



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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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 27, 2019 shooting by Madison Police Department Officer Justin Nelson, Officer Sonny Martinez and Sergeant Ryan Gibson, which resulted in the death of Dean Thomas, has been prepared for release. The Dane County District Attorney determined there is no basis to prosecute the law enforcement officers involved, and DCI is releasing its case file pursuant to Wis. Stat. § 175.47(5)(b).

The DCI case in question is **19-6597: Madison OID - Dean Thomas**. 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, these records have been 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. 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, 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 Mr. Thomas at the crime scene and during his subsequent autopsy, as well as graphic descriptions of Mr. Thomas' injuries from audio recordings and reports.
- Images from family photographs.

In performing the balancing test, DOJ 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.

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 has also been redacted from the records prepared for release:

- Names of adult witnesses, family members, others mentioned by individuals interviewed, and others mentioned in police reports. (First 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.
- The signature of a family member.
- The full name of a juvenile.

Pursuant to the Wis. Stat. § 19.35(1)(a) balancing test, DOJ determined that the public interest in avoiding unnecessary intrusion into the personal lives of persons collaterally mentioned in the records, especially minor children and juveniles, outweighs any public interest in information about the conduct of governmental affairs. Well-established public policy recognizing the confidentiality and privacy of children and juveniles is expressed in Wis. Stat. §§ 48.396 and 938.396. The same underlying public policy of protecting the confidentiality and privacy of children and juveniles outweighs any public interest in disclosure of the juvenile's name. *See Wis. Stat. § 48.396* ("Law enforcement officers' records of children . . . shall not be open to inspection or their contents disclosed" unless certain exceptions apply); *Wis. Stat. § 938.396* ("Law enforcement agency records of juveniles may not be open to inspection or their contents disclosed" unless certain exceptions apply).

- Other information that would identify the above individuals, including dates of birth, home addresses, descriptive information of the exact locations of individual's home

addresses, license plate numbers, home and personal cellular telephone numbers, and information regarding routine work hours and places of employment.

- Witness voices from audio recordings of 911 calls.
- Individual persons names, home addresses and phone numbers from audio recordings.
- Physical descriptions of witnesses from police reports and witness interviews.
- Photographs and video of the interior of a neighbor's apartment, where interaction with Mr. Thomas did not take place.

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 outweigh 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 release, for the reasons explained below.

Personal cell telephone Mobile Equipment Identifier (MEID) for Mr. Thomas, which is economically valuable individually identifiable information, has been redacted pursuant to the Wis. Stat. § 19.35(1)(a) balancing test to protect against identity theft or other unauthorized use following any subsequent disclosure. In applying the balancing test, DOJ determined that the public interest in protecting this economically valuable individually identifiable information from misappropriation or misuse outweighs any public interest in disclosure.

The social security number for Mr. Thomas was 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, as well as the public policies outlined in Wis. Stat. §§ 19.36(10)(a), 801.19, 801.20, and 801.21, outweigh any public interest in disclosure of the social security number of Mr. Thomas.

Certain personnel records were redacted or withheld pursuant to the Wis. Stat. § 19.35(1)(a) balancing test. Well-established public policy recognizing the confidentiality and privacy of an employer's records containing information relating to staff management planning, including performance evaluations, is expressed in Wis. Stat. § 19.36(10)(d). DOJ finds that the same underlying public policy of protecting the confidentiality and privacy of this information outweighs any public interest in disclosure. Additionally, DOJ also determined that there is a strong public interest in keeping the information of private employees confidential. *See Kraemer Bros., Inc. v. Dane County*, 229 Wis. 2d 86, 101-04,

599 N.W.2d 75 (Ct. App. 1999). While public employees have a lower expectation of privacy in this information because of their choice of employment, the same is not true of private employees. *Id.* at 102. Therefore, in performing the balancing test, DOJ determined that the public interest in the expectation of privacy on the part of individuals in their personal lives, as well as the public policies expressed in Wis. Stat. §§ 19.36(10)(a) and (d), outweigh the public interest in disclosure of this information.

