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September 7, 2017

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 31, 2017 shooting by Oshkosh Police Department Officer Aaron Achterberg, which resulted in the death of Isaiah J. Tucker, has been prepared for release.

The DCI case in question is *17-5265: Oshkosh OID – Isaiah J. Tucker*. 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 Johnny 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 official acts of public officers and employees. *Building and Constr. Trades Council v. Waunakee Comm. Sch. Dist.*, 221 Wis. 2d 575, 582, 585 N.W.2d 726 (Ct. App. 1998).

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). Other well-established public policy also 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). 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; *see*

also *Democratic Party of Wisconsin v. Wisconsin Dep't of Justice*, 2016 WI 100, ¶ 28, 372 Wis. 2d 460, 888 N.W.2d 584 (“Wisconsin’s constitutional commitment to the fair treatment of victims and their privacy rights, together with this court’s commitment to minimizing victims’ suffering, weigh in favor of nondisclosure.”).

In preparing these records for release, and in addition to the other more specific reasons detailed in this letter, I applied the Wis. Stat. § 19.35(1)(a) public records balancing test and determined that the public interest in treating the surviving loved ones of the deceased with respect for their privacy and dignity outweighed any legitimate interest in public disclosure of the following information:

- Graphic descriptions and images of Isaiah Tucker taken at the hospital and at the scene of the incident.
- Autopsy photos of Mr. Tucker.

Even in those situations in which a criminal prosecution does not occur, 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, possible harassment, and unnecessary emotional upset outweighs any public interest in the disclosure of the information listed above.

Again, considering the well-established public policy described above, recognizing the privacy rights of a deceased person’s surviving loved ones, I also determined that the public interest in treating the surviving loved ones of Isaiah Tucker with respect for their privacy and dignity outweighed any legitimate public interest in disclosure of certain records. *Cf. Favish*, 541 U.S. at 168, 171-72. Accordingly, pursuant to the Wis. Stat. § 19.35(1)(a) balancing test, the following types of records and information regarding the Tucker family have been redacted:

- Name of Tucker’s juvenile child has been redacted in full. The names of other Tucker family members are reduced to initials only, or to first initial and last name where the surname is Tucker. Home addresses, personal telephone numbers, employment information, vehicle information, and signatures also have been redacted for these individuals.
- Audio recordings of 911 calls placed by witnesses/victims are not being released because they would necessarily identify crime victims. Synopses of these calls prepared for the case file remain included with the release, with minimal redactions made for reasons explained elsewhere in this letter.
- Descriptions of family members’ distress as events unfolded.

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 addition, I 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 individuals who were interviewed or mentioned during interviews. Generally, the initials for the names of these individuals were not redacted. The names of a small number of witnesses who were also victims have been redacted in full for the reasons set forth above.
- Other information that would identify the above individuals, such as home addresses, descriptions of the homes, personal telephone numbers, employment information, vehicle information, signatures, and other personal identifying information.
- Audio/video recordings of witness interviews.
- Digital images of witnesses and their residences, including images of the location at which Mr. Tucker was ultimately located.

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, 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 and driver's license numbers of individual persons.

Home addresses and home telephone numbers of law enforcement officers and other public employees have been redacted pursuant to Wis. Stat. § 19.36(10)(a).

Home addresses, home telephone numbers, and personal cellular 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.* Wis. Stat. § 19.31; *Linzmeier*, 254 Wis. 2d 306, ¶¶ 30, 32, 39, 41. 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.

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 information and in cooperating with other government and law enforcement agencies outweighs any public interest in disclosure of this information. *Cf.* *Linzmeier*, 254 Wis. 2d 306, ¶¶ 30, 32, 39. Additionally, pursuant to the federal Driver's Privacy Protection Act (DPPA), certain personal information and highly personally information (as defined by DPPA) obtained from DOT was redacted because DPPA prohibits release of such 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.

Specific information identifying routine shifts worked by law enforcement officers and emergency medical personnel/firefighters has been redacted pursuant to the Wis. Stat. § 19.35(1)(a) balancing test in the interest of preserving the safety of the officers, firefighters, and EMTs, their families, and their homes. In performing the balancing test, I determined that the public interest in protecting the security of the officer, firefighters, and EMTs, their families, and their homes outweighs any public interest in information regarding their routine shifts. Details regarding the specific shifts worked by the officers and emergency medical personnel involved in the shooting incident on July 31, 2017 have not been redacted from the records.

Crime Laboratory records have been redacted pursuant to Wis. Stat. § 165.79(1) and (2), with the exception of Crime Laboratory records documenting Crime Scene Response Team (CSRT) activity at the three scenes, which are exempt from the statutory restrictions governing release of Crime Laboratory 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 Laboratory and the results of those analyses also has been redacted from the records prior to release.

