



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

Josh Kaul
Attorney General

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

July 24, 2020

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 May 18, 2020 officer-involved death of Nathan L. Davis, has been prepared for release. The Racine County District Attorney determined there is no basis to prosecute any of 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 **20-3776 – Village of Caledonia OI**D. 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) 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 of Mr. Davis at the scene and hospital and during his subsequent autopsy, as well as graphic descriptions of Mr. Davis's medical condition.

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.

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. 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 these individuals where present within DCI case file records. Additionally, 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 death 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 family members, adult witnesses, 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; descriptions, license plate numbers, and VIN numbers of vehicles; driver’s license numbers.

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 driver's license numbers 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) 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, personal cellular telephone numbers, personal electronic mail addresses, and Internet Protocol (IP), Modem MAC, and CPE MAC addresses 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 Caledonia law enforcement officers and the Racine County District Attorney 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. Allowing the direct telephone numbers to become publicly known would have an adverse effect on the personnel's 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. Additionally, the public interest in these individuals performing their job responsibilities, including while conducting investigations at crime scenes, without disruption and unnecessary interruption if their direct numbers became public knowledge outweighs any public interest in disclosure of the non-public numbers for these individuals. *Cf. Linzmeyer*, 254 Wis. 2d 306, ¶¶ 31, 32, 39.

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.

Bank account numbers, credit card numbers, a Charter account number, and Mr. Davis's retirement account information were redacted pursuant to Wis. Stat. § 19.36(13). To the extent this information is not directly governed by Wis. Stat. § 19.36(13), this information was 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 and in protecting the confidentiality and privacy of financial information 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.

U.S. Department of Veterans Affairs (VA) Member and Plan Identification numbers, and a University of Wisconsin – Parkside Student Identification Number were redacted pursuant to the Wis. Stat. § 19.35(1)(a) balancing test. The public interest in protecting this kind of economically valuable information from misappropriation or misuse is recognized in Wis. Stat. § 19.36(13), which prohibits disclosure of financial identifying information of individuals. Although Wis. Stat. § 19.36(13) may not apply directly to the identification numbers, the same public interest in protecting financial identifying information from misappropriation or other misuse applies here. Therefore, the public interest in protecting this economically valuable information from misappropriation or misuse, as well as the public policies outlined in Wis. Stat. §§ 801.19, 801.20, and 801.21, outweigh any public interest in disclosure.

Wisconsin Department of Transportation (DOT) files, accessed through the Wisconsin Department of Justice TIME System, which are provided to law enforcement personnel only and require training and certification to access, were redacted when contained in the investigative file in their original format, and where the information contained within those records is provided within the investigative report. The disclosure of such information by DOJ would significantly impair future information-sharing and other cooperative law enforcement efforts between DOJ and other government agencies. In performing the public records balancing test pursuant to Wis. Stat. § 19.35(1)(a), DOJ concluded the public interest in ensuring law enforcement access to DOT records and in cooperating with other government and law enforcement agencies outweighs any public interest in disclosure of this information. *Cf. Linzmeyer*, 254 Wis. 2d 306, ¶¶ 30, 32, 39; *see also* 18 U.S.C. § 2721 et seq.; *New Richmond News v. City of New Richmond*, 2016 WI App 43, 881 N.W.2d 339.

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

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 federal Health Insurance Portability and Accountability Act (HIPAA). 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).

Emergency medical services (EMS) personnel working with Caledonia Fire and Rescue responded to the scene to provide medical care for Mr. Davis. Specific information regarding their assessment of Mr. Davis, as observed or reported by the EMS personnel or other witnesses, 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.

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 May 18, 2020 incident were not redacted from the records.

Certain information involving confidential law enforcement investigative techniques was redacted to preserve the effectiveness of those confidential 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 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.

Information provided to law enforcement by the National Center for Missing and Exploited Children (NCMEC) via CyberTip was wholly redacted. NCMEC reports are provided to law enforcement on the condition that the report contents will not be shared with

any person outside the criminal investigation or used for any purpose other than a criminal investigation. NCMEC would not provide such reports to law enforcement without law enforcement's agreement to those conditions. In performing the public records balancing test pursuant to Wis. Stat. § 19.35(1)(a), DOJ determined there is a public interest in honoring the conditions under which the NCMEC report was provided to law enforcement and in cooperating with NCMEC so as to encourage the current and future joint law enforcement efforts of our agencies. To not honor the conditions by disclosing the information contained within the CyberTip report would preclude future record-sharing and significantly impair cooperative law enforcement efforts between local law enforcement, DOJ, and NCMEC. DOJ concluded that the public interest in effective investigation of crime and effective law enforcement, which is furthered by honoring the conditions under which NCMEC provided the report to law enforcement, outweighs any public interest in disclosure by DOJ of the information contained within the report. *Cf. Linzmeyer*, 254 Wis. 2d 306, ¶¶ 30, 32, 39.

Explicit descriptions of sexual content, filenames, and usernames were redacted pursuant to the Wis. Stat. § 19.35(1)(a) balancing test. There is a strong public interest in not disclosing these explicit descriptions of the sexual content described, and there is a public interest in avoiding subsequent disclosure of explicit descriptions of the types of explicit sexual content reviewed by investigators in this case. Disclosure of explicit descriptions of sexual content, filenames, and usernames may contribute to the reproduction of child pornography. In performing the balancing test, DOJ concluded that the public interest in any disclosure of this information is outweighed by the public interest in nondisclosure. *See also* Wis. Stat. §§ 19.35(1)(a) ("Except as otherwise provided by law"), 19.36(1), 948.12, and 971.23(11)(d)

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).

DCI report numbers **20-3776/13** and **20-3776/32** document DOJ's receipt of the autopsy records for Mr. Davis, provided by the Milwaukee 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, were wholly redacted from the release. Those records were provided to DOJ by the Milwaukee 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) 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 Milwaukee 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 Milwaukee 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. An excerpt from the medical examiner's records, quoted within DCI report numbers **20-3776/13** and **20-3776/32**, was redacted for the same reasons. If desired, the medical examiner's records may be requested directly from the Milwaukee County Medical Examiner's Office records custodian.

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.

The photograph of an unidentified juvenile was redacted pursuant to the Wis. Stat. § 19.35(1)(a) balancing test. Revealing the photo of this juvenile is not essential to understanding the requested records. The public interest in avoiding unnecessary intrusion into the personal lives of persons collaterally mentioned or included in law enforcement records, especially juveniles, outweighs any public interest in information about the conduct of governmental affairs. Additionally, well-established public policy recognizing the confidentiality and privacy of children and juveniles is expressed in Wis. Stat. §§ 48.396 and 938.396. DOJ finds 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. § 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).

Details regarding an unrelated assignment in which an officer was engaged when called to this incident were redacted pursuant to the Wis. Stat. § 19.35(1)(a) balancing test. There is a public interest in ensuring the officer's safety on returning to those duties and in preventing any jeopardy to the unrelated, ongoing law enforcement investigations. In applying the balancing test, DOJ concluded the public interest in disclosure is outweighed by the public interest in preserving officer safety and ensuring effective investigations of crime and effective law enforcement. *Cf. Linzmeyer*, 254 Wis. 2d 306, ¶¶ 30, 32, 39, 41.

Information regarding whether Mr. Davis was a concealed carry license holder in Wisconsin was redacted pursuant to Wis. Stat. § 175.60(12)(c) and (12g)(b)(1).

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,



Paul M. Ferguson
Assistant Attorney General
Office of Open Government

PMF:hpw