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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2014AP2360

DENNIS A. TEAGUE,

Plaintiff-Appellant,

LINDA COLVIN AND CURTIS WILLIAMS,

Intervening Plaintiffs-Appellants,

v.

J. B. VAN HOLLEN, WALT NEVERMAN, DENNIS FORTUNATO AND BRIAN O'KEEFE,

Defendants-Respondents.

ON APPEAL FROM THE CIRCUIT COURT FOR DANE COUNTY, CASE NO. 10-CV-2306, THE HONORABLE JUAN B. COLAS PRESIDING

RESPONSE BRIEF OF DEFENDANTS-RESPONDENTS

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STATEMENT OF THE ISSUES

1. The public records law requires that an authority disclose a requested record unless the strong presumption of disclosure is overcome. Here, based on the submission of search parameters, the Wisconsin Department of Justice (DOJ) produced a criminal history report with warnings and instructions about its uses and limits. Does the public records law require that DOJ keep the report secret?

Trial court answered: no

2. Wisconsin Stat. § 19.70 provides a mechanism for correcting information in records pertaining to an individual. Here, there are no criminal history records maintained by DOJ pertaining to the appellants. Does Wis. Stat. § 19.70 require DOJ to correct a record?

Trial court answered: no

3. Equal protection prevents government actors from irrationally treating similarly situated persons differently. Here, all requests for criminal histories are subject to the same potential procedures. Histories are returned when there is a sufficiently close match, and the reports state that the histories may not be conclusive. Does DOJ violate equal protection by providing the reports?

Trial court answered: no

4. Procedural due process may protect reputations but only if the government states something improper and injurious, and only if the injury is a tangible inability to find employment. Here, DOJ produced criminal history reports

that stated upfront that they may not actually correspond to the people in question, and that instructed a requester to make further inquiries. At trial, the appellants did not demonstrate tangible harm. Did DOJ violate procedural due process?

Trial court answered: no

5. Substantive due process protects limited fundamental rights against government intrusion. Teague identifies no fundamental right at issue here. Did DOJ violate substantive due process?

Trial court answered: no

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested because the defendants-respondents' arguments are fully presented in this brief. Publication is not requested because the appellants' arguments may be properly rejected based on established principles and clear laws.

STATEMENT OF THE CASE

Dennis Antonio Teague and two intervenors[1] sued regarding criminal history records maintained by the Wisconsin Department of Justice. Teague named the Attorney General and certain Department of Justice

[1] Most proceedings in this case focused on Teague, and facts specific to the intervenors do not generally matter. This brief addresses the common issues in terms of Teague.

administrators (collectively, DOJ) as defendants.[2] DOJ maintains its criminal history database pursuant to Wis. Stat. § 165.83(2), which requires DOJ to obtain fingerprints, descriptions, photographs, and other data on persons who have been arrested for felonies and certain other offenses, and also to store information about the resulting legal actions. The database contains information concerning around 1.3 million people. (R. 109 at 1.)

The public may request searches of the database. Teague's complaint arises from the fact that someone with a criminal history, his cousin Anthony Terrell Parker, used "Dennis Antonio Teague" as an alias. (R. 52 at 3.) Parker also has a birth date listed that is similar to Teague's. (R. 52 at 3.) As a result, a search of Teague's name and birth date generates a report with Parker's name, picture, and criminal history. (R. 52 at 3.) That report also has a litany of warnings and instructions about its uses and limits. (R. 106:Ex. 30.) Teague alleges that returning Parker's report based on a search of Teague's name is illegal.

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[2] One defendant sued in his official capacity, former attorney general J.B. Van Hollen, no longer holds that office. The successor of public officers may be automatically substituted as a party. Wis. Stat. § 803.10(4)(a). Regardless whether this Court issues a substitution order, any misnomer may be disregarded for purposes of deciding the case. *Id.*

I. Procedural background

At summary judgment, the circuit court dismissed four of Teague's claims:

- Violation of Wis. Stat. § 19.67(1), regarding data collection
- Violation of Wis. Stat. § 19.35, regarding the public records law's balancing test
- Violation of former Wis. Stat. § 19.365(1), now Wis. Stat. § 19.70, regarding personal information practices
- Equal protection

And the court allowed two claims to proceed:

- Procedural due process
- Substantive due process

(R. 52.) After a bench trial, the circuit court dismissed the two remaining claims about due process. (R. 109.)

On appeal, Teague raises arguments about all dismissed claims with the exception of the Wis. Stat. § 19.67(1) data collection issue. Teague states in his brief that, for the most part, he adopts the facts as stated by the circuit court in its summary judgment decision and as found by the court in its post-trial decision. (Teague Br. at 4.)

II. Criminal history reports

DOJ's Crime Information Bureau maintains a criminal history database containing information from law enforcement agencies, the Wisconsin Department of Corrections, prosecutors, and the courts. (R. 52 at 2.)

The database includes names, aliases, birthdates, and information about arrests and criminal charges, among other information. (R. 52 at 2.) DOJ accepts information only from authorized entities and by approved means that meet the Bureau's standards for "completeness, accuracy and reliability." (R. 52 at 2.) Teague does not challenge the collection methods or sources of information, and this brief does not address those topics further.

