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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 August 13, 2016 shooting by Milwaukee Police Department Officer Dominique Heaggan-Brown, which resulted in the death of Sylville K. Smith, has been prepared for release.

The DCI case in question is ***16-4915: Milwaukee PD OID – 3218 N. 44th St.*** 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 Mr. Smith taken at the scene of the incident.
- Other graphic images taken at the scene of the incident.
- Autopsy photos of Mr. Smith

- Descriptions of prior injuries sustained by Mr. Smith.

- The prior addresses of Mr. Smith.

  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 identifying 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 for the names of these individuals have been left unredacted. In the case of family members, if the last name is the same as Mr. Smith's, only the first name was redacted to the initial and the last name remains intact. The full name of Mr. Smith's juvenile child was redacted to protect his/her privacy.

  The names of law enforcement officers and other public employees mentioned in the records are not redacted. The names of Sylville Smith's father, Patrick Smith, and mother, Mildred Haynes, were not redacted as they have both provided interviews to the media and were 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, their relationship to Mr. Smith, and places and/or hours of work for these individuals have been redacted.

- Audio/video recordings of witness interviews.

- Portions of audio recordings of unrelated police dispatch communications that could identify subjects or other confidential information, including names, addresses,

birthdates, and vehicle registration information 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 outweigh 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, 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, outweighs 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.

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, 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 public interest in the privacy 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.

DOJ 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, 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 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.

Law enforcement records regarding juveniles and other juvenile offense information have been redacted pursuant to Wis. Stat. § 938.396. To the extent such records and information are not directly governed by Wis. Stat. § 938.396, the records and information have been redacted pursuant to the Wis. Stat. § 19.35(1)(a) balancing test. Well-established public policy recognizing the confidentiality and privacy of children and juveniles is expressed in Wis. Stat. § 938.396. I find that the same underlying public policy of protecting the confidentiality and privacy of children and juveniles outweighs any public interest in disclosure of the redacted information. *See* Wis. Stat. § 938.396 ("Law enforcement agency records of juveniles may not be open to inspection or their contents disclosed" unless certain exceptions apply).

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. Smith. Specific information regarding the medical treatment of Mr. Smith 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 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); *Linzmeyer*, 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.

DCI report number *16-4915/8* documents DOJ's receipt of the preliminary autopsy findings for Sylville Smith, 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. Linzmeyer*, 254 Wis. 2d 306, ¶¶ 30, 32, 39. An excerpt from the medical examiner's records, quoted within DCI report number *16-4915/8*, 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.

DCI report number *16-4915/16* documents the scene examination, as conducted by the DCI. Scene photographs are typically included in these reports, in order to provide a more complete presentation of the scene. These photographs are typically provided by the Crime Lab. In this instance, due to the volatility of the scene and the need for personnel to vacate the premises for their safety, the Milwaukee Police Department took numerous photographs of the scene which were provided to DCI to supplement the Crime Lab scene photographs. In those instances in which a Crime Lab photo was not available for placement in the report, a Milwaukee Police Department photograph was used.

DCI report number *16-4915/51* addresses education records for Officer Heaggan-Brown and Mr. Smith obtained by law enforcement. Education records and related information have been redacted pursuant to the Wis. Stat. § 19.35(1)(a) balancing test. The Federal Educational Records Privacy Act (FERPA) allows certain education records to be released to law enforcement, but generally, it prohibits a federally funded educational institution from disclosing a student's educational records or a student's personally identifiable information contained in such records without the written consent of the student's parents or the student if over age 18. 20 U.S.C. §§ 1232g(b)(1) and 1232g(d). In the hands of an educational institution subject to FERPA, educational records would be confidential and could not be disclosed without the student's consent. Although FERPA does not directly apply to DOJ, it creates a statutory confidentiality interest reflecting a public interest in non-disclosure. Well-established public policy recognizing the confidentiality and privacy of student educational records and personally identifiable information contained in such records is expressed in FERPA. I find that the same underlying public policy of protecting the confidentiality and privacy of student educational records and personally identifiable information contained in such records outweighs any public interest in disclosure of this information.

Personally identifying information related to the identity of informants has been redacted as required by Wis. Stat. §19.36(8). Under Wis. Stat. §19.36(8)(a)1, an informant includes any individual who provides information to law enforcement and either requests confidentiality or is expressly or implicitly promised confidentiality. The authority to delete information related to the identity of the informant also includes the authority to delete any other information that would tend to identify an informant. *See* Wis. Stat. §19.36(8)(b). Notwithstanding Wis. Stat. § 19.36(8)(b), I also redacted the informant's identity pursuant to the Wis. Stat. § 19.35(1)(a) balancing test. Release of this information would compromise the ability of law enforcement to identify additional witnesses and conduct follow-up interviews and could result in the intimidation of or tampering with potential witnesses. The strong public interest in investigating and prosecuting criminal activity, protecting the integrity of the current investigation and associated investigations, protecting the livelihoods and security of individuals who cooperate with law enforcement, protecting law enforcement sources, and encouraging citizens to cooperate with law enforcement investigators in providing information essential to investigating potential criminal activity outweighs any public interest in releasing the redacted information. *Cf. Linzmeyer*, 254 Wis. 2d 306, ¶ 40.

