



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

March 7, 2018

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 January 7, 2018 shooting by Monroe County Sheriff's Department Deputy Jesse Murphy, which resulted in the death of Skyler Burnette, has been prepared for release. The Monroe County District Attorney determined there is no basis to prosecute the law enforcement officer involved, and DCI is releasing its case file pursuant to Wis. Stat. § 175.47(5)(b).

The DCI case in question is **18-115: Monroe County OID – Skyler Burnette**. 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 public interest in disclosure of the following records:

- Graphic images taken at the scene of the incident on Saint Anne Street.
- Graphic images taken during Mr. Burnette's subsequent autopsy.

- Family members' voices from 911 call and dispatch audio.
- Family members' interviews in video/audio format.
- License plate number and description of family members' vehicle.

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 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 voice from body cam video.
- Victim's voice and personal information from radio traffic recordings.
- Full name, apartment number, and employment information.
- Images of the victim and juveniles in the apartment.
- Personal property of the victim in photos and photos taken within the apartment where evidence was not collected.
- Personal and family images from photos and video taken at the crime scene.

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 public interest in disclosure of information that could identify witnesses and other individuals referenced by witnesses. *Cf.* Wis. Stat. § 19.31; *Linzmeier*, 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 of juveniles mentioned (including images of their initials written in the snow outside the apartment door). Children simply mentioned in the investigative reports were of no relevance to DCI's investigation.

Well-established public policy recognizing the confidentiality and privacy of children and juveniles is expressed in Wis. Stat. § 938.396. To the extent the redacted information is not directly governed by that statute, I find that the same underlying public policy of protecting the confidentiality and privacy of the children and juveniles who were simply mentioned in the investigative reports outweighs any public interest in disclosure of the redacted information. *See* Wis. Stat. § 938.396.

- Other information that would identify the above individuals.

Dates of birth, home addresses, apartment numbers, home and personal cellular telephone numbers, driver's license numbers, license plate numbers, photographs, descriptions of residences and their exact locations in relation to the crime scene, employers, employers' locations, and/or hours of work for these individuals have been redacted.

- Audio recordings of witness interviews.

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 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, state identification numbers, medical insurance card identification numbers, court-related identification numbers, PIN numbers, and individual's signatures 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.

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

Home addresses, home telephone numbers, personal cellular telephone numbers, and personal electronic mail addresses of citizens 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; Linzmeyer*, 254 Wis. 2d 306, ¶¶ 30, 32, 39, 41.

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

Photographs of a state identification card have been redacted pursuant to Wis. Stat. § 343.50(12)(e).

Photographs of birth certificates have been redacted pursuant to the limitations of Wis. Stat. §§ 69.20 and 69.21, which only permit the state registrar of vital statistics and local registrars to provide copies of vital records and to disclose information from those records. To the extent that Wis. Stat. §§ 69.20 and 69.21 do not directly apply, the birth certificates have been redacted pursuant to the Wis. Stat. § 19.35(1)(a) balancing test because these documents are purely personal and to protect the privacy of the individual and the individual's family. Well-established public policy recognizing the confidentiality and privacy of vital records is expressed in Wis. Stat. §§ 69.20 and 69.21. I find that the same underlying public policy of protecting the confidentiality and privacy of vital records and the public interest in the expectation of privacy on the part of individuals in their personal lives outweighs any public interest in disclosure of this information.

Password information, personal identification numbers (PIN), user identifications, usernames, and URL's for personal accounts for individuals located on the cell phone extraction report in 18-115/46 have been redacted pursuant to the Wis. Stat. § 19.35(1)(a) balancing test to protect the privacy of these individuals and prevent unauthorized use following any subsequent disclosure. *Cf. Linzmeyer*, 254 Wis. 2d 306, ¶¶ 25-26, 30, 41. Disclosure of this information would provide unauthorized access and be subject to misuse upon any subsequent disclosure. In performing the balancing test, I determined that the public interest in protecting the privacy of these individuals and preventing the information from misuse upon any subsequent disclosure outweighs any public interest in disclosure of this information.

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

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 telephone 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 Laboratory records have been redacted pursuant to Wis. Stat. § 165.79(1), with the exception of Crime Laboratory records documenting Crime Scene Response Team (CSRT) activity at the scene, which are exempt from the statutory restrictions governing release of Crime Laboratory analysis documentation. In accordance with Wis. Stat. § 165.79(1), 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.

