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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 May 31, 2020 shooting incident, which resulted in the death of Thomas Sutherlin, has been prepared for release. The Jefferson County District Attorney determined there is no basis to prosecute the Watertown police officers involved, and DCI is releasing its case file pursuant to Wis. Stat. § 175.47(5)(b).

The DCI case in question is **20-4149: Watertown OID - Thomas Sutherlin**. 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](http://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](mailto: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, DOJ applied the Wis. Stat. § 19.35(1)(a) balancing test, and found that the public interest in treating surviving loved ones of the deceased with respect for their privacy and dignity outweighed any public interest in disclosure of the following records:

- Graphic images in photographs and video of Mr. Sutherlin at the incident scene, graphic images in photographs during his subsequent autopsy and at the hospital, as well as graphic descriptions of Mr. Sutherlin's injuries and condition from video recordings, audio recordings, and reports.

- Mr. Sutherlin's credit card number. Additionally, credit card numbers were redacted pursuant to Wis. Stat. § 19.36(13).

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 information. *Cf. Linzmeyer v. Forcey*, 2002 WI 84, ¶¶ 31, 38, 254 Wis.2d 306, 646 N.W.2d 811.

Certain witnesses in this investigation were crime victims. 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. Therefore, pursuant to the Wis. Stat. § 19.35(1)(a) balancing test, DOJ determined that these public policies requiring that crime victims be treated with respect for their privacy and dignity outweigh any public interest in disclosure of the full names and other personally identifying information of these individuals where present within DCI case file records. Accordingly, names, license plate numbers, and vehicle identification numbers (VIN) for those individuals and their family members have also been fully redacted from the reports, photographs and video prior to release.

Pursuant to the Wis. Stat. § 19.35(1)(a) balancing test, DOJ determined 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, complainants, and other individuals referenced by witnesses or complainants. *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 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 also redacted from the records:

- 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.
- Full names of juveniles mentioned. Revealing the names of the children simply mentioned in the investigative reports were of no relevance to DCI's investigation. Additionally, well-established public policy recognizing the confidentiality and privacy of

children and juveniles is expressed in Wis. Stat. §§ 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).

- Other information that would identify the above individuals, including but not limited to dates of birth, home addresses, home and personal cellular telephone numbers, physical descriptors, and other personally identifiable information such as places of employment and incident numbers from unrelated cases or investigations.
- Names and voices of individuals in dispatch audio regarding unrelated 911 calls.
- The images and voices of witnesses from audio & video recordings.
- License plate numbers and vehicle identification numbers (VIN) for vehicles mentioned in reports and audio that are not related to the incident.

Pursuant to the Wis. Stat. § 19.35(1)(a) balancing test, DOJ determined 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, DOJ determined 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, ¶¶ 31, 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, social security numbers, and driver license numbers 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, DOJ determined 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, social security numbers and driver's license numbers.

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. DOJ determined that the public interest in disclosure of this information is outweighed by the public interest in the expectation of privacy on the part of individuals in their personal lives and in protecting the sources of law enforcement information and 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). DOJ determined that the same underlying public policy of protecting the confidentiality and privacy of personal contact information outweighs any public interest in disclosure of this information.

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

Personal identifying information regarding physical descriptors, including scars, marks and tattoos, was redacted from a criminal history report to protect the privacy of an individual citizen. In performing the public records balancing test pursuant to Wis. Stat. § 19.35(1)(a), DOJ determined that the public policy in favor of protecting the confidentiality of this personally identifiable information, which may have been obtained from patient healthcare records or driver's records protected by federal law, outweighs any public interest in disclosure.

Information provided by interviewed witnesses regarding themselves or their family members that had no bearing on DCI's investigation was redacted pursuant to the Wis. Stat. § 19.35(1)(a) balancing test to protect the privacy of the interviewed witnesses. DOJ determined that the public interest in disclosure of this information is outweighed by the expectation of privacy on the part of individuals in their personal lives and by the public interest in encouraging citizens to cooperate with law enforcement investigators without undue concern that their private lives will become public matters. *Cf. Linzmeyer*, 254 Wis. 2d 306, ¶¶ 31-32. *See also* Memorandum from J.B. Van Hollen, Attorney General, to Interested Parties (July 28, 2010) (public interest in avoiding unnecessary intrusion into the personal lives of individuals and in protecting the privacy of these individuals outweighs any public interest in disclosure of purely personal information).

Certain medical information and medical prescription 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). DOJ determined that 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).