Certain medical and worker's compensation information regarding Mr. Thomas was redacted or withheld 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 and the federal Health Insurance Portability and Accountability Act (HIPAA). Well-established public policy recognizing the confidentiality and privacy of worker's compensation information is also expressed in Wis. Stat. § 102.33(2)(b). Therefore, DOJ finds that the same underlying public policies of protecting the confidentiality and privacy of personal medical and worker's compensation information outweighs any public interest in disclosure of this information. *See also John K. MacIver Inst. for Pub. Policy, Inc. v. Erpenbach*, 2014 WI App 49, ¶ 19 & n.4, 354 Wis. 2d 591, 849 N.W.2d 888 (observing that "[p]ersonal finance or health information" may be subject to redaction as "purely personal" in an email that otherwise is subject to disclosure).

Photographs of Mr. Thomas' driver's license were redacted pursuant to Wis. Stat. § 343.43(1)(f) and Wis. Admin. Code § Trans 102.205. Mr. Thomas' credit card number was also redacted pursuant to Wis. Stat. § 19.36(13). To the extent that this information is not directly governed by those statutes, the redactions were also made pursuant to the Wis. Stat. § 19.35(1)(a) balancing test to protect against identity theft. In applying the balancing test, DOJ determined that the public interest in protecting this economically valuable individually identifiable information from misappropriation or misuse outweighs any public interest in disclosure.

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. 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, 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, 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; *Linzmeier*, 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.

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 have not been redacted from the records.

Credential numbers regarding security access codes from the West Police District (WPD) armory transaction report, attached to DCI case report **19-6597/30**, have been redacted. The safety and security of law enforcement facilities and personnel would be compromised by public disclosure of this information. Pursuant to the Wis. Stat. § 19.35(1)(a) balancing test, the public policy in favor of protecting the safety and security of law enforcement facilities and personnel outweighs any public interest in disclosure of the related security access codes. *Cf. Linzmeyer*, 254 Wis. 2d 306, ¶¶ 25-26, 30, 41.

Credit card numbers of individuals have been redacted pursuant to Wis. Stat. § 19.36(13). To the extent this information is not directly governed by Wis. Stat. § 19.36(13), these records have been redacted pursuant to the Wis. Stat. § 19.35(1)(a) balancing test. Well-established public policy recognizing the confidentiality and privacy of financial identifying information and the protection of economically valuable information from misappropriation or misuse is expressed in Wis. Stat. § 19.36(13). The same public interest in protecting financial identifying information from misappropriation or other misuse, protecting the confidentiality and privacy of financial information, and protecting the expectation of privacy on the part of individuals in their personal lives applies here. The public interest in protecting this information, as well as the public policies outlined in Wis. Stat. §§ 801.19, 801.20, and 801.21, outweigh any public interest in disclosure.

As documented in DCI case report **19-6597/42**, the Wisconsin State Patrol Technical Reconstruction Unit (TRU) assisted with mapping and diagramming the scene, and this material was collected by DCI for review. Due to software issues, DCI was unable to review some of this material; therefore, it is not included in this release. The narrative reports, scene diagrams and animation of the scene 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 were redacted from the records prior to release.

Personally identifiable information related to an informant was redacted as required by Wis. Stat. § 19.36(8). Under Wis. Stat. § 19.36(8)(a)1, an informant includes any individual who provides information to law enforcement and either requests confidentiality or is expressly or implicitly promised confidentiality. The authority to delete information related to the identity of the informant also includes the authority to delete any other information that would tend to identify an informant. *See* Wis. Stat. § 19.36(8)(b). Notwithstanding Wis. Stat. § 19.36(8)(b), identifying information of confidential informants was also redacted 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 informants. *Cf. Linzmeyer*, 254 Wis. 2d 306, ¶¶ 30, 32, 39, 41.