DCI report number ***16-4915/64*** documents the acquisition and examination of video from the City of Milwaukee Tow Lot, where Mr. Smith's rental vehicle was stored. While the location of the Tow Lot is public, the indoor parking structure is not open to the general public and is used to store vehicles that may contain or themselves be evidence of a crime. The video shows numerous vehicles being stored inside the facility and also documents law enforcement investigation surrounding one of those vehicles. As the report details the video surveillance of Mr. Smith's vehicle in depth, the video is being released in a redacted format to permit only the viewing of Mr. Smith's vehicle. Pursuant to the Wis. Stat. § 19.35(1)(a) balancing test, I determined that the public interest in protecting the security of the City of Milwaukee Tow Lot and the law enforcement investigative activities that are conducted there outweighs any public interest in detailed information regarding this business and the unrelated law enforcement activities that are conducted there.

The name of a juvenile interviewed as a possible witness and the related report narratives were redacted from DCI reports numbered ***16-4915/69*** and ***16-4915/76.*** I determined pursuant to Wis. Stat. § 938.396(1) that these interview reports are law enforcement records of a juvenile; therefore, the contents of these records may not be disclosed except as outlined in that statute. To the extent such records and information are not directly governed by Wis. Stat. § 938.396, the records and information have been redacted pursuant to the Wis. Stat. § 19.35(1)(a) balancing test. Well-established public policy recognizing the confidentiality and privacy of children and juveniles is expressed in Wis. Stat. § 938.396. I find that the same underlying public policy of protecting the confidentiality and privacy of children and juveniles outweighs any public interest in disclosure of the redacted information. *See* Wis. Stat. § 938.396 ("Law enforcement agency records of juveniles may not be open to inspection or their contents disclosed" unless certain exceptions apply).

Additionally, the information provided in ***16-4915/76*** is part of a separate ongoing investigation into the violence and arsons that occurred following the shooting death of Mr. Smith. That investigation is continuing at this time, and because the continued

confidentiality of existing records is material to that ongoing investigation, I am declining to release records or information related to that case to you at this time. *Cf. Linzmeyer*, 254 Wis. 2d 306, ¶¶ 30, 32, 39, 41; *Journal/Sentinel, Inc. v. Aagerup*, 145 Wis. 2d 818, 824-27, 429 N.W.2d 772 (Ct. App. 1988). Release of the records while an investigation is still in progress could compromise the ability of DCI to gain cooperation from potential witnesses and jeopardize their ability to conduct additional or follow-up interviews or obtain accurate and truthful information in those interviews. This could have the unfortunate effect of interfering with the ongoing investigation as well as any potential criminal prosecutions. Therefore, in performing the Wis. Stat. § 19.35(1)(a) public records balancing test, I concluded that the strong public interest in effectively investigating and prosecuting criminal activity and in protecting the integrity of the current investigation outweighs any public interest in disclosing references in this case file that also pertain to that separate investigation at this time. *Id.*; Wis. Stat. § 19.35(1)(a).

In addition, reports provided confidentially to DOJ by ATF, as documented in case report ***16-4915/76***, have been redacted. ATF provided these records to DOJ 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. Linzmeyer*, 254 Wis. 2d 306, ¶¶ 30, 32, 39.

The DCI investigative file includes the names and other identifying information of several ATF Task Force Officers from other law enforcement agencies. 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 other identifying 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. Linzmeyer*, 254 Wis. 2d 306, ¶¶ 30, 32, 39. This same protection applies toward officers from other agencies, but operating as ATF agents. 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 public interest in disclosure of this information.

Records of computer forensic analysis of the contents of a cell phone were redacted pursuant to the Wis. Stat. § 19.35(1)(a) balancing test. Disclosure of these computer forensic analysis records would disclose details of law enforcement investigative techniques that would lose their effectiveness and facilitate circumvention if disclosed to the public. Therefore, I concluded that the public interest in effective investigation and prosecution of crime outweighs any public interest in disclosure of the redacted cell phone forensic

analysis records. *Cf. Linzmeyer*, 254 Wis. 2d 306, ¶¶ 30, 32, 39, 41; *Democratic Party of Wisconsin v. Wisconsin Dep't of Justice*, 2016 WI 100, ¶¶ 13, 18, 21, 372 Wis. 2d 460, 888 N.W.2d 584.

The Crime Lab routinely provides investigators with an initial copy of the photographs taken at an examination scene, to allow immediate review of those photos by the investigating agents. The Crime Lab often later provides to the investigating agents a PDF document consisting of those same photographs. In those instances where identical photographs were provided in different formats, the photographs are being provided to you in only one format. Additionally, the audio referenced in report **16-4916/44** and **16-4915/45** are identical and only one copy is being provided.

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,

Paul M. Ferguson
Assistant Attorney General
Office of Open Government

PMF: hpw