



STATE OF WISCONSIN DEPARTMENT OF JUSTICE

BRAD D. SCHIMEL
ATTORNEY GENERAL

Paul W. Connell
Deputy Attorney General

Delanie M. Breuer
Chief of Staff

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

May 5, 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 February 2, 2017 shooting by Walworth County Sheriff Deputy Jesse Smith and Elkhorn Police Officer Robert Rayfield, which resulted in the death of Kris Kristl, has been prepared for release.

The DCI case in question is **17-612: Walworth County OID – Kris Kristl**. 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 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).

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 records:

- Graphic photographs of Kris Kristl at the Aurora Lakeland Medical Center following transport to that facility for treatment.
- Graphic images taken during the autopsy by the Waukesha County Medical Examiner's Office.
- Graphic images taken at the crime scene and during vehicle inspection.

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.

The victim's name and other identifying information of the victim has been redacted pursuant to the Wis. Stat. § 19.35(1)(a) balancing test. Wisconsin Const. art. I, § 9m requires that crime victims be treated with "fairness, dignity and respect for their privacy." Related Wisconsin statutes recognize that this state constitutional right must be vigorously honored by law enforcement agencies and that crime victims include both persons against whom crimes have been committed and the family members of those persons. Wis. Stat. §§ 950.01 and 950.02(4)(a). The Wisconsin Supreme Court, speaking about both Wis. Const. art. I, § 9m, and related victim rights statutes, has instructed that "justice requires that all who are engaged in the prosecution of crimes make every effort to minimize further suffering by crime victims." *Schilling v. Crime Victim Rights Bd.*, 2005 WI 17, ¶ 26, 278 Wis. 2d 216, 692 N.W.2d 623. In preparing these records for release, I determined by application of the Wis. Stat. § 19.35(1)(a) balancing test that these public policies requiring that crime victims and their loved ones be treated with respect for their privacy and dignity outweighed any legitimate public interest in disclosure of the following information where present within the DCI case file records:

- Audio/video recording of the victim's interview.
- Audio of the victim's 911 call.

A summary of the 911 call is being made available which discloses the substantive content of the call.

- Victim's voice and name from radio traffic recordings and reports.
- Victim's license plate number and VIN number.
- Victim's family members' names and information on their place of employment.

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 or in police reports.

Initials for the names of these individuals were not redacted. The last name of family members was left unredacted if it was the same as the deceased individual's last name. The names of law enforcement officers and other public employees mentioned in the records have not been redacted.

- Full names and images of juveniles interviewed or mentioned by witnesses.

Revealing the names of the children who were interviewed as witnesses is not essential to understanding the information they provided, and other children simply mentioned in the investigative reports 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. In addition, the password for a personal cell phone has been redacted.

- References on maps showing the exact location of witness's home and specific information describing the home's interior.
- Personal information from Facebook pages including place of employment, schools attended, birthplace information, login information, and IP/web addresses.
- Audio recordings of witness interviews.
- The image of a witness was blurred and the voice redacted in squad video recording.
- Phone records recovered from a witness's cell phone as they revealed nothing of evidentiary value to the investigation.
- License plate number, VIN number, and vehicle description of someone inadvertently mentioned during a license plate check. This information was of no significance to DCI's investigation and could negatively affect the individual's privacy. This was also redacted from radio traffic audio.

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, social security numbers, driver's license numbers, and state identification 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 this information.

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, 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.

Pursuant to the Wis. Stat. § 19.35(1)(a) balancing test, certain redactions have been made to the Facebook pages included in the DCI case file, in deference to the privacy interests of the persons to whom those portions of the records pertain. The redacted information consists of contacts among various persons unrelated to this investigation. In applying the balancing test, I determined that the public interest in respecting the privacy of these individuals outweighs any public interest in disclosure of this information.

Patient health care records for an individual interviewed has been redacted pursuant to Wis. Stat. §§ 146.81 and 146.82. To the extent the information is not directly governed by Wis. Stat. §§ 146.81 and 146.82, 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 outweighs any public interest in disclosure of this information.

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.

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.

EMT personnel working with Paratech Critical Care and Elkhorn Fire responded to the shooting scene to provide medical care for Mr. Kristl. Specific information regarding their assessment and treatment of Mr. Kristl, as observed or reported by the EMS personnel or other witnesses, including in the audio portion of video recordings, 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.

Copies of Paratech Critical Care and Elkhorn Fire reports contained within the DCI case file have been redacted pursuant to Wis. Stat. §§ 256.15(12) and 146.82(5)(c) except for the information authorized for release by Wis. Stat. § 256.15(12)(b). In view of the strong public policy protecting the confidentiality of personal medical information expressed in Wis. Stat. 146.82(5)(c), and in accordance with Wis. Stat. § 256.15(12), excerpts from these reports have also been redacted where present within related DCI case reports. 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.

In addition, specific information regarding the treatment of Mr. Kristl by law enforcement, as reported by those providing 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.

