



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

BRAD D. SCHIMEL
ATTORNEY GENERAL

Andrew C. Cook
Deputy Attorney General

17 W. Main Street
P.O. Box 7857
Madison, WI 53707-7857
www.doj.state.wi.us

Paul M. Ferguson
Assistant Attorney General
fergusonpm@doj.state.wi.us
608/266-1221
TTY 1-800-947-3529
FAX 608/267-2779

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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 July 23, 2016 shooting by Milwaukee County Police Department Officers Michael Budziszewski, Jeffrey Kennedy, Sean Mahnke, and Bryan Miller, which resulted in the death of Austin J. Howard Jr, has been prepared for release.

The DCI case in question is **16-4472: OID/Milwaukee PD/5th and Clark**. 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. Access to copies of related photographs, audio recordings and video recordings may be obtained by contacting DOJ Communications Director John Koremenos at 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 outweighed any legitimate public interest in disclosure of the following information:

- Graphic images of Austin Howard taken at the scene of the incident.
- Graphic images taken at the scene of the shooting in the 2500 block of N. 5th Street, Milwaukee.
- Autopsy photos of Mr. Howard.

- Graphic descriptions of the injuries sustained by the homicide victim, Willie Williams.
- The prior addresses of Mr. Howard.

In performing the balancing test, I determined that the public interest in protecting the privacy of this 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 information that could identify witnesses and other individuals referenced by witnesses. *Cf. Wis. Stat. § 19.31; Linzmeyer*, 254 Wis. 2d 306, ¶¶ 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 of adult witnesses, family members, and others mentioned by individuals interviewed.

Initials of the names of these individuals have been left unredacted. In the case of family members, if the last name is the same as Mr. Howard's, only the first name was redacted to the initial and the last name remains intact.

The names of law enforcement officers and other public employees mentioned in the records are not redacted. The name of the stabbing victim, Willie Williams, has not been redacted as it was widely reported in the media. The name of Austin Howard's father, Austin Howard Sr., was not redacted as he provided interviews to the media and was identified in those media accounts.

- Other information that would identify the above individuals.

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

- Audio recordings of witness interviews and witness calls to 911.
- Portions of audio recordings of unrelated police dispatch communications that could

identify subjects or other confidential information, including names, addresses, birthdates, and telephone numbers, regarding unrelated incidents, which occurred contemporaneously.

- Digital images of witnesses.

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.

The complete name and identifying information of a domestic violence victim identified in this investigation, including current and former addresses and place of employment, which could lead to his/her identification, have been redacted in order to protect his/her privacy. 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 a criminal prosecution does not occur, it is the policy of our office to protect 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 the victim from unnecessary public attention, possible harassment, and unnecessary emotional upset outweighs any public interest in the disclosure of this information.

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, driver’s license/State ID numbers, and social security 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, as well as the public policies outlined in Wis. Stat. §§ 801.19, 801.20, and 801.21, outweigh any public interest in disclosure of the dates of birth, driver’s license/State ID numbers, or social security 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.

Birthdates of law enforcement officers have been redacted pursuant to Wis. Stat. § 19.36(10)(a). PeopleSoft personnel numbers for Milwaukee Police Department officers, which are analogous to social security numbers or other economically valuable individually identifiable information for these officers, 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 PeopleSoft numbers of individual law enforcement officers.

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. Two exceptions were made. First, the address of the scene where the officer-involved shooting incident occurred has not been redacted because that address has been widely publicized, and pursuant to the balancing test, I determined that public interest in disclosure of that address outweighs the privacy interest of the resident. Second, where investigators conducted interviews of neighbors in the area of the shooting, only the street numbers and/or apartment numbers of those addresses 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.

FBI numbers or information indicating whether or not FBI numbers exist has been redacted pursuant to 28 C.F.R. §§ 20.21(c)(2) and 20.33, because disclosure of the existence

or non-existence of FBI numbers impermissibly would indicate the existence or non-existence of federal criminal history.

