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To Whom This May Concern:

In response to public records requests received by the Wisconsin Department of Justice (DOJ), a copy of DOJ's Division of Criminal Investigation (DCI) investigative case file for DCI's investigation into the December 5, 2015 shooting by Neenah Police Department Officers Craig Hoffer and Robert Ross which resulted in the death of Michael Funk, has been prepared for release.

The DCI case in question is **15-6622: Neenah PD Hostage Situation and OID**. That investigative case file has been reviewed in preparation for public release, and a copy of the case file reports has been made available online on the Wisconsin Department of Justice's website at [www.doj.state.wi.us/dci/officer-involved-critical-incident](http://www.doj.state.wi.us/dci/officer-involved-critical-incident). Access to copies of related photographs, audio recordings and video recordings may be obtained by contacting DOJ Communications Director Johnny Koremenos at [koremenosj@doj.state.wi.us](mailto:koremenosj@doj.state.wi.us).

Certain information has been redacted from the records, either because specifically required by law or pursuant to the Wis. Stat. § 19.35(1)(a) balancing test. These redactions are described below. In addition, I have been mindful in preparing these records for release that the purpose of the Wisconsin public records law is to shed light on the workings of government and the acts of public officers and employees in their official capacities. *Building and Constr. Trades Council v. Waunakee Comm. Sch. Dist.*, 221 Wis. 2d 575, 582, 585 N.W.2d 726 (Ct. App. 1998).

Well-established public policy recognizes the privacy rights of a deceased person's surviving loved ones. *Cf. National Archives and Records Admin. v. Favish*, 541 U.S. 157, 168, 171-72 (2004). In preparing these records for release, I applied the Wis. Stat. § 19.35(1)(a) public records balancing test and determined that the public interest in treating surviving loved ones of the deceased with respect for their privacy and dignity outweighs any legitimate public interest in disclosure of graphic images of Michael Funk taken at the scene, on a hospital gurney and during his autopsy. In performing the balancing test, I determined that the public interests in protecting the privacy of Mr. Funk's family, and in facilitating cooperation with law enforcement in sensitive investigations, also outweighs any public interest in disclosure of the described records. *Cf. Linzmeyer v. Forcey*, 2002 WI 84, ¶ 38, 254 Wis. 2d 306, 646 N.W.2d 811.

In preparing these records for release, I also 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 citizens involved in those investigations outweighs any legitimate public interest in disclosure of identifying information that could identify witnesses and other individuals referenced by witnesses. *Cf. Wis. Stat. § 19.31; Linzmeyer*, 2002 WI 84, ¶¶ 30, 32, 39, 41. Due to the sensitive and sometimes controversial nature of officer-involved shooting incidents, public disclosure of the full names and other identifying information for individuals interviewed or mentioned during interviews 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. Accordingly, the following information has been redacted from the records prepared for release:

- Names and unique nicknames of adult witnesses, family members and others mentioned by individuals interviewed or in related records.

Initials for the names of these individuals have been left unredacted. The names of Mr. Funk, Brian Flatoff and Tom and Joan Schmidt are included in media accounts and other public records, and therefore, they have not been redacted from the DCI records. For family members who share the last name of one of these individuals, only the first names of the family members were redacted to the initial. Names of law enforcement officers are not redacted; however, specific tactical duties for Winnebago County officers have been redacted for the reasons explained in this letter.

- Full names of juveniles interviewed or mentioned by witnesses.

The names of these children were simply mentioned in the investigative reports, and were of no relevance to DCI's investigation.

- Other information that would identify the above individuals.

Dates of birth, home addresses, home and personal cell telephone numbers and signatures for these individuals have been redacted, along with information regarding places and/or hours of work.

- Audio and video recordings of witness interviews and witness calls to 911.
- Digital images of witnesses, including juveniles.

Images of Mr. Funk and Mr. Flatoff have been included in media accounts and therefore, images of these two men have not been redacted from DCI records, except for graphic images of Mr. Funk as discussed above.

In performing the balancing test, I determined that the public interest in avoiding unnecessary intrusion into the personal lives of persons collaterally mentioned in a law enforcement report outweighs any legitimate public interest in information about the conduct of governmental affairs. 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 outweighs any public interest in disclosure of this described information. *Cf. Linzmeyer*, 254 Wis. 2d 306, ¶ 38.