The criminal history records in the database each correspond to a particular person, identified by fingerprints. (R. 52 at 2.) When the Bureau receives a record not already associated with fingerprints, it creates a new and unique State Identification Number that associates the name provided with fingerprints and records. (R. 52 at 2.) The associated name is the "primary" or "master" name. (R. 52 at 2; R. 109 at 1.) If records are later received with matching fingerprints, but under a different name, the new name is added to the existing State Identification Number as an alias. (R. 52 at 2.)

The public may request searches of the database based on, at a minimum, a first and last name and birth date. (R. 52 at 2; R. 109 at 2.) Most searches are submitted online. (R. 120 at 50-52.) The quantity ranges from 13,000 to more than 22,000 requests per week (R. 120 at 50-52), and adds up to around 800,000 requests per year (R. 121 at 130). Searches are for likely matches, if any, and submitted names are compared to both "primary" names and aliases.

(R. 52 at 2-3.) If a match is found that is sufficiently close based on algorithms, a response is automatically generated. (R. 52 at 2.) If a match is close, but not sufficiently so based on the system's parameters, a Bureau employee determines the appropriate response. (R. 52 at 2-3.) If a match is not close, no criminal history report is generated. (R. 52 at 3.)

Here, search requests were made using "Dennis A. Teague" and "Dennis Antonio Teague" and his birth date of October 4, 1982. (R. 52 at 3.) Teague is not listed as a primary name in the database. (R. 52 at 3.) However, Teague's cousin, Anthony Terrell Parker, is listed, and Parker has used Dennis Antonio Teague as an alias. (R. 52 at 3; R. 116 at 150.) Parker also has a similar birth date listed of October 10, 1982. (R. 52 at 3.)

That input was sufficiently close to generate a report of Parker's criminal history. (R. 52 at 3.) Because this case is entirely about the report, the following quotes it in detail. In particular, the following quotes a report current as of the June 2014 trial. (R. 106:Ex. 30 (color); Teague App. at 40-50 (black and white version of the exhibit).) The record contains older versions of reports, which have disclaimers and a similar structure, but they are shorter and are not identical to the more recent version. (*See* R. 52 at 15-20.) Teague's arguments do not turn on any differences between the older and newer reports. That is consistent with the fact that he seeks forward-looking relief, meaning the most

current versions of the reports are what matter. (R. 122 at 3; Teague Br. at 2.)

The report begins with a header, "Department of Justice Crime Information Bureau," and states a request and report date (05/30/2014). (R. 106:Ex. 30 at 1.) It then states:

> This criminal background check was performed by searching the following data submitted to the Crime Information Bureau:
>
> | | |
> |---|---|
> | Name | DENNIS A TEAGUE |
> | Date of Birth | 10/04/1982 |
> | Sex | U |
> | Race | U |

After that statement of search parameters, the following qualifications, warnings, and instructions appear, explaining that the report that follows is not necessarily about the actual person whose data was entered:

> IMPORTANT EXPLANATION ABOUT HOW TO UNDERSTAND THIS RESPONSE
>
> **This response reports the result of a criminal history search conducted with the name, date of birth, and any other identifying data you provided. The identifying data you provided is printed above. If you submitted fingerprints with your search request see the statement below.**
>
> **Read this entire explanation, the "How to Read the Following Criminal History Report" section and the "Notice to the Employers" section. Read these sections carefully to understand how this response relates to the indentifying data you provided.**

Printed below these explanations is a Wisconsin criminal history record that has been identified as a possible match to the identifying data you provided.

A criminal history search based on a name, date of birth, and other identifying data that is not unique to a particular person (like "sex" or "race") may result in:

1. Identification of criminal history records for multiple persons as potential matches for the identifying data submitted, or

2. Identification of a criminal history record belonging to a person whose identifying information is similar in some way to the identifying data that was submitted to be searched, but is not the same person whose identifying data was submitted for searching.

The Crime Information Bureau (CIB) therefore cannot guarantee that the criminal history record below pertains to the person in whom you are interested.

You must carefully read the entire Wisconsin criminal history record below in order to determine whether the record pertains to the person in whom you are interested.

Do not assume that the criminal history record below pertains to the person in whom you are interested.

Additional information about finger-based search submissions: Fingerprint-based background checks generally provide a more reliable result and are

> prone to fewer false matches due to the specific indentifying features of fingerprints.[3]

(R. 106:Ex. 30 at 1; Teague App. at 40.)

Those warnings are followed by another heading (which, in the actual report, is in red), and more specific instructions about how to read the report:

> HOW TO READ THE FOLLOWING CRIMINAL HISTORY REPORT
>
> **The criminal history reported below is linked by fingerprints to the name appearing directly after these explanatory sections . . . .**
>
> It is not uncommon for criminal offenders to use alias or fraudulent names and false dates of birth, sometimes known as "identify theft."
>
> **If the name you submitted to be searched is DIFFERENT from the "Master Name" below**, the Wisconsin criminal history record below may belong to someone other than the person whose name and other identifying data you submitted for searching. If an alias or fraudulent name used by the person who is the "Master Name" is similar to the name you submitted for searching, that does not mean that the person whose name you submitted for searching has a criminal history. . . .
>
> . . .
>
> **To determine whether the Wisconsin criminal history below actually belongs to the person whose name and other identifying information**

[3] To clarify, although this general disclaimer mentions fingerprints, the trial testismony was that fingerprint searches were not available to the general public (*see* R. 119 at 19-20), but that searches by certain government entities may have different mechanisms available involving fingerprints (*see* R. 119 at 18, 65-66).