FBI numbers or information indicating whether or not FBI numbers exist were redacted pursuant to 28 C.F.R. §§ 20.21(c)(2) and 20.33, because disclosure of the existence or non-existence of FBI numbers would impermissibly indicate the existence or non-existence of federal criminal history.

A state identification number was redacted pursuant to Wis. Stat. § 343.50(8). To the extent the number is not directly governed by Wis. Stat. § 343.50(8), the number was redacted pursuant to the Wis. Stat. § 19.35(1)(a) balancing test. Well-established public policy recognizing the confidentiality and privacy of information concerning or relating to an applicant or identification card holder is expressed in Wis. Stat. § 343.50(8). DOJ determined

that the same underlying public policy of protecting the confidentiality and privacy of such information and the public interest in the expectation of privacy on the part of individuals in their personal lives and in preventing the misappropriation or misuse of such information upon any subsequent disclosure outweigh any public interest in disclosure of this information.

Personal cell telephone International Mobile Equipment Identity (IMEI), Mobile Station International Subscriber Directory Number (MSISDN / Phone number) and an Android ID number, which are economically valuable individually identifiable information, were 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.

Personal email addresses of individuals were redacted pursuant to the Wis. Stat. § 19.35(1)(a) balancing test. In performing the balancing test, DOJ determined that the public interest in disclosure of this information is outweighed by the expectation of privacy on the part of individuals in their personal contact information and by the public interests 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. Linzmeyer*, 254 Wis. 2d 306, ¶¶ 30-32. Serial numbers and passcodes for individuals' cell telephones have been redacted in consideration of the same privacy expectations on the part of individuals who cooperated with the investigation, and because this potentially economically valuable property identification information was not connected with the purpose of the investigation.

Emergency medical services (EMS) personnel working with the Watertown Fire Department responded to the scene to provide medical care for Mr. Sutherlin. Specific information regarding their assessment and treatment of Mr. Sutherlin, 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, DOJ determined that 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 assessments and observations of Mr. Sutherlin by law enforcement, as reported by those on the scene or relayed by other law enforcement from those on the scene, and specific information regarding treatment of Mr. Sutherlin by law enforcement, as reported by those providing the treatment, including in the audio portion of video recordings, 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 and the federal Health Insurance Portability and Accountability Act (HIPAA). DOJ determined that the same underlying public policy of protecting the confidentiality and privacy of personal health

information, as well as the analogous restrictions on release of patient treatment information described under Wis. Stat. § 256.15(12), outweigh any public interest in disclosure of the redacted information.

Specific information identifying officers' routine work shifts and/or work rotations was redacted pursuant to the Wis. Stat. § 19.35(1)(a) balancing test in the interest of preserving the safety and security of the officers involved, those officers' families, and those officers' homes. In performing the balancing test, DOJ determined that the public interest in protecting the security of the officers, the officers' families, and the officers' homes outweighs any public interest in this information. Details regarding the specific shifts worked by the officers involved in the May 31, 2020 shooting incident have not been redacted from the records.

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. DOJ finds that the strong public interest in effective investigation and prosecution of criminal activity outweighs any public interest in disclosure of these direct telephone numbers of 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.

Certain information involving confidential law enforcement investigative technology and techniques was redacted pursuant to the Wis. Stat. § 19.35(1)(a) balancing test 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), DOJ determined that 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.

DCI case report **20-4149/22** includes the name of a federal Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) special agent. The ATF and other federal agencies have advised DOJ that, pursuant to express exemptions to disclosure set forth in the federal Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(7), they protect and do not disclose the

names, images, and other identifying information of their agents and personnel. Because of the nature of those jobs, revealing these names, images, and other identifying information could reasonably be expected to: disclose identities of confidential sources and undercover agents; reveal confidential law enforcement techniques; and endanger the life or physical safety of these individuals because their jobs entail a significant threat of retaliatory action against known agents. *See* 5 U.S.C. §§ 552(7)(D), (E), and (F). *Cf. Linzmeyer*, 254 Wis. 2d 306, ¶¶ 30, 32, 39.

For those reasons, these federal agencies have requested that DOJ redact this information from records in order to protect the safety and security of federal law enforcement personnel including undercover agents, and to preserve the integrity of federal investigations and other potentially related investigations. Under Wisconsin's public records law, DOJ may consider the policies reflected in exceptions to disclosure under FOIA when determining whether to provide access to records. *See Linzmeyer*, 254 Wis. 2d 306, ¶ 32; *Democratic Party of Wis.*, 372 Wis. 2d 460, ¶¶ 13, 18. The Wisconsin Supreme Court has cited the FOIA statutory exemptions in applying the balancing test analysis to Wisconsin law enforcement records. *Linzmeyer*, 254 Wis. 2d 306, ¶¶ 32-33; *Democratic Party of Wis.*, 372 Wis. 2d 460, ¶¶ 13, 18. Release of the redacted information would harm the public interest sought to be protected by these FOIA exemptions. That consideration, in turn, is a factor in the determination that such information could not be released under Wisconsin's public records law.