In addition to the overall redactions set forth thus far, certain other specific types of redactions have been made from the records prior to public release, for the reasons explained below.

Birthdates and driver's license numbers 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 and driver's license numbers of individual persons.

Photographs of driver's licenses have been redacted pursuant to Wis. Stat. § 343.43(1)(f) and Wis. Admin. Code § Trans 102.205.

Home addresses, home telephone numbers and personal cell telephone numbers have been redacted pursuant to the Wis. Stat. § 19.35(1)(a) balancing test. In performing the balancing test, I determined that the public interest in disclosure of this information is outweighed by the public interest in the expectation of privacy on the part of individuals in their personal lives and in protecting the sources of law enforcement information and in encouraging citizens to cooperate with law enforcement investigators without undue concern that their private lives will become public matters. *Cf. Linzmeyer*, 254 Wis. 2d 306, ¶¶ 31-32. One exception was made: Where investigators conducted interviews of neighbors in the area of the shooting, only the street numbers and/or apartment numbers of individual residences have been redacted, because the reports make clear this was a neighborhood canvass of addresses in the vicinity.

Direct telephone numbers assigned to specific law enforcement officers have been redacted pursuant to the Wis. Stat. § 19.35(1)(a) balancing test because these numbers are not made public and must remain confidential. In applying the public records balancing test to these phone numbers, I concluded that the strong public interest in effective investigation and prosecution of criminal activity outweighs any public interest in disclosure of these direct telephone numbers of law enforcement officers. 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. General use, publicly available telephone numbers for the law enforcement agencies involved have not been redacted from the records.

Bank account numbers of individuals have been redacted pursuant to Wis. Stat. § 19.36(13).

Crime Lab records have been redacted pursuant to Wis. Stat. § 165.79(1) and (2), with the exception of Crime Lab records documenting Crime Scene Response Team (CSRT) activity at the scene, which are exempt from the statutory restrictions governing release of Crime Lab analysis documentation. In accordance with Wis. Stat. § 165.79(1) and (2), information present within DCI case reports that discloses what analyses were performed by the Crime Lab and the results of those analyses also has been redacted from the records prior to release.

Gold Cross Ambulance Service personnel responded to the shooting scene to provide medical care for Mr. Funk. Excerpts from DCI records that document patient assessment and treatment information provided by emergency services personnel have been redacted in accordance with Wis. Stat. §§ 256.15(12) and 146.82(5)(c).

Patient health care records and information obtained from those records have been redacted pursuant to Wis. Stat. §§ 146.81 and 146.82. I also redacted certain other medical information, not directly governed by Wis. Stat. §§ 146.81 and 146.82, pursuant to the Wis. Stat. § 19.35(1)(a) balancing test. Well-established public policy recognizing the confidentiality and privacy of personal medical information is expressed in Wis. Stat. §§ 148.81 and 146.82. I find that the same underlying public policy of protecting the confidentiality and privacy of personal medical information outweighs any public interest in disclosure of this information.

The DCI investigative file includes records provided to DOJ by the Fond du Lac County Medical Examiner's Office on the condition that the records would not be shared with any person outside the criminal investigation. Therefore, pursuant to the Wis. Stat. § 19.35(1)(a) balancing test, I redacted these records. The medical examiner's office would not provide records to DOJ without DOJ's agreement to those conditions. In performing the public records balancing test, I determined there is a public interest in honoring the conditions under which the medical examiner's records were provided to DOJ and in cooperating with the medical examiner's office so as to encourage the current and future joint law enforcement efforts of our agencies. To not honor the conditions by disclosing the records would preclude future record-sharing and significantly impair cooperative law enforcement efforts between DOJ and the Fond du Lac County Medical Examiner's Office. I concluded that the public interest in effective investigation of crime and effective law enforcement, which is furthered by honoring the conditions under which the Fond du Lac County Medical Examiner's Office provided the records to DOJ, outweighs any public interest in disclosure by DOJ of the records. *Cf. Linzmeyer*, 254 Wis. 2d 306, ¶¶ 30, 32, 39. If desired, medical examiner's records may be requested directly from the Fond du Lac County Medical Examiner's Office records custodian.

