October 25, 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 September 13, 2019 shooting by Marathon County Deputy Russell Gage, which resulted in the death of Robert Domine, has been prepared for release. The Clark 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 19-5501: Loyal OID – Robert Domine. That investigative case file was 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 was 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, these records were prepared for release mindful 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. Waukakee 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, the Wis. Stat. § 19.35(1)(a) public records balancing test was applied, and 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 in photographs and video of Robert Domine at the crime scene and during his subsequent autopsy, as well as graphic descriptions of Mr. Domine’s injuries from audio recordings and reports.
- Mr. Domine’s driver’s license number.

Mr. Domine’s driver’s license number was also 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), the public interest in 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 driver’s license number.

- Mr. Domine’s cellular telephone serial number.

The serial number for a cellular telephone was also redacted pursuant to the Wis. Stat. § 19.35(1)(a) balancing test. The public interest in protecting the confidentiality and security of this property and in preventing misappropriation or other misuse of this economically valuable individually identifiable information upon any subsequent disclosure outweighs any public interest in disclosure of this information.

- Family photograph images from video and photographs taken within Mr. Domine’s home.

In performing the balancing test, 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.

Pursuant to the Wis. Stat. § 19.35(1)(a) balancing test, 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 was 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 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 were not redacted.

- Other information that would identify the above individuals including dates of birth, home addresses, home and personal cellular telephone numbers, signatures, license
plate numbers, the voices of citizen callers from dispatch audio, specific information describing the exact location of individual's homes, and information regarding work hours and places of employment from reports and/or audio.

- Audio recordings of witness interviews.
- Images of witnesses interviewed from video.
- The interior of a neighbor's home captured in photographs.
- Images of family photographs taken within the deceased's home.

Pursuant to the Wis. Stat. § 19.35(1)(a) balancing test, 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, 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 were made from the records prior to release for the reasons explained below.

Birthdates of individual persons were redacted to protect against identity theft or other unauthorized use following any subsequent disclosure. Pursuant to the Wis. Stat. § 19.35(1)(a) public records balancing test, 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.

Home addresses, home telephone numbers, and personal cellular telephone numbers for citizens were redacted pursuant to the Wis. Stat. § 19.35(1)(a) balancing test. 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 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). The same underlying public policy of protecting the confidentiality and privacy of personal contact information outweighs any public interest in disclosure of this information.

Home addresses and home telephone numbers of law enforcement officers and other public employees were redacted pursuant to Wis. Stat. § 19.36(10)(a). To the extent such records and information are not directly governed by Wis. Stat. § 19.36(10)(a), the information was redacted pursuant to the Wis. Stat. § 19.35(1)(a) public records balancing test. 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). The
same underlying public policy of protecting the confidentiality and privacy of personal contact information and the public interest in the expectation of privacy on the part of individuals in their personal lives outweigh any public interest in disclosure of this information.

Direct telephone numbers assigned to specific law enforcement officers were redacted pursuant to the Wis. Stat. § 19.35(1)(a) balancing test because these numbers are not made public and must remain confidential. The strong public interest in effective investigation and prosecution of criminal activity outweighs any public interest in disclosure of these direct telephone numbers of the law enforcement officers. Allowing the direct telephone numbers of the 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 were not redacted from the records.

Information of a purely personal nature was redacted pursuant to the Wis. Stat. § 19.35(1)(a) balancing test. The public interest in avoiding unnecessary intrusion into the personal lives of individuals and protecting the privacy of these individuals outweighs any public interest in disclosure of this information. See Memorandum from J.B. Van Hollen, Attorney General, to Interested Parties (July 28, 2010).

Crime Laboratory records were not redacted pursuant to Wis. Stat. § 165.79(1), 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 were redacted from the records prior to release.

Information containing specific details regarding weapons assigned to law enforcement personnel was redacted to preserve the safety, security, and effectiveness of the law enforcement officers. Pursuant to the Wis. Stat. § 19.35(1)(a) public records balancing test, 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.

Specific information identifying routine shifts worked by law enforcement officers was 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. 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 September 13, 2019 shooting incident were not redacted from the records.

Specific information regarding assessments and observations of the deceased by law enforcement, as reported by those on the scene or relayed by other law enforcement from
those on the scene, was 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. 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.

Certain information involving confidential law enforcement investigative technology and techniques was redacted to preserve the effectiveness of that confidential technology and those techniques, which would be undermined by disclosure. Release of this information would threaten the integrity of future law enforcement investigations; would significantly impair the future ability of law enforcement to investigate criminal activity effectively; and would put at risk the safety of the public, law enforcement personnel, informants, witnesses, and others involved in law enforcement investigations. In performing the public records balancing test pursuant to Wis. Stat. § 19.35(1)(a), the strong public interest in protecting public safety; in the safety of law enforcement personnel and others involved in law enforcement investigations; in effective investigation and prosecution of criminal activity; and in protecting the ability of law enforcement to use its technology and techniques effectively and gather information confidentially when conducting sensitive investigations outweighs any public interest in disclosure of this information. See Wis. Stat. § 19.31; 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.

Specific details regarding SWAT, tactical team, and Task Force assignments for officers who responded to this incident were 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), 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.

The Dane County Medical Examiner's Office conducted the autopsy of Mr. Domine and records they provided to the DOJ were wholly redacted from the release. Those records were provided to DOJ by the Dane 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. Pursuant to the Wis. Stat. § 19.35(1)(a) public records balancing test, 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 Dane County Medical Examiner's Office. The public interest in effective investigation of crime and effective law enforcement, which is furthered by honoring the conditions under which the Dane 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. Excerpts
from the medical examiner’s records, quoted within DCI reports, were redacted for the same reasons. If desired, the medical examiner’s records may be requested directly from the Dane 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 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

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