December 10, 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 November 5, 2019 shooting by Monroe County Sheriff’s Sergeant Ryan Oswald, Monroe County Sheriff’s Deputy Jason Rice, and Sparta Police Officer Kyle Gursalski, which resulted in the death of Michael Nguyen, has been prepared for release. The Monroe 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 **19-6849: Leon OID - Michael Nguyen.** 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 was redacted from the records, either because specifically required by law or pursuant to the Wis. Stat. § 19.35(1)(a) public records 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. 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. Nguyen at the crime scene and during his subsequent autopsy, as well as graphic descriptions of Mr. Nguyen’s injuries from audio recordings and reports.
• Prescription medication.

Information that specifically identifies medications prescribed for Mr. Nguyen was also 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 this information.

• Military service records.

DCI report number 19-6849/50 documents DOJ’s receipt of Mr. Nguyen’s military service records. The DCI report was included with the released records; however, the attached records were wholly redacted from the release. The records were also redacted pursuant to Wis. Stat. § 45.04(2)-(3) and VA 1.10. See also Wis. Stat. § 19.36(1). To the extent such records are not directly governed by those provisions, the records were redacted pursuant to the Wis. Stat. § 19.35(1)(a) balancing test. Well-established public policy recognizing the confidentiality and privacy of military service records is expressed in Wis. Stat. § 45.04(2)-(3) and VA 1.10. The same underlying public policy of protecting the confidentiality and privacy of military service records, 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.

• Cell phone passcode, electronic mail address, Internet Protocol (IP) address, and Facebook usernames and profile.

The passcode for Mr. Nguyen’s cell phone, his personal electronic mail address, his Internet Protocol (IP) address, and Facebook user names and profile were also redacted pursuant to the Wis. Stat. § 19.35(1)(a) balancing test. In performing the 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 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.

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, 254 Wis. 2d 306, ¶ 38.

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. 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. Even in those situations in which a criminal prosecution does not occur, it is the policy of our office to consider the privacy rights of those who could be considered victims entitled to these protections when applying the balancing test regarding the release of investigative records. Pursuant to the Wis. Stat. § 19.35(1)(a) balancing test, these public policies requiring that crime victims be treated with respect for their privacy and dignity outweigh any public interest in disclosure of the names or other personally identifying information of those individuals where present within DCI case file records. Accordingly, victims' names; victims' home address; images and descriptions of victims' residence in photographs, video, and reports; images of a victim within photographs and video recordings; a victim's cellphone serial number and passcode; a victim's Facebook address, profile, and user name; a victim's signature from a consent to search form; and a victim's voice from audio and video recordings were redacted from the reports prior to release. The public interest favoring protection of the victims from unnecessary public attention, possible harassment, and unnecessary emotional upset outweighs any public interest in the disclosure of this information.

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.

- The full name of a juvenile.

The juvenile's name was also redacted pursuant to the Wis. Stat. § 19.35(1)(a) balancing test. In performing the balancing test, 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, and their exact location, license plate numbers, vehicle identification number, and descriptions of vehicles, home and personal cellular telephone numbers, and information regarding routine work hours and places of employment.

- Signature from a consent to search form from a business owner and the serial number of a business owner’s firearm.

- Audio recordings of witness interviews and voices of witness calls to 911.

- Digital images of witnesses from photographs and video recordings as well as their voices.

- Descriptions of emotional distress.

Descriptions of the emotional distress exhibited by the citizens and victim inside the tavern during the shooting were also redacted pursuant to the public records balancing test to protect their privacy as crime victims as explained elsewhere in this letter. Release of the descriptions would revictimize them and adversely impact their emotional healing. In applying the balancing test, the public interest in respect for crime victims outweighs any public interest in disclosure. Cf. Wis. Stat. § 19.31; Linzmeyer, 254 Wis. 2d 306, ¶¶ 30, 32, 39, 41.

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 and a driver's license number 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, 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, home telephone numbers, and personal cellular telephone numbers 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.

Direct telephone numbers assigned to specific law enforcement officers and other public employees 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.

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).
DOJ is not releasing records under court seal. See Wis. Stat. § 19.35(1)(a) ("Except as otherwise provided by law"); Wis. Stat. § 19.36(1); see also Wis. Stat. § 801.21. References to information that is contained in the records under court seal and is prohibited from being released pursuant to the court's order, were also redacted elsewhere in the records, pursuant to the court seal.

Crime Laboratory records were redacted pursuant to Wis. Stat. § 165.79(1). 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.

Emergency medical services (EMS) personnel working with the Sparta Area Ambulance Service responded to the shooting scene to provide medical care for Mr. Nguyen. Specific information regarding their assessment and treatment of Mr. Nguyen, as observed or reported by the EMS personnel or other witnesses, including in the audio portion of video recordings, was 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 Sparta Area Ambulance Service pre-hospital care reports contained within the DCI case file were 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 were also 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.

Specific information regarding the treatment of Mr. Nguyen by law enforcement, as reported by those providing the treatment, 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.

Medical information was 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 “personal finance or health information” may be subject to redaction as “purely personal” in an email that otherwise is subject to disclosure).

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 details regarding tactical team assignments for officers who responded to this incident were redacted to preserve the security and effectiveness of these law enforcement techniques, which would be undermined by disclosure. 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.

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 November 5, 2019 shooting incident were not redacted from the records.

The street addresses for the offices where DCI agents work at confidential locations shared by undercover agents were 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. The public interest in protecting the confidentiality of these locations, so that undercover agents can effectively investigate criminal activity, outweighs any public interest in disclosure of these confidential street addresses. Wis. Stat. § 19.35(1); Linzmeyer, 254 Wis. 2d 306, ¶ 41.

As documented in the DCI case file, squad video recordings and body camera recordings from the officers involved were collected by DCI for review. Also documented in the DCI case file is business surveillance video. Due to space constraints, the very large investigatory file, and the time necessary to review this material, duplicative video and video that does not depict scenes of investigatory interest are not included in this release. DCI's review of these recordings is documented in individual reports within the DCI case file. Additional materials may be requested by specifying the report number. Such requests should be made through ordinary public records channels and will be processed accordingly.
DCI report number 19-6849/29 documents DOJ's receipt of the pathology preliminary laboratory findings for Mr. Nguyen, provided by the Monroe County Medical Examiner's Office. The DCI report was included with the released records; however, the attached records, provided by the medical examiner's office, were wholly redacted from the release. Those records were provided to DOJ by the Monroe County Medical Examiner's Office on the condition that the report would not be shared with any person outside the criminal investigation, and the medical examiner's office would not provide the report 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 report 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 would preclude future record-sharing and significantly impair cooperative law enforcement efforts between DOJ and the Monroe 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 Monroe County Medical Examiner's Office provided the report to DOJ, outweighs any public interest in disclosure by DOJ of the report. Cf. Linzmeyer, 254 Wis. 2d 306, ¶¶ 30, 32, 39. Information from the forensic pathologist at the autopsy, quoted within DCI report number 19-6849/29, was redacted for the same reasons. If desired, the medical examiner's records may be requested directly from the Monroe 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