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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Dennis A. Teague,
Plaintiff - Appellant, **Case No. 2014AP002360**

Linda Colvin and Curtis Williams,
Intervening Plaintiff-Appellants,
v.

J.B. Van Hollen, Walt Neverman, Dennis Fortunato, and Brian O'Keefe,
Defendant - Respondents.

ON APPEAL FROM DANE COUNTY CIRCUIT COURT
THE HONORABLE JUAN COLAS PRESIDING

REPLY BRIEF OF PLAINTIFF-APPELLANTS

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I. GLOBAL BALANCING CANNOT BE APPLIED TO JUSTIFY RELEASE OF NAME-BASED RECORD REPORTS ON KNOWN VICTIMS OF IDENTITY THEFT.

The parties agree the standard of review is *de novo* and that CIB does not balance competing interests each time it responds to record requests about subjects like Teague because the agency has already "globally" balanced the interests in favor of disclosure. Resp't. Br. at 13

CIB asks the Court to affirm this global balancing for four reasons, all of which should be rejected.

CIB's first claim — that the public records law is not applicable because plaintiffs are "attempting to litigate a search process, and not records" — misstates Teague's complaint. Plaintiffs are not "litigat[ing] a search process." CIB's search algorithms can be as precise or sloppy as CIB chooses without implicating the public records law. Further, CIB can disseminate whatever information it chooses to law enforcement agencies without implicating public records law. However, when CIB chooses to disclose information to public requesters, the public records law and its common law balancing test apply.

The balancing test applies, despite CIB's second argument, both to decisions to withhold information and to release information. Independent of the agency's decision, courts balance the interests when affirming the withholding to the information as in *Hempel v. City of Baraboo,* 2005 WI 120, ¶ 63, 284 Wis.2d 162, 699 N.W.2d 551, reversing withholding, as in *Kroeplin v. DNR,* 2006 WI App 227, 297 Wis.2d 254, 725 N.W.2d 286, affirming release, as in *Linzmeyer v. Forcey*, 2002 WI 84, 254 Wis. 2d 306, 643 N.W.2d 811, or reversing release,

as in *Klein v. Wisconsin Resource Center,* 218 Wis.2d 487, 582 N.W. 2d 44 (1998).

CIB's third justification for global balancing, that all criminal records contain the same kind of information, fails because the record of a person with no criminal history does not contain all the same information as the record of someone with a criminal history. The innocent person's "record" has no picture, no SID number, no list of arrests and convictions. CIB does not respond to Teague's discussion of *Newspapers Inc. v. Breier,* 89 Wis. 2d 417, 279 N.W.2d 179 (1979) (App. Brf. at 10-13), and its observation that the decision to release police blotters is different from the deicision to release rap sheets — even though both records contain some of the same information.

While the results of the common law balancing change depending on all the circumstances, the duty to balance all the public interests does not. While the public interest in protecting the names and addresses of public employees is less strong than in protecting the same information about non-government employees, *Kraemer Brothers, Inc. v. Dane County,* 229 Wis. 2d 86, 599 N.W.2d 5 (Ct. App. 1999), even accurate information about public employees and the performance of their duties must sometimes be withheld under the *de novo* common law balancing test. *See, e.g., Klein v. Wisconsin Resource Center,* 218 Wis.2d 487; *MTEA v. Milwaukee Board of School Directors*, 227 Wis. 2d 779, 802, 596 N.W.2d 403, (1999) *citing Monfils v. Charles*, 216 Wis.2d 323, 575 N.W.2d 728 (Ct. App. 1998); *Weis v. City of Milwaukee,* 208 Wis.2d 95, 559 N.W.2d 588 (1997)(Bablitch, J., concurring, for majority).

The balancing test prohibits global balancing because there are always **other** relevant facts to consider, whether the information sought is about criminal investigations (*Linzmeyer, Breier),* or government operations (*Hempel, Kroeplin),* or the

record subject's colorable fear adverse consequences (*Klein, Monfils, Weiss).*

In its *de novo* review, this Court should weigh all of the "relevant characteristics," including those CIB has ignored: (1) CIB does not clarify whether the report generated is about the person for whom information is sought; (2) CIB's "match" process is stunningly unreliable (See App. Br. at 6, n.3); and (3) CIB knows successful challengers, like Teague, do not have criminal records (A.App. 262-264, 273).