> **you submitted for searching**, compare the information reported below to the other information you have obtained about that person. Inconsistencies may indicate that the criminal history reported below does not belong to the person whose name and other identifying information you submitted for searching. You may need to ask for clarification from the person whose name and other identifying information you submitted for searching.
>
> **Before you make a final decision adverse to a person based on the following criminal history record**, in addition to any other opportunity you offer the applicant to explain the following criminal history record, please notify the applicant of:
>
> 1. His or her right to challenge the accuracy and completeness of any information contained in a criminal history record, and
>
> 2. The process for submitting a challenge.
>
> [What follows is information about how to submit a free challenge, among other information.]

(R. 106:Ex.30 at 2; Teague App. at 41.) Lastly, and still before a criminal history is reported, there is yet another heading and warning specifically for employers, which states in part:

> NOTICE TO EMPLOYERS
>
> It may be a violation of state law to discriminate against a job applicant because of an arrest or conviction record. Generally speaking, an employer may refuse to hire an applicant on the basis of a conviction record only if the circumstances of the offense for which the applicant was convicted substantially relate to the circumstances of the particular job. . . .

> Before you make a final decision adverse to an applicant based on the following criminal history record, in addition to any other opportunity you offer the applicant to explain the following criminal history record, please notify the applicant of:
>
> 1. His or her right to challenge the accuracy and completeness of any information contained in a criminal history record, and
>
> 2. The process for submitting a challenge.
>
> [Proving information on how to submit a free challenge]

(R. 106:Ex. 30 at 2-3; Teague App. at 42.)

After these warnings and instructions, there is a criminal history report for Anthony Terrell Parker. The report begins with larger bold type stating, **ANTHONY TERRELL PARKER**, together with Parker's color picture. (R. 106:Ex. 30 at 3 (color); Teague App. at 42.) The report then states information about addresses and birth dates. (R. 106:Ex. 30 at 3.) Below that, it says "Convicted Felon," provides an employer and occupation, if any, and then has a section for "Alias names/Fraudulent data." Parker's report states as aliases: "Anthonu T. Parker," "Anthony T. Parker," and "Dennis Antonio Teague." (R. 106:Ex. 30 at 3.) What follows are several pages of Anthony Terrell Parker's criminal history, where, for each entry, it states:

"Subject Name: ANTHONY TERRELL PARKER." (R. 106:Ex. 30 at 4-11; Teague App. at 43-50.)[4]

DOJ provides a "challenge process" where people like Teague may submit fingerprints and will receive a notarized statement that they do not in fact have a Wisconsin criminal history. (R. 109 at 2-3.) Teague (and the other plaintiffs) has used that process and has an official letter stating that he has no Wisconsin criminal history, which he may provide to others. (R. 106:Ex. 25; Teague App. at 169; R. 116 at 175-76.)

ARGUMENT

With the criminal history reports, DOJ provides information that may help a member of the public discern if a person has a criminal history. Or the information may not, as the reports state upfront. Teague's arguments boil down to asking for different services that he thinks would be better. But his view is not the only view, and it supports no legal claim.

DOJ's name-based method for members of the public to search for records is cost effective, quick, and easy to use with basic information. The flipside is that the searches come with limits, which are stated. (*See* R. 106: Ex. 30 at 4-11.) Teague's idea is that every search should require a fingerprint (Teague Br. at 16), but that approach

[4] As with Teague, neither of the intervening plaintiffs had a criminal history, but persons with their first and last names and the same or similar dates of birth listed did. (R. 109 at 2.)

comes with downsides: additional cost to the requesting public and to the agency; delay based on large volumes of fingerprint information and the loss of the ability for automated responses; concerns with reliability of the print; and the fact that not everyone will have fingerprints available when requesting records. (*See* R. 119 at 19, 64, 70, 146, 151, 153-54, 199; R. 121 at 128-134, 140-41 (discussing various issues related to fingerprint searches submitted by the general public).)[5]

More to the point, just because Teague disagrees with the balance struck using name-based searches does not make the reports unlawful. DOJ provides information that is often useful and accounts for instances like Teague's where it turns out not to be useful.

I. Disclosure of the reports does not run afoul of the public records law.

Teague argues that DOJ is forbidden from disclosing the criminal history report under the public records law balancing test. Whether the public records law is violated is a question of law, subject to de novo review. *John K. MacIver Inst. for Pub. Policy, Inc. v. Erpenbach*, 2014 WI App 49, ¶ 14, 354 Wis. 2d 61, 848 N.W.2d 862. Teague's application

[5] There also was testimony that a single fingerprint model is inconsistent with how law enforcement, such as the FBI, collects and references prints, which involves "ten fully rolled prints, four finger pats, two thumb prints to ensure positive identification." (R. 119 at 67.)

of the public records law is flawed—it is the wrong framework and, even if applicable, it is satisfied.

The Wisconsin public records law governs scenarios where a "requester" makes a public "records" request to an "authority," as defined by statute. *See* Wis. Stat. § 19.32 (defining terms). It is the authority's obligation to timely disclose such records, if they exist, unless a statutory or common law exception applies or, in exceptional cases, where the public interest in nondisclosure outweighs the strong presumption of disclosure. *See John K. MacIver Inst.*, 354 Wis. 2d 61, ¶ 13 (summarizing procedures); Wis. Stat. § 19.35 (access/timing). This framework does not help Teague.