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).

A photographic image of a UnityPoint Health – Meriter Hospital business identification and access card has been redacted to protect the security of that employer's related business security systems, which would be compromised by public disclosure of that information. Pursuant to the Wis. Stat. § 19.35(1)(a) balancing test, DOJ determined that the public interest in protecting the security of the business and the people who work there outweighs any public interest in detailed information regarding the businesses' security information. *Cf. Linzmeyer*, 254 Wis. 2d 306, ¶¶ 25-26, 30, 41.

Emergency medical services (EMS) personnel working with the City of Madison Fire Department responded to the shooting scene to provide medical care for Mr. Thomas. Specific information regarding their assessment and treatment of Mr. Thomas, 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), pursuant to the Wis. Stat. § 19.35(1)(a) balancing test, 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 the City of Madison Fire Department 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. Pursuant to the Wis. Stat. § 19.35(1)(a) balancing test, 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. Thomas 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. 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. 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 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. 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 27, 2019 shooting incident have not been redacted from the records.

DCI case report **19-6597/40** 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. Pursuant to the Wis. Stat. § 19.35(1) balancing test, 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.

An investigative firearms trace summary report provided confidentially to DOJ by ATF have been redacted from case report **19-6597/40**. ATF provided the report to DOJ for its internal use only, on the condition that the reports remain the property of ATF and may not be redistributed outside DOJ without express authorization from ATF. ATF would not have

provided this report to DOJ without DOJ's acceptance of those conditions. ATF authorized DOJ to disclose the substantive information from the investigative report, excluding the ATF trace summary report number, which is included in the narrative portion of case report **19-6597/40**. Pursuant to the Wis. Stat. § 19.35(1)(a) balancing test, there is a public interest in honoring the conditions under which ATF provided the report to DOJ and in cooperating with ATF so as to encourage the current and future joint law enforcement efforts of our agencies. To not honor the conditions by disclosing the report would preclude future report-sharing and significantly impair cooperative law enforcement efforts between DOJ and ATF. The public interest in effective investigation of crime and effective law enforcement, which is furthered by honoring the conditions under which ATF provided the investigative reports to DOJ, outweighs any public interest in disclosure by DCI of the ATF reports. *Cf. Linzmeyer*, 254 Wis. 2d 306, ¶¶ 30, 32, 39.

Patient health care records and information obtained from those records has been redacted pursuant to Wis. Stat. §§ 146.81 and 146.82. Certain other medical information, not directly governed by Wis. Stat. §§ 146.81 and 146.82, has been redacted 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. 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 medical information has been redacted 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, and the same underlying public policy of protecting the confidentiality and privacy of personal medical information outweighs any public interest in disclosure of this information. *See also John K. MacIver Inst. for Pub. Policy, Inc. v. Erpenbach*, 2014 WI App 49, ¶ 19 & n.4, 354 Wis. 2d 591, 849 N.W.2d 888 (observing that “[p]ersonal finance or health information” may be subject to redaction as “purely personal” in an email that otherwise is subject to disclosure).

DCI report numbers **19-6597/6** and **16-6597/29** document DOJ's receipt of the property/evidence release report, and autopsy photographs of Mr. Thomas, provided by the Dane County Medical Examiner's Office. The DCI reports have been included with the released records; however, the attached report and photographs, provided by the medical examiner's office, have been wholly redacted from the release. The report and photographs were provided to DOJ by the Dane County Medical Examiner's Office on the condition that they would not be shared with any person outside the criminal investigation, and the medical examiner's office would not provide the report and photographs 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 information was 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 report and photographs 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 this information to DOJ, outweighs any public interest in disclosure by DOJ of the report or photographs. *Cf. Linzmeyer*, 254 Wis. 2d 306, ¶¶ 30, 32, 39. If desired, the medical examiner's report and photographs 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 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

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