



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 19, 2018 shooting by Green Bay Police Department Officer Erik O'Brien, which resulted in the death of Jonathon Tubby, has been prepared for release. The Brown County District Attorney determined there is no basis to prosecute the law enforcement officer involved, and DCI is releasing its case file pursuant to Wis. Stat. § 175.47(5)(b).

The DCI case in question is **18-7807: Green Bay PD OID - Jonathon Tubby**. 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, I have been mindful in preparing these records for release 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, I applied the Wis. Stat. § 19.35(1)(a) public records balancing test and determined 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 of Mr. Tubby at the scene, during his subsequent autopsy, and in a video recording.
- Graphic descriptions of Mr. Tubby's injuries at the scene.

In performing the balancing test, I 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.

In preparing these records for release, I also determined by application of the public records balancing test that 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 been redacted from the records prepared for release:

- The names of adult witnesses, Mr. Tubby's family members, and others mentioned by interviewed individuals were redacted to initials. In instances where a family member shared the last name of Mr. Tubby, only the first names were redacted to initials.
- Dates of birth, home addresses, home and personal cellular telephone numbers, employment information, signatures, and other information that would identify these individuals.
- Audio recordings of telephone calls made from jail by a family member of Mr. Tubby. The content of the audio recordings is summarized in the DCI case reports.
- Criminal history information and vehicle check information of those interviewed or mentioned.

In performing the balancing test, I determined that 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, I determined that 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.

Pursuant to the Wis. Stat. § 19.35(1)(a) balancing test, certain redactions have been made to the Facebook pages included in the DCI case file. The redacted information consists of contacts, names, and images of various persons, including juveniles, unrelated to this investigation as well as a website address that provides access to this information. In applying the balancing test, I determined that 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.

I redacted the images of juveniles mentioned within the requested records pursuant to the Wis. Stat. § 19.35(1)(a) balancing test. Revealing the images of juveniles is not essential to understanding the requested records. In performing the balancing test, I 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. Additionally, well-established public policy recognizing the confidentiality and privacy of children and juveniles is expressed in Wis. Stat. §§ 48.396 and 938.396. I find 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).

In addition to the overall redactions set forth thus far, certain other specific types of redactions have been made from the records prior to public release, for the reasons explained below.

Birthdates, social security numbers, and driver's license numbers of individual persons have been redacted to protect against identity theft or other unauthorized use following any subsequent disclosure. In performing the public records balancing test pursuant to Wis. Stat. § 19.35(1)(a), I concluded that 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.

FBI numbers or information indicating whether or not FBI numbers exist has been 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 impermissibly would indicate the existence or non-existence of federal criminal history.

A state identification number has been 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). I find 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.

National Crime Information Center (NCIC) information has been redacted. NCIC information is provided to law enforcement personnel only, require certification to access, and is confidential and prohibit secondary dissemination. Disclosure of such information by

DOJ in violation of the prohibition would preclude future information sharing and significantly impair other cooperative law enforcement efforts between DOJ and other law enforcement agencies and organizations. In performing the public records balancing test pursuant to Wis. Stat. § 19.35(1)(a), I concluded the public interest in access to NCIC information and in cooperating with other law enforcement agencies and organizations outweighs any public interest in disclosure of this information. *Cf. Linzmeyer*, 254 Wis. 2d 306, ¶¶ 30, 32, 39. Additionally, I concluded that the public interest supports maintaining the confidentiality of these law enforcement investigative techniques and use of technology and the results, to preserve the effectiveness of those confidential techniques and technology, which would be undermined by disclosure. Applying the public records balancing test, I determined that the public interest in protecting the ability of law enforcement to gather information confidentially when conducting sensitive investigations and in protecting the privacy of citizens involved in those investigations outweighs any public interest in disclosure. *Cf. Linzmeyer*, 254 Wis. 2d 306, ¶¶ 30, 32, 39, 41.

Pursuant to the Wis. Stat. § 19.35(1)(a) balancing test, organ donor information has been redacted from Transaction Information for the Management of Enforcement (TIME) System reports. In applying the balancing test, I determined that the public interest in respecting the privacy of individuals' organ donation information, and 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.