First, there is a mismatch between Teague's complaint and the public records law. Teague does not argue that, as a general matter, criminal histories should not be made public. Rather, he dislikes that a search using his name and birth date yields a report stating Parker's history. He seeks a remedy "[e]njoining [the Bureau] to release records only on a positive fingerprint identification." (Teague Br. at 16.)

In other words, Teague is attempting to apply the public records law to litigate a search process, and not records. However, the public records law governs only the latter. *See* Wis. Stat. § 19.31 (purpose of law is to provide access to information); Wis. Stat. § 19.35(1)(a) (governing

records).[6] Likewise, he points to no authority in the public records law for a court enjoining DOJ in the way he requests. Teague's public records claim should be rejected as lacking a starting point.

Second, even if the public records law were properly at issue, Teague's theory would fail. The law starts with a blanket rule: "a strong presumption of complete openness with regard to public records." *See John K. MacIver Inst.*, 354 Wis. 2d 61, ¶ 16 (citation and quotation marks omitted). Access can be denied only "in an exceptional case." Wis. Stat. § 19.31. It is Teague's burden to show that this is the exceptional case because he is "the party seeking nondisclosure." *John K. MacIver Inst.*, 354 Wis. 2d 61, ¶ 14. He does not meet his burden

Teague points to no statutory or common law exception. Rather, Teague asserts that the balancing test forbids disclosure because the reports defame Teague with false information. But his premise is not correct because he points to no falsity. Teague dislikes the fact that the Parker report was produced in response to a request using his name. The report, however, did not falsely state that it was about the real Teague, and it has warnings telling the reader its limits.

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[6] The circuit court did not rule on this basis (or some other bases discussed in this brief), but this Court may affirm on alternative grounds. *Glendenning's Limestone & Ready-Mix Co. v. Reimer*, 2006 WI App 161, ¶ 14, 295 Wis. 2d 556, 721 N.W.2d 704.

Teague says he is nonetheless concerned about others' perception of him, but "the potential for embarrassment is not a basis for precluding disclosure." *Milwaukee J. Sentinel v. DOA*, 2009 WI 79, ¶ 62, 319 Wis. 2d 439, 768 N.W.2d 700. The correct question is whether important public interests are impacted. *See id.*; *Woznicki v. Erickson*, 202 Wis. 2d 178, 188, 549 N.W.2d 699 (1996) (discussing public policy interests). As the public records law recognizes, the general public interest is in access to information. That interest is served by providing access to histories that come with instructions and warnings that state the information's uses and limits. Teague cannot seriously dispute that the public may benefit from information that, in many instances, will be a useful step in learning whether someone has a criminal history. Such information may protect the requester's safety, or may serve other publically-important purposes: for example, when it comes to jobs or activities involving children or sensitive information, or in the case of violent felonies.

Further, Teague's personal concerns have not been ignored. Not only are there explanations in the reports themselves, but also Teague may preemptively supply the letter provided by DOJ that establishes that he has no Wisconsin criminal history.

Teague argues that DOJ should conduct a formal balancing test for each criminal history report. But he misses the point of the case-by-case balancing test analysis.

When an authority is not disclosing a record, it is important to specifically explain why documents overcome the presumption of disclosure: "In determining whether a public policy exists to overcome the presumption of openness, we apply a balancing test on a case-by-case basis . . . ." *Linzmeyer v. Forcey*, 2002 WI 84, ¶ 25, 254 Wis. 2d 306, 646 N.W.2d 811; *see also John K. MacIver Inst.*, 354 Wis. 2d 61, ¶ 14 (stating that a court should apply the balancing test "when the record custodian has refused to produce the record, in order to evaluate the merits of the custodian's decision" (citation omitted)). But, here, DOJ is conforming to the presumption of openness.

In any event, even if DOJ bore a burden to justify disclosure, the burden would be met. A balancing analysis can be applied to the reports without separately analyzing each because they all have the same relevant characteristics: they state disclaimers, provide criminal history information about an identified person, and include information like aliases. That information may be used to make inquiries to learn if the actual person has the relevant history. Where such inquiries might lead does not change the reasons to make the initial information available. Analyzing this collectively or individually, the result is the same.

II. The criminal history report does not violate Wis. Stat. § 19.70.

Teague seeks to apply another inapt framework, found in Wis. Stat. § 19.70. He asserts that this statute requires DOJ to "correct" the reports that issue when his name and birth date are searched. This argument should be rejected as contrary to the plain language of the statute.

Wisconsin Stat. § 19.70(1) provides in relevant part:

> an individual . . . may challenge the accuracy of a record containing personally identifiable information pertaining to the individual that is maintained by an authority if . . . the individual notifies the authority, in writing, of the challenge. After receiving the notice, the authority shall do one of the following:
>
> (a) Concur with the challenge and correct the information.
>
> (b) Deny the challenge . . . .

As the circuit court correctly concluded, this framework, on its face, is inapplicable. *See State ex rel. Kalal v. Circuit Ct. for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110 (courts apply statutes as plainly written).