EMT personnel responded to the shooting scene to provide medical care for Skyler Burnette. Specific information regarding their observations, assessment and treatment of Mr. Burnette, as observed or reported by the EMT 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.

In addition, specific information regarding Mr. Burnette's medical condition as observed by law enforcement, 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.

Information containing specific details regarding weapons assigned to law enforcement personnel has been redacted to preserve the safety, security, and effectiveness of the law enforcement officers. 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; *Linzmeier*, 254 Wis. 2d 306, ¶¶ 30, 32, 39, 41.

Specific information identifying the routine shifts worked by a 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. Details regarding the specific shifts worked by the officers involved in the January 7, 2018 incident have not been redacted from the records.

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); *Linzmeier*, 254 Wis. 2d 306, ¶ 41.

Patient health care records and information obtained from those records has been redacted pursuant to Wis. Stat. §§ 146.81 and 146.82. I also have determined to redact certain other medical information, not directly governed by Wis. Stat. §§ 146.81 and 146.82, pursuant to the Wis. Stat. § 19.35(1)(a) balancing test. Well-established public policy recognizing the confidentiality and privacy of personal medical information is expressed in Wis. Stat. §§ 148.81 and 146.82. I find that the same underlying public policy of protecting the confidentiality and privacy of personal medical information outweighs any public interest in disclosure of most of this information, although limited medical information directly relevant to the investigation has been released under Wis. Stat. § 175.47(5)(b).

Certain information related to children has been redacted because it is confidential pursuant to Wis. Stat. § 48.396. Personal information about children mentioned in certain reports and in images has been redacted pursuant to the Wis. Stat. § 19.35(1)(a) balancing test. I determined that the public interest in protecting the privacy of these children, avoiding the dissemination of rumors and other uncorroborated information that could cause reputational damage or other harm to these children, and facilitating cooperation with law enforcement in sensitive investigations, as well as the public policies outlined in Wis. Stat. § 48.396, outweigh any public interest in disclosure of this information. *Cf. Linzmeyer*, 254 Wis. 2d 306, ¶ 38.

Pursuant to the Wis. Stat. § 19.35(1)(a) balancing test and in view of the strong public policies protecting the confidentiality of personal medical history information and the privacy rights of a deceased person's surviving loved ones, I determined to release only portions of the pathologist's autopsy report for Mr. Burnette. A summary of the autopsy and toxicology results provided by the pathologist is included within the narrative of DCI report *18-115/40*, and a copy of the referenced reports are also included in the records prepared for release. However, portions of Mr. Burnette's autopsy report pertain to his general health was not significant in DCI's investigation of this matter. In considering whether to release those portions of the autopsy report, I weighed the public interest in disclosure of this information against the public interest in protecting the privacy of Mr. Burnette's surviving family members. *Cf. Favish*, 541 U.S. at 168, 171-72 (applying federal Freedom of Information Act to release of death scene photos, reasoning that invasion of family privacy is unwarranted where no significant public interest, "more specific than having the information for its own sake," would be advanced by release and likely to be advanced by release). I also considered the well-established public policy recognizing the confidentiality and privacy of personal medical information as expressed in Wis. Stat. § 146.82. Under these circumstances I determined that the public interest in confidentiality of Mr. Burnette's private medical information and privacy of his surviving loved ones outweighs any public interest in disclosure of these portions of the report.

As documented in the DCI case file, squad video and body camera recordings from the officers involved in responding to the scene of the officer-involved shooting were collected by DCI for review. The DCI case file contains the body camera footage from Deputy Jesse Murphy that captures the interaction with Mr. Burnette. Audio from the body camera worn by Deputy Jesse Murphy was prepared for release as well as audio from dispatch. Due to the time necessary to review and prepare these materials, the other videos are not included in this release. DCI's review of all of these recordings is summarized in detail in individual reports within the DCI case file. You may request additional materials by specifying what you seek by report number. Any such requests should be made through DOJ's ordinary public records request process and will be processed accordingly.

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,



Paul M. Ferguson
Assistant Attorney General
Office of Open Government

PMF:pss