Pursuant to the federal Driver's Privacy Protection Act (DPPA), which prohibits release of personal information and highly restricted personal information in response to a public records request, personal information, as defined in DPPA, contained within the DCI records that was obtained from the Wisconsin Department of Transportation (DOT) Division of Motor Vehicles (DMV) database has been redacted. *See* 18 U.S.C. § 2721 et seq.; *New Richmond News v. City of New Richmond*, 2016 WI App 43, 881 N.W.2d 339.

Information that would reveal the home address of a law enforcement officer has been redacted pursuant to Wis. Stat. § 19.36(10)(a). To the extent such records and information are not directly governed by Wis. Stat. § 19.36(10)(a), the information has been redacted pursuant to the Wis. Stat. § 19.35(1)(a) balancing test. Well-established public policy recognizing the confidentiality and privacy of the personal contact information of an employer's employees is expressed in Wis. Stat. § 19.36(10)(a). I find that the same underlying public policy of protecting the confidentiality and privacy of personal contact information and the public interest in the expectation of privacy on the part of individuals in their personal lives outweigh any public interest in disclosure of this information.

Home addresses and personal cellular telephone numbers have been redacted pursuant to the Wis. Stat. § 19.35(1)(a) balancing test. In performing the balancing test, I 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, 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. 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). I find 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.

Direct telephone numbers assigned to specific law enforcement officers have been redacted pursuant to the Wis. Stat. § 19.35(1)(a) balancing test because these numbers are not made public and must remain confidential. In applying the public records balancing test to these telephone numbers, I concluded 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 law enforcement officers. Allowing the direct telephone numbers of 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.

A potentially nonpublic cell telephone number for a public employee has been redacted from the records pursuant to Wis. Stat. § 19.36(10)(a). To the extent the number is not directly governed by Wis. Stat. § 19.36(10)(a), the number has been redacted pursuant to the Wis. Stat. § 19.35(1)(a) balancing test. In performing the balancing test, I 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. 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). I find 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.

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 has been redacted from the records prior to release.

Specific information regarding the medical treatment of Mr. Tubby 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. I find 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.

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. In performing the public records balancing test pursuant to Wis. Stat. § 19.35(1)(a), I determined that 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.

Information involving confidential law enforcement investigative technology and techniques has been redacted to preserve the effectiveness of the confidential technology and 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), I concluded 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.

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. In performing the balancing test, I determined that 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 19, 2018 shooting incident have not been redacted from the records.

Payroll numbers for Green Bay Police Department officers and Brown County Sheriff Department deputies, which are analogous to social security or other economically valuable individually identifiable information for these officers, have been redacted to protect against identify theft or other unauthorized use following any subsequent disclosure. In performing the public records balancing test pursuant to Wis. Stat. § 19.35(1)(a), I concluded that the public policy in favor of protecting the confidentiality of this economically valuable individually identifiable information and preventing its misuse upon any subsequent disclosure outweighs any public interest in disclosure of the payroll numbers of individual law enforcement officers.

Login information for a computer in the Brown County Jail has been redacted pursuant to the Wis. Stat. § 19.35(1)(a) balancing test to protect against unauthorized use following any subsequent disclosure. Disclosure of the login information would allow unauthorized access and create a security risk to law enforcement and correction officers, personnel, prisoners, records, and jail systems. In performing the balancing test, I determined that the public interest in protecting the security of law enforcement and

corrections officers, personnel, prisoners, records, and jail systems outweighs any public interest in the computer login information. *Cf. Linzmeyer*, 254 Wis. 2d 306, ¶¶ 25-26, 30, 41.

There were two squad camera video recordings each for Officer Wernecke and Officer Stevens. Although all recordings are documented in reports included with this release, one squad camera video recording for each officer has not been produced for the reasons explained in the next paragraph. Squad camera videos from the Green Bay Police Department, a cell phone video taken by a bystander, and a 3D reconstruction video, as described in reports **18-7807/24**, **18-7807/44**, **18-7807/45**, **18-7807/46**, and **18-7807/53**, have been prepared for release. These recordings are included with this records release under the report numbers associated with review of the related recordings, rather than under acquisition report number **18-7807/22**. However, the first approximately 40 minutes of routine patrol video captured in the squad recording documented in DCI report **18-7807/45** and the final approximately 15 minutes of the squad video recording documented in DCI report **18-7807/46** have not been included with this release as they did not contain footage of investigatory interest as explained further in the next paragraph. The name of the bystander at the incident and the names of individual officers appear within the digital record link name in the links list available with this records release.