The statute covers "the accuracy of a record containing personally identifiable information pertaining to the individual." But Teague points to no record containing inaccurate information about him. Rather, he dislikes that an accurate report about Parker was produced when someone requested a search using Teague's name and birth date. He does not challenge that Parker used Teague as an alias, or that anything else stated about Parker is incorrect.

Thus, the triggering language does not apply for two reasons: (1) there is no existing "record" in possession of DOJ that might be correctable because reports are generated based on input from particular requests, and (2) there is no criminal history record "pertaining to" Teague; there are only histories about other people, including Anthony Terrell Parker. In fact, Teague concedes that "[t]he fact that Teague's name is in a [Bureau] alias table is not what makes Parker's information 'pertain to' Teague." (Teague Br. at 19.) There also is a third reason that Teague's argument fails, related to remedies. The only available statutory remedy is: "correct the information." Wis. Stat. § 19.70(1)(a). But Teague is not asking that information held by DOJ—a criminal history of Parker—be corrected, and he does not allege that Parker's history is incorrect.

Teague cites no support for any other interpretation. Rather, he cites two attorney general opinions, but then does not discuss them. It suffices to observe that those opinions are not about the statute or scenario here. In fact, if anything, their reasoning cuts against Teague. *See* OAG-07-14 (Oct. 15, 2014), 2014 WL 8470382, at *2 (discussing Wis. Stat. § 19.356, and opining that just mentioning a public official's name does not mean a record contains "information relating to" that person); OAG-1-06 (Aug. 3, 2006), 2006 WL 4737914, at *3 (also discussing Wis. Stat. § 19.356, and opining that "the mere fact that the record contains personally identifiable

information about an individual, for example, the individual's name, does not mean that individual is entitled to be notified that the record is proposed to be released").

Teague seems to think that the general definition of "personally identifiable information" is important, but it does not add anything here:

> (5) "Personally identifiable information" means information that can be associated with a particular individual through one or more identifiers or other information or circumstances.

Wis. Stat. § 19.62(5). Teague seems to think that this definition is helpful to him because it refers to information that "can be associated" with a person. (Teague Br. at 18.) However, the definition, standing alone, is not the provision at issue. The provision that matters, Wis. Stat. § 19.70(1), addresses only personally identifiable information "pertaining to the individual." And, as Teague concedes, there is nothing in the Parker report that pertains to him.

At bottom, what Teague seems to have in mind is that Wis. Stat. § 19.70(1) should apply to potential assumptions by third parties, even though the assumptions are disclaimed in the report. Teague's goal cannot be squared with the statute. Hypothetical assumptions are not "a record containing personally identifiable information pertaining to the individual."

III. Teague does not show an equal protection violation.

Teague argues that DOJ's handling of criminal history requests violates equal protection principles. (Teague Br. at 22.) He concedes, however, that rational basis review applies. (Teague Br. at 22.) His equal protection theory fails for multiple reasons.

A. Teague's assertions about policy promulgation are misplaced.

Teague begins his equal protection argument by discussing agency policy promulgation. (Teague Br. at 22-23.) It is not clear what he has in mind, but it is neither preserved nor on point. It is not preserved because he did not raise promulgation at summary judgment when his equal protection claim was decided. (R. 22 at 26-32; R. 44 at 23-28; R. 52 at 8-10.) *See In re Guardianship of Willa L.*, 2011 WI App 160, ¶¶ 21-27, 338 Wis. 2d 114, 808 N.W.2d 155 (arguments raised for the first time on appeal are subject to forfeiture).

It is not on point because there is no claim in this case about policy promulgation. Teague cites cases about overturning administrative decisions that turn on an unpromulgated policy, but this case is not a judicial review of an administrative decision. *See, e.g., Wis. Tel. Co. v. Dep't of Indus., Labor & Human Relations*, 68 Wis. 2d 345, 362-64, 228 N.W.2d 649 (1975) (reversing an agency decision because, among other flaws, it was based on sex

discrimination guidelines that were not promulgated according to sec. 227.023). In any event, Teague does not support the idea that DOJ needs to promulgate how it carries out searches technologically.

B. Disclosure of the criminal history reports does not violate equal protection principles.

Aside from his promulgation argument, Teague's equal protection argument fails for several reasons. Teague's argument is based on his view that DOJ practices improperly create two classes of people:

1) People with no criminal history whose name has not been used by someone with a history.

2) People with no criminal history whose name has been used by someone with a history.

Teague thinks there is no reason to issue reports in the latter case and that therefore it violates equal protection. This line of argument fails for several reasons.

The Equal Protection Clause "ensures that people will not be discriminated against with regard to 'statutory classifications and other governmental activity.'" *Thorp v. Town of Lebanon*, 2000 WI 60, ¶ 37, 235 Wis. 2d 610, 612 N.W.2d 59 (citing a U.S. Supreme Court case).[7] It is "designed to assure that those who are similarly situated will be treated similarly." *State v. Smith*,

[7] As with all of his constitutional claims, Teague does not distinguish between Wisconsin's Constitution and the U.S. Constitution.

2010 WI 16, ¶ 15, 323 Wis. 2d 377, 780 N.W.2d 90 (citation and quotation marks omitted).

Generally, such challenges are subject to either strict scrutiny or rational basis review. *See Thorp*, 235 Wis. 2d 610, ¶ 37. Teague concedes it is the latter here.

