights, meaning they had to be notified and given time to contest the release of the unredacted records. The DOJ sent those notices out in December.

The Woznicki deadlines have passed; however, two outstanding records are delayed because those notices were returned and the DOJ had to find the employees' new addresses.

As such, the agency released the unredacted records of the other employees this week. *Lakeland Times* publisher Gregg Walker praised the DOJ's decision not to appeal the court's decision, but he also said the case should never have gone to court in the first place.

"As I have said before, there was never any reason to take this case to court because the courts have consistently ruled that public employee names and records are to be released once a disciplinary investigation is completed, in the public interest of accountability," Walker said. "The DOJ recognized they could not win at least part of the case and released those names in August, but it took them more than a year after we filed a lawsuit to do so, at a cost of thousands of dollars to taxpayers."

Indeed, the DOJ agreed to pay $10,000 in *Lakeland Times*' legal fees and costs after the agency released the names of law enforcement officers disciplined for abuse of the state's TIME system between 2013 and 2015.

Walker also said the DOJ should have recognized that the case it continued to contest and ultimately lost should not have been pursued further.

"Statutory and case law are clear," Walker said. "Actually, it was a no-brainer, and I'm glad the DOJ decided against an appeal and more frivolous spending of taxpayers' money."

No blanket exceptions

In court last November, *Times*' attorney April Rockstead Barker argued that a ruling favoring the DOJ would create a blanket exception, effectively rewriting the open records law, and shield many state and other public workers from having their misconduct records tied to them by name.

That would allow workers to evade individual accountability to the public, a fundamental tenet of the public records law, Barker argued.

The state had also argued that the permanent nature of the Internet would expose those guilty of misconduct to irreparable damage to their employment prospects if their names were released, but the judge rejected that argument as well.

"The court appreciates the concerns regarding the openness and longevity of Internet search results, but as of yet, there is not a statutory or common law justification for denying full access to records on that basis," Bailey-Rihn wrote in the decision. "Additionally, many of defendants' listed reasons for redacting information have already been addressed by higher courts. The purpose of the open records law is to allow for transparent and accountable government and public employees."

The judge said the case presented interesting arguments, but she said the state had to demonstrate an exceptional reason for refusing access to each individual record that is being denied, and that it did not do.

She also rejected the notion that there was no public interest in the names because the misconduct involved work rule violations rather than criminal activity.

"The Wisconsin Court of Appeals in Kroeplin stated that the public records law advocates for disclosure of records 'where the conduct involves violations of the law or significant work rules,'" the decision stated. "This implicitly contradicts the DOJ's argument that the records may be withheld because the misconduct was not criminal by including work rules in the court's analysis."

She said the court explicitly addressed the issue in Kroeplin, quoting that case: "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."

Bailey-Rihn said three court decisions had considered and rejected the argument that the reputational interests of public employees are an important factor and that employees whose names are released may be embarrassed, or in more severe cases, struggle getting hired based on the release of their names.

She specifically dismissed the argument that exposed employees may have trouble finding future employment.

"A public interest in continued employment, especially for employees who may have serious work misconduct, would certainly give way to the public interest in transparency," she wrote.

And she rejected the idea that misconduct was minor, saying the agency itself had called some of the incidents serious at the time of discipline.

"Finally, the records at issue are characterized both as 'garden variety' and severe," she wrote. "Defendants assert both that the misconduct is minimal and therefore the public does not need the information while simultaneously stating that release of names could cause challenges in future employment. Having reviewed the facts, it seems that the records likely land somewhere in between the two opposing characterizations."

While it is not entirely clear where each individual record falls on the scale, Bailey-Rihn wrote, the court finds that neither justification is adequate to rebut the presumption of openness.

"Defendants have not shown how personal reputation concerns relate to the larger public interest," she wrote.

The judge said the argument that the employees were lower level was not persuasive and that courts in the past have held that generalized concerns that apply to all "public employees" fail the "exceptional reason" requirement.

She also noted that courts have held that all public officials are subject to heightened scrutiny.

"Further, as previously stated the Wisconsin Supreme Court requires that there be particular concerns for withholding information, not issues that could be generalized to all public employees," she wrote. "Based on these tenets, a generalized argument limiting access to lower level employees is not an exceptional circumstance that would favor nondisclosure."

The court is also aware that if this distinction were to be used, it could easily qualify as a blanket exception, Bailey-Rihn stated.

"A record custodian could deny access to any employee not in a supervisory role," the decision stated. "Due to concerns over blanket exceptions and the case law favoring full and open access, the Court finds the distinction between the authority levels unpersuasive."

Finally, Bailey-Rihn rejected the state's argument that releasing the names would deter supervisors from fully and adequately investigating misconduct.

"However, the Court of Appeals in Kroeplin rejected the argument that investigators of employee misconduct 'would be less than candid if they feared that their appraisals might be available for public inspection,'" she wrote. "The court rejected the argument stating that there was no indication that disclosing the records would have the purported effects."

Here, Bailey-Rihn wrote, there did not seem to be a practical difference between DOJ's argument and the rejected argument in Kroeplin.

"As in Kroeplin, DOJ fails to point to any evidence indicating that disclosing misconduct records would inhibit supervisors from investigating claims or imposing discipline," she wrote. "There is a statutory presumption of openness; without evidence of an actual chilling effect on investigations, the Court is not going to deny full access."

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