Emergency medical services (EMS) personnel from the Oshkosh Fire Department provided medical care for Mr. Tucker at the scene and transported him to the hospital. Specific information regarding their assessment and treatment, as observed or reported by the EMS personnel or other witnesses, has been redacted from the records in accordance with Wis. Stat. §§ 256.15(12) and 146.82(5)(c). To the extent the information is not directly governed by Wis. Stat. §§ 256.15(12) and 146.82(5)(c), in applying the Wis. Stat. § 19.35(1)(a) balancing test I find that the same underlying public policy of protecting the confidentiality and privacy of personal medical 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 this information. Where copies of reports prepared by EMS personnel are contained within the DCI case file, they have been redacted pursuant to Wis. Stat. §§ 256.15(12) and 146.82(5)(c).

In addition, specific information regarding life-saving attempts for Mr. Tucker provided by law enforcement, as reported by those who provided the treatment, has been redacted from the records 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. § 146.82. 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.

DCI report numbers *17-5265/1, 61, and 64* document DOJ's receipt of the preliminary autopsy findings, autopsy report, and toxicology records for Mr. Tucker. The toxicology testing was conducted for the Winnebago County Coroner's Office by Axis Forensic Technology, and the results were provided to DOJ by the Winnebago County Coroner's Office. Mr. Tucker's autopsy was conducted by the University of Wisconsin Hospital Forensic Pathologist. The DCI reports documenting receipt of these records are included with the release; however, the records attached to these reports, which were provided by the medical examiners' offices, have been wholly redacted from the release. Those records were provided to DOJ on the condition that the reports would not be shared with any person outside the criminal investigation, and the medical examiners' offices 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 examiners' records were provided to DOJ and in cooperating with the medical examiners' offices 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 Winnebago County Coroner's Offices and the University of Wisconsin Hospital. 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 medical examiner's offices provided their records to DOJ, outweighs any public interest in disclosure by DOJ of the autopsy records provided by the medical examiners. *Cf. Linzmeyer*, 254 Wis. 2d 306, ¶¶ 30, 32, 39. If desired, these records may be requested directly from the records custodians at the Winnebago County Coroner's Offices and the University of Wisconsin Hospital.

As documented in the DCI case file, body camera recordings from the officers involved at the scene where Mr. Tucker was located and the scene of the officer-involved shooting were collected by DCI for review. Due to the time necessary to review and prepare this materials, video that does not depict scenes of investigatory interest are not included in this release. DCI's review of these recordings is documented in individual reports within the DCI case file.

Information provided by the body camera manufacturer, to include the website to download specific analytical software and account retrieval information, was redacted pursuant to the Wis. Stat. § 19.35(1)(a) balancing test. Disclosure of this law enforcement restricted information would disclose details of law enforcement investigative technology and 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 this information. *Cf. Linzmeyer*, 254 Wis. 2d 306, ¶¶ 30, 32, 39, 41.

The investigative file contains a search warrant sealed by order of the Outagamie County Circuit Court. The records remain sealed at this time; therefore, DOJ is unable to provide the related report. *See* Wis. Stat. § 19.35(1)(a) ("Except as otherwise provided by law . . .").

The Wisconsin State Patrol Technical Reconstruction Unit (WSP TRU) conducted a mapping of the accident scene and provided a disc containing that data to DOJ. However, the data is in a format that DOJ is unable to view, and therefore, we are unable to release. Because DOJ has not been able to determine whether any contents on this disc may require redaction prior to release, we did not include a copy of this disc with the other records prepared for release.

WSP TRU trajectory analysis images and information were redacted pursuant to the Wis. Stat. § 19.35(1)(a) balancing test. These images and information involve confidential law enforcement investigative technology and techniques, and they have been redacted to preserve the effectiveness of that confidential technology and those techniques, which would be undermined by disclosure. The ability of law enforcement to investigate crimes and carry out their other responsibilities effectively would be impaired significantly if this information were widely disclosed. Applying the public records balancing test, I determined that the public interest in effective investigation of crime, protection of public safety, and protection of the ability of law enforcement to use its technology effectively and gather information confidentially when conducting sensitive investigations outweighs any public interest in

disclosure. See Wis. Stat. § 19.31; *Linzmeier*, 254 Wis. 2d 306, ¶¶ 30, 32, 39, 41; *Democratic Party of Wisconsin*, 372 Wis. 2d 460, ¶¶ 13, 18, 21.

Where possible, 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. However, essentially duplicative records remain in several spots, for clarity where they are referenced within the attached report.

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,



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Office of Open Government

PMF:hpw