The DCI case file documents receipt of numerous other squad video, body camera, and Bearcat video recordings, and a recording from an exterior surveillance camera from the Brown County Jail, which were collected by DCI for review, as noted within acquisition reports and/or in individual reports documenting DCI's review of these recordings. The video recordings identified by DCI investigators during review as containing the best coverage of the incident are included with the records being produced for this public records release as described above with minimal redactions made for reasons set forth elsewhere in this letter. However, the squad video recordings documented in reports numbered **18-7807/49**, **18-7807/50**, and **18-7807/55**, which were reviewed as documented within those reports or within reports documenting interviews of the listed officers, have not been produced for release at this time due to space constraints, the very large investigatory file, and the substantial time and resources necessary to review this material. Most of the footage in these recordings do not capture the incident, due to the angle of the recordings; the remaining video and the audio content in these recordings is substantially duplicative of the video recordings that are included in this release or do not depict scenes of investigatory interest. Producing copies of the additional squad and camera video recordings listed in reports, **18-7807/47**, **18-7807/48**, **18-7807/49**, and **18-7807/50**, with necessary redactions completed, would require a substantial amount of staff time and resources. The public records law does not impose such heavy burdens on a record custodian that normal functioning of the office would be severely impaired and does not require expenditure of excessive amounts of time and resources to respond to a public records request. *Schopper v. Gehring*, 210 Wis. 2d 208, 213, 565 N.W.2d 187 (Ct. App. 1997); *State ex rel. Gehl v. Connors*, 2007 WI App 238, ¶ 17, 306 Wis. 2d 247, 742 N.W.2d 530. Individuals may request additional recordings by specifying what they seek by report number. Such requests should be made through DOJ's regular public records request channels and will be processed accordingly. The related reports, which are included in this public records release, document the contents of these additional recordings.

DCI report number **18-7807/63** documents DOJ's receipt of the autopsy and toxicology records for Mr. Tubby, provided by the Dane 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, have been wholly redacted from the release. Those records were provided to DOJ by the Dane County Medical Examiner's Office on the condition that the reports would not be shared with any person outside the criminal investigation, and the medical examiner's office would not provide the reports to DOJ without DOJ's agreement to those conditions. In performing the public records balancing test pursuant to Wis. Stat. § 19.35(1)(a), I determined there is a public interest in honoring the conditions under which the medical examiner's reports were provided to DOJ and in cooperating with the medical examiner's office so as to encourage the current and future joint law enforcement efforts of our agencies. To not honor the conditions by disclosing the reports would preclude future record-sharing and significantly impair cooperative law enforcement efforts between DOJ and the Dane County Medical Examiner's Office. I concluded that the public interest in effective investigation of crime and effective law enforcement, which is furthered by honoring the conditions under which the Dane County Medical Examiner's Office provided the reports to DOJ, outweighs any public interest in disclosure by DOJ of the reports. *Cf. Linzmeyer*, 254 Wis. 2d 306, ¶¶ 30, 32, 39. If desired, the medical examiner's records may be requested directly from the Dane County Medical Examiner's Office records custodian.

Only one copy of records for which duplicate copies exist has been included with the records prepared for release. *Stone v. Bd. of Regents*, 2007 WI App 223, ¶ 20, 305 Wis. 2d 679, 741 N.W.2d 774.

The law permits DOJ to impose fees for certain "actual, necessary and direct" costs associated with responding to public records requests. Wis. Stat. § 19.35(3). Pursuant to Wis. Stat. § 19.35(3)(f), DOJ may require prepayment for the costs of locating (if applicable), copying, and mailing the requested records if the total amount exceeds \$5.00. Pursuant to Wis. Stat. § 19.35(3)(e), in this instance, DOJ is waiving its fees, and 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,

A handwritten signature in blue ink, appearing to read "Paul M. Ferguson", with a long horizontal flourish extending to the right.

Paul M. Ferguson
Assistant Attorney General
Office of Open Government

PMF:cjm