That means the classifications are upheld unless they bear no rational relationship to serving "a legitimate government interest." *Aicher ex rel. LaBarge v. Wis. Patients Comp. Fund*, 2000 WI 98, ¶ 57, 237 Wis. 2d 99, 613 N.W.2d 849 (citation omitted). Under rational basis, "perfection 'is neither possible nor necessary.'" *Id.* This recognizes "that classifications often are imperfect and can produce inequities." *Id.* Such classifications are nonetheless upheld if they conceivably advance a governmental objective, even if the court must construct that rationale. *Id.*

A basic problem with Teague's argument is that no governmental actor or law is doing something that causes the alleged class-based harm to him. *See Thorp*, 235 Wis. 2d 610, ¶ 37 (equal protection is applicable to governmental acts). DOJ does not classify him: the criminal history reports do not require Teague to do anything, and they do not purport to state a truth about Teague. DOJ, rather, provides potentially useful information in response to requests from others. Teague's fear is that someone else will ignore the disclaimers and instructions,

but the act of ignoring disclaimers is not state action.[8] His claim thus lacks basic development.

Further, even if applicable here, Teague does not show that the Equal Protection Clause is violated.

First, DOJ is not treating him differently or discriminatorily. *See Thorp*, 235 Wis. 2d 610, ¶ 37 (Equal Protection Clause "ensures that people will not be discriminated against"). Rather, for every search requested, the input is run through the same system. (R. 52 at 2-3; R. 109 at 2.) In fact, what Teague dislikes is that DOJ does *not* distinguish between people, but rather runs the searches no matter who the actual person is. That does not state an equal protection claim.

Second, even if Teague's class categories are entertained, they are rational. It makes sense that, when a request is made using a name that matches an alias and with a similar birth date, that the requester be given a report for the person with the alias. It could be that the person requesting a search is being duped, as that is the point of using an alias. The report, which comes with a color photo, will help the requester figure that out.

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[8] Teague asserts that the search results are "prima facie evidence of any conviction," as if that rule applies to him, but that does not make sense. (Teague Br. at 24.) Teague refers to Wis. Stat. § 973.12, governing sentencing for persistent or repeat offenders. Its mention of reports as prima facie evidence necessarily refers to evidence for someone like Parker (because it is his criminal history), not someone like Teague (whose identity was co-opted).

Teague's premise is that DOJ could be making this information available in a different way, but that view does support his constitutional claim. State actors are not required to administer programs perfectly, and that is especially true when the applicable scrutiny is rational basis. *See Aicher ex rel. LaBarge*, 237 Wis. 2d 99, ¶ 57 (stating that "perfection is neither possible nor necessary" and "that classifications often are imperfect and can produce inequities" (citation and quotation marks omitted)). Further, Teague's view of the ideal is not universally accepted, especially considering efficiency (those making requests have an interest in fast, simple-to-request, and relatively inexpensive reports) and the fact that not all requesters will have fingerprints to submit. Under Teague's view, those requesters would be out of luck.

Teague's application of the five-factor test for statutory challenges, *see Aicher ex rel. LaBarge*, 237 Wis. 2d 99, ¶ 58 (stating five criteria applied to a statutory challenge), yields the same result. (R. 52 at 9-10.) The five criteria are whether (1) the class is based on distinctions "which make one class really different from another;" (2) the class is "germane to the purpose of the law;" (3) the class is not limited to "existing circumstances;" (4) the class applies equally to the class members; and (5) there is reason to think the different treatment is for "the public good." *See id.* DOJ's practices pass muster under this test as well.

First, there is a difference between a matching alias (and similar birth date) and no match. Teague argues that this distinction is inadequate because, in his particular case, the report was not useful. (Teague Br. at 27.) But the right question is whether it makes sense to provide reports when someone searches for an alias. As already discussed, it makes sense because, among other reasons, the requester might be facing an imposter.

Similarly, the distinction is germane to the purpose: it is a useful first step in detecting a trick, or in discerning if someone has a relevant criminal record. Teague thinks there are better ways but, again, that is neither the right question nor the only view. (*See* R. 119 at 19, 64, 70, 146, 151, 153-54, 199; R. 121 at 128-134, 140-41.)

The third and fourth criteria are met because the classification is applied equally across the class. The searches are subject to the same algorithms or human intervention, and they allow for new circumstances—new aliases and birth dates. *See id.* This is not a case of Teague's being singled out to be run through a separate system.

Finally, the classification serves a public purpose. Teague implicitly concedes that the public has an interest in learning of criminal histories, and receiving a report based on an alias serves that purpose, as does receiving it quickly and relatively easily.

Teague's equal protection claim should be rejected.

IV. Teague's procedural due process challenge lacks merit.

Teague's procedural due process premise is about reputation. He asserts that someone may decide that the report about Parker is about Teague, without verifying whether that is true. The most obvious flaw in Teague's argument is that his reputation-based claim requires proof of tangible harm. The circuit court found, as a matter of fact, that Teague did not prove harm.

Teague's due process claim was decided after a bench trial. On review, the circuit court's "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Wis. Stat. § 805.17(2).