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. In addition, specific shift information was redacted from recorded interviews with law enforcement officers. Details regarding the specific shifts worked by the officers involved in the February 2, 2017 shooting incident have not been redacted from the records.

Information that reveals undercover assignments for local law enforcement personnel has been redacted pursuant to the Wis. Stat. § 19.35(1)(a) balancing test. Disclosure of this information could endanger the safety of the law enforcement personnel. Additionally, providing this information could also jeopardize the operations of undercover personnel who may be functioning in a role in which their true status as an active law enforcement officer is unknown to subjects, targets, witnesses, and others who interact with that undercover officer. Disclosure of the information publicly would reveal a confidential law enforcement technique that would lose its effectiveness if it became public knowledge. I find that the public interest in revealing this information is outweighed by the public interest in effectively investigating and prosecuting criminal activity and in protecting the safety of law enforcement personnel and promoting effective law enforcement investigations. *Cf. Linzmeyer*, 254 Wis.2d 306, ¶¶ 30-32, 39, 41.

Specific details regarding SWAT team assignments for officers 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.

Certain information about confidential law enforcement investigative techniques and equipment, which reveals specific details regarding how to access weapons carried by the officers involved has been redacted to preserve the effectiveness of those confidential techniques and that equipment. Public disclosure would undermine law enforcement's ability to use those techniques and that equipment effectively to investigate criminal activity and would threaten the safety of the officers. I determined that the public policies favoring effective investigation and prosecution of criminal activity interest, including the ability of law enforcement to gather information confidentially when conducting sensitive investigations, and in protecting the safety of law enforcement personnel, outweigh any public interest in disclosure of this information. *Cf. Wis. Stat. § 19.31; Linzmeyer*, 254 Wis. 2d 306, ¶¶ 30, 32, 39, 41.

DCI case report *17-612/51* 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. 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. 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 the public records law.

The exact 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 address. Wis. Stat. § 19.35(1); *Linzmeyer*, 254 Wis. 2d 306, ¶ 41.

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.

Pursuant to the federal Driver's Privacy Protection Act (DPPA), which prohibits release of personal information and highly restricted personal information in response to a public records request, personal information, as defined in DPPA, contained within the DCI records that was obtained from the Wisconsin Department of Transportation (DOT) Division of Motor Vehicles (DMV) database has been redacted. *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.

Information regarding law enforcement records of a juvenile has been redacted pursuant to Wis. Stat. § 938.396. To the extent the information is not directly governed by § 938.396, 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 law enforcement records of juveniles outweighs any public interest in disclosure of this information.

Pursuant to the Wis. Stat. § 19.35(1)(a) balancing test, organ donor information has been redacted from Transaction Information for the Management of Enforcement (TIME) System reports in deference to the privacy interests of the persons to whom those reports pertain. In applying the balancing test, I determined that the public interest in respecting the privacy of individuals' organ donation information, which may derive from confidential patient health care records or other health-related sources, outweighs any public interest in disclosure of the information.

Additionally, I redacted information originating from the National Law Enforcement Telecommunications System (NLETS) as disclosure of such information outside of authorized users of NLETS is strictly prohibited. NLETS, a private, non-profit corporation owned by the states, is an interstate justice and public safety network used to exchange law enforcement, criminal justice, and public safety-related information. Disclosure of information obtained through NLETS outside of authorized users is strictly prohibited. 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 NLETS member agencies and organizations. In performing the public records balancing test pursuant to Wis. Stat. § 19.35(1)(a), I concluded the public interest in ensuring DOJ's access to NLETS and in cooperating with NLETS member agencies and organizations outweighs any public interest in disclosure of this information. *Cf. Linzmeyer*, 254 Wis. 2d 306, ¶¶ 30, 32, 39.

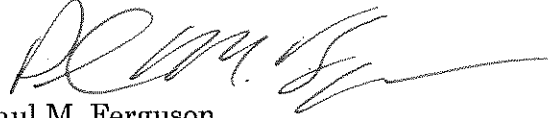
DCI report number 17-612 documents DOJ's receipt of the autopsy and toxicology records and autopsy photographs and x-rays taken for Kris Kristl provided by the Waukesha County Medical Examiner's Office. The DCI report has been included with the released records; however, the attached records, provided by the medical examiner's office, have been wholly redacted from the release. Those records were provided to DOJ by the Waukesha County Medical Examiner's Office on the condition that the records would not be shared with any person outside the criminal investigation, and the medical examiner's office would not provide the records 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 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 Waukesha 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 Waukesha County Medical Examiner's Office provided the records to DOJ, outweighs any public interest in disclosure. *Cf. Linzmeyer*, 254 Wis. 2d 306, ¶¶ 30, 32, 39. An excerpt from the medical examiner's records, quoted within DCI report number 17-612/73, has been redacted for the same reasons. If desired, the medical examiner's records may be requested directly from the Waukesha County Medical Examiner's Office records custodian.

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.

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 "Paul M. Ferguson", with a long horizontal flourish extending to the right.

Paul M. Ferguson
Assistant Attorney General
Office of Open Government

PMF:pss