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To Whom This May Concern:

Following an explosion in downtown Sun Prairie, Wisconsin, on July 10, 2018, the Wisconsin Department of Justice (DOJ) State Fire Marshal's Office provided assistance to the Sun Prairie Police Department in its investigation of the incident. At this time, due to widespread interest in this incident, copies of DOJ Division of Criminal Investigation (DCI) records from case files ***18-5021*** and ***18-5203***, related to that State Fire Marshal assist, have been prepared for general public release without waiting for specific requests. The investigative records of the Sun Prairie Police Department (SPPD) have also been prepared for public release at this time. Copies of both agencies' records are now available on each agency's website. SPPD's investigative records available on DOJ's website are in the redacted form in which SPPD provided them to DOJ, and DOJ did not apply any of the redactions to these records. Redactions made by DOJ to DOJ's investigative records are explained below. Access to copies of related digital records as mentioned in either agency's file may be obtained by submitting a public records request directly to the agency in question. For DOJ, specific requests should be directed to the Office of Open Government.

The State Fire Marshal has a discretionary right to consider evidence gathered in the course of an investigation as privileged. *State ex rel. Spencer v. Freedy,* 198 Wis. 388, 391-92, 223 N.W. 861 (1929); *Gilbertson v. State,* 205 Wis. 168, 171-73, 236 N.W. 539 (1931); *Black v. General Electric Co.*, 89 Wis. 2d 195, 205-06, 278 N.W.2d 224 (Ct. App. 1979); Wis. Stat. § 165.55(8). I have reviewed the reports prepared in this case and have considered the contents in light of the public records law and the Fire Marshal's privilege. In this instance, I have concluded that the Fire Marshal's privilege may be waived and the records released, with the exception of information redacted from the prepared records as explained below.

With the exception of Sun Prairie Fire Department personnel who were injured or killed in the explosion, the names of victims in this incident have been redacted pursuant to the Wis. Stat. § 19.35(1)(a) balancing test. Wisconsin Const. art. I, § 9m requires that crime victims be treated with "fairness, dignity and respect for their privacy." Related Wisconsin statutes recognize that this state constitutional right must be vigorously honored by law enforcement agencies and that crime victims include both persons against whom crimes have been committed and the family members of those persons. Wis. Stat. §§ 950.01 and 950.02(4)(a). The Wisconsin Supreme Court, speaking about both Wis. Const. art. I, § 9m, and related victim rights statutes, has instructed that "justice requires that all who are engaged in the prosecution of crimes make every effort to minimize further suffering by crime

victims." *Schilling v. Crime Victim Rights Bd.*, 2005 WI 17, ¶ 26, 278 Wis. 2d 216, 692 N.W.2d 623. Even in those situations in which no criminal prosecution occurs, it is the policy of our office to consider the privacy rights of those who could be considered victims entitled to these protections when applying the balancing test regarding the release of investigative records. I concluded the public interest favoring protection of victims from unnecessary public attention and emotional upset outweighs any public interest in the disclosure of the names of these individuals.

In preparing these records for release, I further determined by application of the public records balancing test that the public interest in protecting the ability of law enforcement to gather information when conducting sensitive investigations, and in protecting the privacy of certain citizens referenced in those investigations, outweighs any public interest in disclosure of information that could identify those individuals. *Cf.* Wis. Stat. § 19.31; *Linzmeyer v. Forcey*, 2002 WI 84, ¶ 30, 32, 39, 41, 254 Wis. 2d 306, 646 N.W.2d 811. Public disclosure of the full names and other identifying information for the specific individuals who were working at the site of the explosion on the incident date, and who were contracted to handle location work prior to that date, could expose these individuals to unwanted public scrutiny, criticism or pressure from outside sources, which could have a chilling effect on future witnesses' willingness to come forward and cooperate with law enforcement in investigations of similar incidents. Legal review following the completion of the Sun Prairie Police Department's investigation into this explosion determined that no probable cause exists to charge any single person with a crime. In performing the balancing test, I determined that the public interest in avoiding unnecessary intrusion into the personal lives of these specific workers outweighs any public interest in identifying these individuals in connection with this investigation. Furthermore, I determined that the public interest in protecting the privacy of these individuals, and in facilitating cooperation with law enforcement in sensitive investigations, also outweigh any public interest in identification of these individuals. *Cf. Linzmeyer*, 254 Wis. 2d 306, ¶ 38.

