February 1, 2019

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 October 18, 2018 shooting by Walworth County Sheriff’s Department Deputy Peter Wisniewsky, which resulted in the death of Sean Dutcher, has been prepared for release. The Walworth 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 18-7771: Elkhorn OID – Sean Dutcher. 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 the DOJ Communications Office at dojcommunications@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. Fawish, 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 photographs and video taken by the Wisconsin State Crime Laboratory (WSCL) of Sean Dutcher at the crime scene, and during his subsequent autopsy.
- Graphic crime scene photographs taken by the WSCL during vehicle inspection.
• Graphic crime scene images that appear on body camera and surveillance video.

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.

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; 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, a 911 caller, individuals listed on paperwork found in the vehicle, and others mentioned by individuals interviewed. 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 the owners of Brogan & Patrick Mfg. Corp. were not redacted as it is a public business. The names of members of the Brogan family were not redacted as they volunteered for interviews with news media and were mentioned by name in news articles, and therefore, their identities are already in the public domain.)

The names of law enforcement officers, other public employees and tow truck operators mentioned in the records have not been redacted.

• Full names of juveniles interviewed or mentioned by witnesses. Children simply mentioned in the investigative reports were of no relevance to DCI's investigation.

Additionally, 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 children and juveniles outweighs any public interest in disclosure of the redacted information. See Wis. Stat. § 938.396.

• Other information that would identify the above individuals including dates of birth, home addresses, home and personal cellular telephone numbers, signatures, voice of a
911 caller, vehicle description, and information regarding work hours and places of employment.

- License plate numbers and vehicle identification numbers (VIN) of witnesses and those interviewed.
- Audio/video recordings of witness interviews.
- Images of a Brogan & Patrick Mfg. Corp. employee from video recordings.
- Personal family photographs, notes, business paperwork, and areas of the inside of the business not related to the crime scene from crime scene pictures and video taken inside Brogan & Patrick Mfg. Corp.

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 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 outweighs any public interest in disclosure of the dates of birth of individual persons.

Home addresses, home telephone numbers, personal cellular telephone numbers, and personal electronic mail addresses 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. Additionally, well-established public policy recognizing the confidentiality and privacy of the personal contact information of an employer's employees is expressed in Wis. Stat. § 19.36(10)(a). I find that the same underlying public policy of protecting the confidentiality and privacy of personal contact 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 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.

Certain information involving confidential law enforcement investigative technology and techniques has been redacted to preserve the effectiveness of that confidential technology and those techniques, which would be undermined by disclosure. Such information is not advertised by the providing company or readily available to the public. 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 pursuant to Wis. Stat. § 19.35(1)(a), 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. Cf. Wis. Stat. § 19.31; Linzmeyer, 254 Wis. 2d 306, ¶¶ 30, 32, 39, 41.

Purely personal information of those interviewed has been redacted pursuant to the Wis. Stat. § 19.35(1)(a) balancing test. I determined that the public interest in avoiding unnecessary intrusion into the personal lives of individuals and in protecting the privacy of these individuals outweighs any public interest in disclosure of purely personal information. See Memorandum from J.B. Van Hollen, Attorney General, to Interested Parties (July 28, 2010).

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.

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.

In addition, specific information regarding Mr. Dutcher’s medical condition as observed by law enforcement has been redacted from the reports and audio/video 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 and equipment 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 specific details regarding weapons and equipment outweighs any public interest in disclosure. Cf. Wis. Stat. § 19.31; Linzmeyer, 254 Wis. 2d 306, ¶¶ 30, 32, 39, 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. Details regarding the specific shifts worked by the officers involved in the October 18, 2018 shooting incident have not been redacted from the records.

Specific details regarding SWAT member positions for officers who responded to this incident 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 positions and techniques, outweighs any public interest in disclosure. Cf. Wis. Stat. § 19.31; Linzmeyer, 254 Wis. 2d 306, ¶¶ 30, 32, 39, 41.

As documented in the DCI case file, cell phone extractions, Crime Laboratory photographs and video of the vehicle after removal from the scene, surveillance video recordings, squad video recordings, and body camera recordings from the officers involved at the scene of the officer-involved shooting were collected by DCI for review. Due to space constraints, the very large investigatory file, and the time necessary to review this
material, duplicative material or material that does not contain scenes or information of investigatory interest are not included in this release. To review this material and apply any required redactions would require substantial staff time and resources and be overly burdensome. The public records law does not impose such heavy burdens on a record custodian that normal functioning of the office would be severely impaired, and does not require expenditure of excessive amounts of time and resources to respond to a public records request. Schopper v. Gehring, 210 Wis. 2d 208, 213, 565 N.W.2d 187 (Ct. App. 1997); State ex rel. Gehl v. Connors, 2007 WI App 238, ¶ 17, 306 Wis. 2d 247, 742 N.W.2d 530. Individuals may request additional materials by specifying what they seek by report number. Such requests should be made through DOJ’s ordinary public records channels and will be processed accordingly. DCI’s review of these materials is documented in individual reports within the DCI case file.

DCI report number 18-7771/86 documents DOJ’s receipt of the autopsy and toxicology records for Sean Dutcher, 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 by DOJ of the records. Cf. Linzmeyer, 254 Wis. 2d 306, ¶¶ 30, 32, 39. 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,

[Signature]

Paul M. Ferguson
Assistant Attorney General
Office of Open Government

PMF:pss