Specific details regarding SWAT and tactical team assignments for officers who responded to this incident have been redacted to preserve the security and effectiveness of these law enforcement techniques. In performing the public records balancing test pursuant to Wis. Stat. § 19.35(1)(a), I determined that the public interest in effective investigation of crime and protection of public safety, including protecting the ability of law enforcement to respond in emergency situations without jeopardizing officer safety or undermining officer effectiveness by revealing their equipment and techniques, outweighs any public interest in disclosure. *Cf. Wis. Stat. § 19.31; Linzmeyer*, 254 Wis. 2d 306, ¶¶ 30, 32, 39, 41. The names

and SWAT positions of Winnebago County officers were also redacted, at their request, for the reasons set forth above.

The street address for the office of DCI agents who 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); *Linzmeier*, 254 Wis. 2d 306, ¶ 41.

DCI case report *15-6622/65* includes the name of a federal Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) special agent. DOJ consulted with ATF's legal counsel about disclosure of the names of ATF personnel because the ability of DOJ to work effectively with ATF on future law enforcement matters requires us to respect requested confidentiality regarding ATF employees and information. The ATF advised us that, pursuant to 5 U.S.C. § 552(b)(7)(C), it protects the names of its agents from disclosure because of the nature of their job, which entails a significant threat of retaliatory action against known agents. *Cf. Linzmeier*, 254 Wis. 2d 306, ¶¶ 30, 32, 39. In performing the Wis. Stat. § 19.35(1) balancing test, I determined that the underlying public interest in effective law enforcement and safety of federal ATF agents outweighs the general presumption of disclosure under public records law. I also determined that any public interest in disclosure of the ATF employee name that was redacted from *15-6622/65* is further outweighed by the public interest in preventing circumvention of federal law by not allowing the Wisconsin public records law to be used to obtain records that could not be obtained from the federal source of the records under federal law.

In addition, records provided confidentially to DOJ by ATF, as documented in case report *15-6622/114*, have been redacted. ATF provided these records to DOJ for its internal use only, on the condition that these records remain the property of ATF and may not be redistributed outside DOJ without express authorization from ATF. ATF would not have provided these records to DOJ without DOJ's acceptance of those conditions. Therefore, in performing the Wis. Stat. § 19.35(1)(a) balancing test, I determined there is a public interest in honoring the conditions under which ATF provided the records to DOJ and in cooperating with ATF so as to encourage the current and future joint law enforcement efforts of our agencies. To not honor the conditions by disclosing the records would preclude future report-sharing and significantly impair cooperative law enforcement efforts between DOJ and ATF. I concluded that the public interest in effective investigation of crime and effective law enforcement, which is furthered by honoring the conditions under which ATF provided these records to DOJ, outweighs any public interest in disclosure by DOJ of these ATF records. *Cf. Linzmeier*, 254 Wis. 2d 306, ¶¶ 30, 32, 39.

Specific information that reveals the quantity and location of security cameras employed by the Eagle Nation Cycle Shop and surrounding businesses, the password for the business's DVR system, and details regarding locking mechanisms on the exterior doors of the business has been redacted pursuant to the Wis. Stat. § 19.35(1)(a) balancing test. I determined that the public interest in protecting the security of these businesses and the

people who work there outweighs any public interest in this detailed information regarding these businesses' security systems.

DCI case report *15-6622/92* documents receipt by DCI of a squad video recording obtained from the vehicle operated by Officer Robert Ross on December 5, 2015. That report also documents DCI's review of this recording. This squad video recording is approximately 13 hours in length. A copy of the portion of this recording that captures the shooting incident has been prepared for public release and is included with the other digital records being made available at this time. If you wish to obtain access to the remainder of this squad video, please contact me.

Additional audio files consisting of telephone calls to law enforcement dispatch centers and communication between a crisis negotiator and Mr. Flatoff are currently being prepared for public release. Once this is complete, DOJ will release these additional audio files. To check the status of the preparation of these files, you may visit the DOJ website listed above or contact me.

As mentioned above, access to copies of related photographs, audio recordings and video recordings may be obtained by contacting DOJ Communications Director Johnny Koremenos. The video recordings are provided via a link to a YouTube website. YouTube policy restricts the ability to post copyrighted material. The audio that accompanies some of the video recordings captured the radio broadcast of copyrighted music. As a result, YouTube would not permit the posting of the audio portions of some video recordings. These video recordings without audio are available on the YouTube site. If you wish to obtain copies of the video recordings with accompanying audio, please contact me.

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,



Paul M. Ferguson  
Assistant Attorney General  
Office of Open Government

PMF:hpw