A. Teague does not refute the factual finding of no tangible harm.

Teague's claim is injury to reputation, but "[r]eputation by itself is neither liberty nor property within the meaning of the due process clause of the fourteenth amendment." *Weber v. City of Cedarburg*, 129 Wis. 2d 57, 73, 384 N.W.2d 333 (1986). Rather, Teague must show that he was stigmatized *and* that he suffered a "tangible" loss. *See Abcarian v. McDonald*, 617 F.3d 931, 941 (7th Cir. 2010) (must suffer "a tangible loss of . . . employment opportunities as a result of public disclosure"); *see also Stipetich v. Grosshans*, 2000 WI App 100, ¶ 24, 235 Wis. 2d 69, 612 N.W.2d 346 (requiring "alteration or elimination of a

right or status"). Further, that tangible loss must "significantly undermine opportunities for future employment." *Taplick v. City of Madison Pers. Bd.*, 97 Wis. 2d 162, 173, 293 N.W.2d 173 (1980).

The circuit court found, as a matter of fact, that "[t]he criminal history responses have not altered a legal status for any of the plaintiffs or prevented their employment or deprived them of any other right or privilege." (R. 109 at 3; Teague App. at 3.) Teague does not refute that factual finding. Rather, he challenges whether the reports themselves "defamed" him (Teague Br. at 30), and he asserts that "state law requires or allows reliance on" the reports. (Teague Br. at 37.)

But these assertions are not examples of tangible harm to him, much less a significant undermining of his employability. Teague may have in mind that, theoretically, if state law required *blind* reliance on a report generated from a search, then harm could result. But he does not back that theory up. He points to nothing in state law requiring that an entity accept the DOJ reports as stating a truth about a name used as a search term. Further, even if that were hypothetically the case, it would only matter if that manifested into harm to Teague.

Instead, Teague cites cases addressing child abuse and sex offender scenarios. (Teague Br. 35-36.) However, those cases are about challenging allegations, not about aliases. *See*, *e.g.*, *Dupuy v. Samuels*, 397 F.3d 493, 496-498

(7th Cir. 2005) (discussing findings related to child abuse and the ability to challenge them); *Kirby v. Siegelman*, 195 F.3d 1285, 1291-92 (11th Cir. 1999) (addressing someone not convicted of a sex crime designated as a sex offender).

At bottom, Teague makes no real attempt to show that the tangible-harm finding fails the "clearly erroneous" test. *See* Wis. Stat. § 805.17(2) (applicable standard). What matters is whether the court's findings were "against the great weight and clear preponderance of the evidence." *Phelps v. Physicians Ins. Co. of Wis.*, 2009 WI 74, ¶ 39, 319 Wis. 2d 1, 768 N.W.2d 615. Teague never meaningfully addresses that evidentiary question.

And, even if he had, he would have fallen short. In his testimony, Teague could not state that any employer had relied on the DOJ reports to his detriment (*see* R. 116 at 177-80 (merely noting one vague reference to his "background")), and Teague admitted that he has been able to find a variety of employment (R. 116 at 164-65, 167-70.) There was evidence that any past trouble with employment could be attributed to other causes. (R. 116 at 171-73, 190-92.) The other plaintiffs offered even less. Plaintiff Linda Colvin cited one instance of an employment screening organization's misunderstanding, but her testimony went on to explain that the organization ultimately "retracted" its objections. (R. 118 at 85; Teague App. at 202.) And the remaining intervening plaintiff, Curtis Williams, offered no

testimony at all. (*See* R. 122 at 44, 92-93 (discussing lack of testimony).)

Because tangible harm is a required element, this Court need not analyze the claim further.

B. Teague's procedural due process claim also fails for additional reasons.

For the sake of completeness, the following addresses other flaws in Teague's procedural due process theory. The general due process framework is as follows:

> The Wisconsin and United States Constitutions prohibit governmental actions that would deprive any person of life, liberty or property without due process of law. " 'In procedural due process claims, the deprivation by state action of a constitutionally protected interest in 'life, liberty, or property' is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process of law.' "

State v. Hazen, 198 Wis. 2d 554, 558, 543 N.W.2d 503 (Ct. App. 1995) (footnote omitted).

First, Teague's basic premise—that DOJ has harmed his reputation and, thus, deprived him of something—is flawed because it turns on speculation by other people, not statements by DOJ. The reports generated by DOJ do not purport to offer a truth about Teague. Rather, the criminal history information is about Parker.

Teague's premise is that someone might decide that he has a criminal record, despite the disclaimers, but that does not support a claim against DOJ. For example, in the context of a firing, the Wisconsin Supreme Court has stated:

"Speculation by other citizens in the community, as to why the plaintiff was not rehired, does not constitute harmful governmental action for which redress may be secured under the due process clause of the fourteenth amendment." *Richards v. Bd. of Educ. Joint Sch. Dist. No. 1, City of Sheboygan*, 58 Wis. 2d 444, 454-55, 206 N.W.2d 597 (1973). Likewise, Teague's worry that others will speculate is not government action by DOJ.

Second, even if due process protections were triggered here, that simply means Teague should have access to a reasonable process. He has that access. In *Richards*, the supreme court explained that if the state had made "any charge against [the plaintiff] that might seriously damage his standing and associations in his community," then "due process would accord an opportunity to refute the charge." *Richards*, 58 Wis.2d at 454.