Records provided to the State Fire Marshal's Office by the U.S. Infrastructure Company (USIC), as documented in reports numbered ***18-5021/4*** and ***18-5021/5***, were produced in response to a fire marshal subpoena, and only after a protective agreement was signed by DOJ agreeing that the records provided would not be redisclosed. These records include information that is not publicly available, including utility prints, maps, schematics and drawings; information that reveals trade secrets; documents containing proprietary information; and documents containing information that could jeopardize the security of utility facilities including gas distribution facilities or practices. The following considerations were weighed in applying the Wis. Stat. § 19.35(1)(a) balancing test to determine whether these records should be released by DOJ:

- USIC has a contractual relationship with the utility companies for which it requires that any disclosure of related property, including the types of records provided to DOJ by USIC, be produced only subject to a protective order.

- The number of technicians and manner in which USIC dispatches its technicians to service its contracts, as well as how long it takes to perform the work, is trade secret information. Release of detailed ticket information, such as that contained in the

records produced for DOJ by USIC, risks disclosure of this information to USIC's competitors. This type of release is currently the subject of litigation in Indiana, in which USIC has been granted a preliminary injunction against a competitor who improperly received such information. The lawsuit pending against that company is seeking damages in excess of $50 million. In addition to the redactions set forth herein, trade secret information was redacted pursuant to Wis. Stat. § 19.36(5).

- The National Infrastructure Protection Plan, created by the Department of Homeland Security following 9/11, provides guidance for government and private sector participants to protect critical U.S. utility infrastructure that is vulnerable to terrorist attacks, in the interest of national safety. This plan protects locations related to infrastructure in numerous sectors, including communications and pipeline infrastructure locations as included in the records produced by USIC.

- Failure to honor the protective agreement signed by DOJ, without which USIC would not have produced the records in question, would preclude future record-sharing by USIC and similar companies, significantly impairing the ability of law enforcement agencies to complete investigations involving critical infrastructure.

- Report ***18-5021/5*** summarizes our review of 13 of the files produced by USIC identified as being of potential interest in this investigation. (That summarized information does not reveal specific information covered by the protective agreement.)

After careful consideration, in the exercise of my statutory discretion pursuant to Wis. Stat. § 165.55(8), I am declining to waive the privilege as to the subpoenaed materials produced by USIC, and those records are not included in the release of DOJ's State Fire Marshal file. In addition, a ShareFile link that was used to facilitate the transfer of these records from USIC to the State Fire Marshal's Office has been redacted to prevent access to the protected records. Application of the Wis. Stat. § 19.35(1)(a) balancing test further supports this determination. In applying the balancing test, I concluded that the strong public interest in protecting the integrity of records provided pursuant to a protective agreement, the release of which could jeopardize national security and undermine cooperation with law enforcement in investigations involving critical infrastructure, outweighs any public interest in disclosing the requested records.

Furthermore, under Wisconsin's public records law, I may consider the policies reflected in exceptions to disclosure under the federal Freedom of Information Act ("FOIA") when determining whether to provide access to records. *See Linzmeyer*, 254 Wis. 2d 306, ¶ 32; *Democratic Party of Wisconsin v. Wisconsin Dep't of Justice*, 2016 WI 100, ¶¶ 13, 18, 372 Wis. 2d 460, 888 N.W.2d 584. FOIA includes an express exemption for "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). FOIA also includes an express exemption for "records or information compiled for law enforcement purposes, but only to the extent that production of such law enforcement records or information . . . (F) could reasonably be expected to endanger the life or physical safety of any individual." 5 U.S.C. § 552(b)(7). The Wisconsin Supreme Court has cited this statute in applying the balancing test analysis to Wisconsin law enforcement records. *Linzmeyer*, 254 Wis. 2d 306, ¶¶ 32-33; *Democratic Party of Wisconsin,* 372 Wis. 2d

460, ¶¶ 13, 18. Release of the subpoenaed materials produced by USIC would disclose information that falls under these exemptions to FOIA. That consideration, in turn, was a factor in the determination that such information could not be released under Wisconsin's public records law.