Crime Information Bureau (CIB) criminal history records, which are provided to law enforcement personnel only, require certification to access, and are confidential and prohibit secondary dissemination, have been redacted. Disclosure of such information by DOJ in violation of the prohibition would preclude future information sharing and significantly impair other cooperative law enforcement efforts between DOJ and other law enforcement agencies. In performing the public records balancing test pursuant to Wis. Stat. § 19.35(1)(a), I concluded the public interest in access to CIB criminal history records and in cooperating with other law enforcement agencies outweighs any public interest in disclosure of this information. *Cf. Linzmeyer*, 254 Wis. 2d 306, ¶¶ 30, 32, 39.

Wisconsin Department of Transportation (DOT) files and Probation and Parole records, accessed through the Wisconsin Department of Justice TIME System, which are provided to law enforcement personnel only and require training and certification to access, have been redacted when contained in the investigative file in their original format, and where the information contained within those records is provided within the investigative report. I concluded that disclosure of such information by DOJ would significantly impair future information sharing and other cooperative law enforcement efforts between DOJ and other government agencies. In performing the public records balancing test pursuant to Wis. Stat. § 19.35(1)(a), I concluded the public interest in access to DOT and Probation and Parole records and in cooperating with other government and law enforcement agencies outweighs any public interest in disclosure of this information. *Cf. Linzmeyer*, 254 Wis. 2d 306, ¶¶ 30, 32, 39. Furthermore, information contained within the DCI records that was obtained from DOT's Division of Motor Vehicles (DMV) database has been redacted pursuant to the federal Driver's Privacy Protection Act, which prohibits release of this information in response to a public records request. *See* 18 U.S.C. § 2721 et seq.; *New Richmond News v. City of New Richmond*, 2016 WI App 43, 881 N.W.2d 339.

Juvenile offense information has been redacted pursuant to Wis. Stat. § 938.396 and the Wis. Stat. § 19.35(1)(a) balancing test. To the extent the redacted information is not directly governed by Wis. Stat. § 938.396, well-established public policy recognizing the confidentiality juvenile offense information is expressed in that statute. In applying the balancing test, I find that the same underlying public policy of protecting the confidentiality of this information and fostering rehabilitation of youthful offenders outweighs any public interest in disclosure of juvenile offense information.

The Quest card account number of Mr. Howard has been redacted pursuant to the Wis. Stat. § 19.35(1)(a) balancing test in the interest of preserving the confidentiality of this economically valuable individually identifiable information and preventing its misuse upon any subsequent disclosure. Well-established public policy recognizing the confidentiality and privacy of an individual's financial information is expressed in Wis. Stat. §§ 801.19 and 19.36(13). Even if Wis. Stat. §§ 801.19 and 19.36(13) do not directly govern the financial included in this record, I find that the same underlying public policy of protecting the confidentiality and privacy of financial information and account numbers outweighs any public interest in disclosure of the redacted information.

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.

The Milwaukee Fire Department (MFD) responded to the shooting scene to provide medical care for Mr. Howard. Specific information regarding the medical treatment of Mr. Howard by the MFD, as observed or reported by other witnesses, has been redacted from the records pursuant to the Wis. Stat. § 19.35(1)(a) balancing test. Additionally, excerpts from DCI records that document patient assessment and treatment information provided by the responding MFD emergency medical personnel, as well as medical information contained within Department of Corrections records, has been redacted. Well-established public policy recognizing the confidentiality and privacy of personal medical information is expressed in Wis. Stat. § 146.82. Even if Wis. Stat. § 146.82 does not directly govern the medical information included in these records, I find that the same underlying public policy of protecting the confidentiality and privacy of personal health information, as well as the analogous restrictions on release of patient treatment information described under Wis. Stat. § 256.15(12), outweigh any public interest in disclosure of the redacted information.