Here, Teague may obtain a letter verifying that he has no criminal record (and he has received such a letter). He may provide that letter to anyone he pleases. Teague nonetheless wants more process: that all searches require a fingerprint. But that does not balance the interest of the requesting public, which has an interest in inexpensive and fast searches that can be achieved without fingerprints (thus, allowing greater public access). DOJ's approach achieves that goal, while still allowing Teague to dispel speculation. That balance makes sense. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (stating

the factors for determining sufficient process, including the private interest, risk of an erroneous deprivation, value of additional safeguards, and the governmental burden).

Finally, Teague devotes argument to his expert witness testimony, but none of this fixes the flaws in his theory. Further, the circuit court was not required to conclude that expert testimony was useful: the criminal history reports were in evidence, and they were not written for a technical audience.

Teague primarily discusses Dr. Sam Racine, who offered a more elaborate version of Teague's theory that some people will speculate that the Parker report is about Teague. Teague's other expert, on "plain language writing," offered similar thoughts. (*See* R. 117 at 7-9, 49.) But none of this was legally relevant because it was about others' speculation. *See Richards*, 58 Wis. 2d 444, 454-55 (speculation by others is not governmental action under due process principles).

Further, Teague seems to think that the circuit court was required to credit his experts' opinions. But the "trier of fact is not bound by the opinion of an expert; rather, it can accept or reject the expert's opinion." *In re Commitment of Kienitz*, 227 Wis. 2d 423, 438, 597 N.W.2d 712 (1999). And, here, the testimony was not compelling. For example, Dr. Racine said that she specialized in "communications within the workplace" and was employed as the "director of the sales preparedness program" with a corporation,

"help[ing] prepare teams as they make presentations to clients." (R. 116 at 15, 17.) She had never professionally worked with law enforcement, had no knowledge about who requests Wisconsin criminal history reports, and had never seen a criminal history report until being contacted by plaintiffs' counsel. (R. 116 at 49-50, 83.) None of this suggests that she had something vital to say.

V. Teague's substantive due process argument lacks basic development.

Finally, Teague argues that his substantive due process rights are violated. (Teague Br. at 37-39.) This argument lacks basic development and should be summarily rejected. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (courts generally do not address issues that are inadequately briefed).

"A court's task in a challenge based on substantive due process 'involves a definition of th[e] protected constitutional interest, as well as identification of the conditions under which competing state interests might outweigh it.'" *State v. Wood*, 2010 WI 17, ¶ 18, 323 Wis. 2d 321, 780 N.W.2d 63 (citation omitted). "Official conduct that represents an abuse of office . . . violates the substantive component of the due process clause only if it 'shocks the conscience'." *See Christensen v. Cnty. of Boone, IL*, 483 F.3d 454, 464 (7th Cir. 2007).

Teague cites no support for the proposition that a protected interest is in play here. He does not assert, nor

could he, that any of the traditionally protected matters—"relating to marriage, family, procreation, and the right to bodily integrity"—are at issue. *See Albright v. Oliver*, 510 U.S. 266, 272 (1994) (discussing the limited reach and the reluctance to expand the rights). Even if he had, Teague does not attempt to show this case "shocks the conscience" in a way that would justify an expansion of substantive due process. Providing criminal histories with disclaimers—and with certifications available regarding non-criminality—is not shocking.

In fact, after citing the general concept (Teague Br. 37), Teague cites no cases in the body of this argument at all (Teague Br. at 38). Much less does he attempt to show that substantive due process should be expanded. *See, e.g.*, *Thorp v. Town of Lebanon*, 2000 WI 60, ¶ 50, 235 Wis. 2d 610, 612 N.W.2d 59 ("the United States Supreme Court expressed its reluctance to expand the concept of substantive due process."); *Lambert v. Hartman*, 517 F.3d 433, 444 (6th Cir. 2008) (recognizing "the hurdle required for the recognition of a *new* fundamental right"). Teague's claim should be summarily rejected.

And, in any event, "there is no fundamental right to one's own reputation." *Zutz v. Nelson*, 601 F.3d 842, 850 (8th Cir. 2010) (citing *Paul v. Davis*, 424 U.S. 693, 701 (1976)); *Lifton v. Bd. of Educ. of City of Chicago*, 290 F. Supp. 2d 940, 944-45 (N.D. Ill. 2003) ("The liberty interest in her good reputation is not a 'fundamental' right

or liberty interest protected under the theory of substantive due process," citing *Washington v. Glucksberg,* 521 U.S. 702, 719–20 (1997)).

Teague also asserts that, regardless of fundamental rights, DOJ's process fails rational basis review. That argument is not preserved. The circuit court stated in its ruling that "Plaintiffs do not make [a rational basis] claim" (R. 109 at 3), and Teague does not explain otherwise.

Further, for reasons already discussed, it is rational to provide an efficient method to request criminal histories. Likewise, searches based on an alias may be useful. DOJ's system properly serves the public interest in access. There is nothing improper about providing those options to the public, especially since the uses and limits are stated upfront, and Teague has an attestation to dispel his concerns about misunderstandings. None of this adds up to a claim.

CONCLUSION

For the reasons stated, the defendants-respondents respectfully request that this Court affirm the district court's dismissal of all claims.

Dated this 17th day of June, 2015.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 7650 words.

Dated this 17th day of June, 2015.

ANTHONY D. RUSSOMANNO
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I hereby certify that:

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I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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Dated this 17th day of June, 2015.

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