Therefore, pursuant to the Wis. Stat. § 19.35(1)(a) balancing test, DOJ finds that disclosure of this information could endanger the safety of law enforcement personnel; could subject federal law enforcement personnel to a significant threat of retaliatory action against known agents; could jeopardize the operations of undercover personnel who may be functioning in a role in which their true status as active law enforcement officers is unknown to subjects, targets, witnesses, and others who interact with those undercover officers; and could reveal confidential law enforcement techniques that would lose their effectiveness if they became public knowledge. Accordingly, DOJ finds that the public interest in revealing this information is outweighed by the public interest in effectively investigating and prosecuting criminal activity, in protecting the safety of law enforcement personnel, and in promoting effective law enforcement investigations. *Cf. Linzmeyer*, 254 Wis. 2d 306, ¶¶ 30-32, 39, 41.

An investigative report provided confidentially to DOJ by ATF has been redacted from case report **20-4149/22**. ATF provided the report to DOJ for its internal use only, on the condition that the report 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 that is included in the narrative portion of case report **20-4149/22**.

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. The ability of DOJ to work effectively with these federal law enforcement agencies on future law enforcement matters requires DOJ to respect the requested confidentiality regarding

federal law enforcement personnel, information, and reports. 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 report to DOJ, outweighs any public interest in disclosure by DCI of the ATF reports. *Cf. Linzmeyer*, 254 Wis. 2d 306, ¶¶ 30, 32, 39. Therefore, pursuant to the Wis. Stat. § 19.35(1) balancing test, DOJ finds that the public interest in effective law enforcement, in effectively investigating and prosecuting criminal activity, in protecting the integrity of ongoing investigations, and in interagency cooperation, outweighs any public interest in disclosing this information. *Cf. Linzmeyer*, 254 Wis. 2d 306, ¶¶ 30, 32, 39.

Specific information within case reports **20-4149/20 & /25** that reveal specific security procedures for the business at the scene of the incident has been redacted pursuant to the Wis. Stat. § 19.35(1)(a) balancing test. DOJ determined that the public interest in protecting the security of a business and the people who work there outweighs any public interest in detailed information regarding the business' security procedures. Information regarding the results of DCI's canvass for and review of related surveillance video is documented in the reports.

As documented in the DCI case file, surveillance video, squad video recordings, body camera recordings from the officers involved, the officers that arrived after the incident, and the business surveillance video were collected by DCI for review. Due to space constraints, the large investigatory file, and the time necessary to review this material, not all video is included in this release. DCI's review of the recordings from the officers involved is documented within the DCI case file and these videos (two squad camera recordings and one body camera recording) are being produced for this release. Additional materials may be requested by specifying the report number. Such requests should be made through DOJ's public records request process and will be processed accordingly.

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.

DCI report **20-4149/32** documents DOJ's receipt of a preliminary autopsy determination and autopsy photographs for Mr. Sutherlin provided by the Jefferson County Medical Examiner's Office. The DCI report was included with the released records; however, the photographs provided by the medical examiner's office, were wholly redacted from the release. Those photographs were provided to DOJ by the Jefferson County Medical Examiner's Office on the condition that the photographs would not be shared with any person outside the criminal investigation, and the medical examiner's office would not provide the photographs to DOJ without DOJ's agreement to those conditions. Pursuant to the Wis. Stat. § 19.35(1)(a) balancing test, DOJ determined that there is a public interest in honoring the conditions under which the photographs 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 photographs would preclude future record-sharing and significantly impair cooperative law enforcement efforts

between DOJ and the Jefferson County Medical Examiner's Office. Therefore, DOJ determined that the public interest in effective investigation of crime and effective law enforcement, which is furthered by honoring the conditions under which the Jefferson County Medical Examiner's Office provided the photographs to DOJ, and under which the Jefferson County Medical Examiner's Office generally provides the records to DOJ, outweighs any public interest in disclosure by DOJ of the photographs. *Cf. Linzmeyer*, 254 Wis. 2d 306, ¶¶ 30, 32, 39. Information from the medical examiner's office preliminary autopsy determination, quoted within DCI reports, was redacted for the same reason. If desired, the medical examiner's photographs may be requested directly from the Jefferson County Medical Examiner's Office records custodian.

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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