Digger's Hotline also provided records requested by the State Fire Marshal's Office, as documented in report number ***18-5021/6***, consisting of 237 pages documenting calls received by Digger's Hotline. The State Fire Marshal's Office review of those records is documented in the narrative of report number ***18-5021/6***, and notes that there were no calls of interest that did not have a corresponding record from USIC. (A review of the USIC records identified as being of interest is documented in report number ***18-5021/5***.) The records provided by Digger's Hotline, which contain detailed information about each listed call for the requested three-month time period, include personally identifying information for hundreds of individuals and potentially sensitive information related to each hotline call, and would require extensive review to identify and mark any redactions required prior to public release. Due to the time necessary to review and prepare these materials for public release, the records provided by Digger's Hotline have not been included with the records being produced. The public records law does not impose such heavy burdens on a record custodian that normal functioning of the office would be severely impaired and does not require expenditure of excessive amounts of time and resources to respond to a public records request. *Schopper v. Gehring*, 210 Wis. 2d 208, 213, 565 N.W.2d 187 (Ct. App. 1997); *State ex rel. Gehl v. Connors*, 2007 WI App 238, ¶ 17, 306 Wis. 2d 247, 742 N.W.2d 530. The related report documents the contents of the Digger's Hotline records to the extent they were of interest to the State Fire Marshal's Office investigation.

Birthdates of individual persons have been redacted to protect against identity theft or other unauthorized use following any subsequent disclosure. In performing the public records balancing test pursuant to Wis. Stat. § 19.35(1)(a), I concluded that the public policy in favor of protecting the confidentiality of this economically valuable individually identifiable information and preventing its misuse upon any subsequent disclosure outweighs any public interest in disclosure of the dates of birth.

The name and remote pilot license number for a DCI special agent, which could be used to obtain individually identifiable information about this agent, has been redacted to protect against identity theft or other unauthorized use following any subsequent disclosure. In performing the public records balancing test pursuant to Wis. Stat. § 19.35(1)(a), I concluded that the public policy in favor of protecting the confidentiality of this individually identifiable information and preventing its misuse upon any subsequent disclosure outweighs any public interest in disclosure of this information.

The street address for an office where DCI agents work at a confidential location shared by undercover agents has been redacted pursuant to the Wis. Stat. § 19.35(1)(a) balancing test to protect the safety of these agents and the ability of these agents to effectively investigate crime in undercover capacities. I determined that the public interest in protecting the confidentiality of this location, so that undercover agents can effectively investigate criminal activity, outweighs any public interest in disclosure of this confidential street address. Wis. Stat. § 19.35(1); *Cf. Linzmeyer*, 254 Wis. 2d 306, ¶ 41.

The direct telephone number for a DCI special agent has been redacted pursuant to the Wis. Stat. § 19.35(1)(a) balancing test. In applying the public records balancing test, I determined that the strong public interest in effective investigation and prosecution of criminal activity outweighs any public interest in disclosure of this direct telephone number for a law enforcement officer. Allowing the direct telephone numbers of law enforcement officers to become publicly known would have an adverse effect on the officers' future ability to investigate criminal activity because the phones are used for undercover calls and other investigative business where it is essential to prevent a caller from recognizing the number as belonging to law enforcement in order to protect the safety of law enforcement personnel, informants, and others involved in an investigation. *Cf. Linzmeyer*, 254 Wis. 2d 306, ¶¶ 30, 32, 39. The general number for DCI is publicly available.

Similarly, non-public, direct telephone numbers for legal counsel affiliated with USIC and personnel from various agencies and businesses who attended the site excavation as documented in the log-in sheet attached to report number ***18-5021/1***, as well as the "on site contact number" for a Push Underground Construction company employee listed in report number ***18-5021/5***, have been redacted pursuant to the Wis. Stat. § 19.35(1)(a) balancing test. General numbers for these agencies and businesses are publicly available. I determined that the public interest in these individuals performing their job responsibilities without disruption and unnecessary interruption if their direct, non-public telephone numbers became public knowledge, and in facilitating citizen cooperation with law enforcement investigations, outweighs any public interest in disclosure of the non-public, direct telephone numbers for these individuals. *Cf. Linzmeyer*, 254 Wis. 2d 306, ¶¶ 31, 32, 39.

The law permits DOJ to impose fees for certain "actual, necessary and direct" costs associated with responding to public records requests. Wis. Stat. § 19.35(3). Pursuant to Wis. Stat. § 19.35(3)(f), DOJ may require prepayment for the costs of locating (if applicable), copying, and mailing the requested records if the total amount exceeds $5.00. Pursuant to Wis. Stat. § 19.35(3)(e), in this instance, DOJ is waiving its fees, and therefore the records are being made available online at this time without any payment required.

Pursuant to Wis. Stat. § 19.35(4)(b), this determination is subject to review by mandamus under Wis. Stat. § 19.37(1) or upon application to a district attorney or the Attorney General.

Sincerely,

Tina R. Virgil, Director/State Fire Marshal
Division of Criminal Investigation
Department of Justice

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Enclosure