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.

Specific information identifying routine shifts worked by law enforcement officers has been redacted pursuant to the Wis. Stat. § 19.35(1)(a) balancing test in the interest of preserving the safety of the officers, the officers' families, and the officers' homes. In performing the balancing test, I determined that the public interest in protecting the security of the officers, the officers' families, and the officers' homes outweighs any public interest in information regarding their routine shifts.

A printout of the case report module of DCI's ACISS database has been redacted. The redacted excerpt discloses structural elements of the case report module. DCI uses ACISS pursuant to a software licensing agreement (the "Licensing Agreement") with ACISS Systems, Inc. ("ACISS Systems") and payment of annual licensing fees. The ACISS software and the structure and operation of ACISS (collectively, the "ACISS program") are the confidential, valuable, and proprietary intellectual property of ACISS Systems. The ACISS program and all associated intellectual property rights are maintained confidentially by ACISS Systems as trade secrets. ACISS Systems also holds copyright

interests in the ACISS program. The Licensing Agreement requires DCI to protect the confidentiality of ACISS Systems' confidential, valuable, and proprietary intellectual property. The Licensing Agreement also prohibits DCI from copying or disclosing ACISS Systems' intellectual property. Copyrighted materials are not "records" subject to disclosure under the Wisconsin public records law, nor are published materials in the possession of an authority that are available for sale. Wis. Stat. § 19.32(2). Additionally, a computer program is not subject to examination or copying under the public records law. Wis. Stat. § 19.36(4). Finally, "[a]n authority may withhold access to any record or portion of a record containing information qualifying as a trade secret . . ." Wis. Stat. § 19.36(5). Therefore, we are not disclosing structural elements of the ACISS case report module.

DCI report numbers *16-4472/16* and *16-4472/22* document DOJ's receipt of the preliminary autopsy findings and the Medical Examiner diagram for Austin Howard, provided by the Milwaukee County Medical Examiner's Office. The DCI report has been included with the released records; however, the attached records, provided by the medical examiner's office, have been wholly redacted from the release. Those records were provided to DOJ by the Milwaukee County Medical Examiner's Office on the condition that the reports would not be shared with any person outside the criminal investigation, and the medical examiner's office would not provide the reports to DOJ without DOJ's agreement to those conditions. In performing the public records balancing test pursuant to Wis. Stat. § 19.35(1)(a), I determined there is a public interest in honoring the conditions under which the medical examiner's reports 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 reports would preclude future record-sharing and significantly impair cooperative law enforcement efforts between DOJ and the Milwaukee 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 Milwaukee County Medical Examiner's Office provided the reports to DOJ, outweighs any public interest in disclosure by DOJ of the report. Cf. *Linzmeier*, 254 Wis. 2d 306, ¶¶ 30, 32, 39. An excerpt from the medical examiner's records, quoted within DCI report number *16-4472/16*, has been redacted for the same reasons. If desired, the medical examiner's records may be requested directly from the Milwaukee County Medical Examiner's Office records custodian.

Finally, it should be noted that a few portions of the probation officer records included in this DCI case file, as documented in report number *16-4472/46*, were redacted by the Department of Corrections (DOC) before they provided the records to DCI. Those redactions appear to have been made by hand, rather than by computer and can be recognized due to that stylistic difference.

Only one copy of records for which duplicate copies exist has been included with the records prepared for release. *Stone v. Bd. of Regents*, 2007 WI App 223, ¶ 20, 305 Wis. 2d 679, 741 N.W.2d 774.

Finally, records wholly unrelated to the investigation which may have been incidentally contained within case information have not been provided, as they have no relationship to the investigation and provide no information related to the investigation.

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,

A handwritten signature in black ink, appearing to read "P.M. Ferguson", with a long horizontal flourish extending to the right.

Paul M. Ferguson
Assistant Attorney General
Office of Open Government

PMF:hpw