The Court should also weigh the **public** interests (1) in receiving accurate information that is actually about the person for whom the information is sought, and (2) in protecting the reputations and privacy of innocent citizens which the appellate courts explicitly recognized in *Breier, Woznicki*, 202 Wis.2d 178, 549 N.W.2d 699 (1996), and *Kraemer.* It is not, as CIB's brief's fourth argument denigrates, a mere "potential for embarrassment," but the **public** interest in protecting reputations of innocent citizens because we are all potential victims of identity theft.

Because these public interests ignored by CIB outweigh the public interest in disclosing highly defamatory information about the wrong person, this Court should order CIB to stop releasing any record, except the return "No criminal history found," in response to name-based background checks about known successful challengers like Teague.

II. CIB'S INTERPRETATION OF "PERTAIN" IS ABSURD.

CIB's argument that its association of Parker's criminal history information with Teague's name and date of birth (personal identifiers) somehow does not "pertain" to Teague must be rejected because it leads to absurd results.

The real life example of State Bar Numbers (SBNs) makes that absurdity clear. Each SBN is a personal identifier of a lawyer. When a SBN is entered into CCAP, a lawyer gets associated with a particular case. If the association is flawed, either because of a clerk's typographical error or some other error, such as entering the SBN for one Sheila Sullivan rather than another (there are two of them), case information is associated with the wrong lawyer. Under those circumstances, the CCAP record will "pertain" to the wrong lawyer until CCAP corrects the association to the wrong SBN.

Under Teague's definition of "pertain," Wis. Stat. § 19.70 authorizes the wrongfully associated lawyer to have the information corrected on CCAP. Under the CIB's interpretation, the wrongly associated lawyer could not correct the record because the "underlying" information does not "pertain" to the non-involved lawyer. That result is absurd and unnecessary.

III. CIB'S DISCRIMINATORY CLASSIFICATION OF INNOCENT PEOPLE IS IRRATIONAL.

CIB'S claim, at 21, that Teague's argument for a heightened rational basis review was not preserved is wrong because Teague made that argument at summary judgment, (R. 22:7, n.18). A tighter fit under the rational basis test is required because CIB's alias policy is not the legislature's choice but is unpromulgated and sub-regulatory. CIB never addresses the substance of this argument and should therefore be deemed to have conceded it. *See, e.g., Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp,* 90 Wis.2d 97, 109, 279 N.W.2d 493 (Ct. Ap. 1979).

CIB argues (at 23-24) that its policy does not violate equal protection because "no governmental actor" causes the alleged harm. While the "harm" may be attributed to private

citizens mislead by CIB's reports, it is CIB that chooses which innocent people will receive a clean report and which, like Teague, will not. CIB could produce the following exemplar report in response to background checks for all innocent people, including the plaintiffs.

This criminal background check was performed by searching the following data submitted to the Crime Information Bureau.

Name	**DENNIS TEAGUE**
Date of Birth	**10/04/1982**
Sex	**U**
Race	**U**

The response is based on a search using the identification data supplied.
Searches based solely on name and non-unique identifiers are not fully
reliable. The CIB cannot guarantee that the information furnished pertains
to the individual you are interested in.

NO CRIMINAL HISTORY FOUND.

Instead, CIB produces dense reports linking each plaintiff's name and date of birth to a lengthy criminal record of someone else. This result is unequivocally the product of CIB policy.

It appears that CIB concedes that there is no legitimate purpose in associating innocent people with criminals' records. [1] The crux of CIB's argument (at 24) appears to be that CIB's purpose is to protect requestors from being "duped" by criminals using an alias. However, CIB's own rationalizations under the five-factors demonstrate the lack of fit between CIB's goal and its choice of means.

[1] This point is so obvious few courts have been required to address it. In one of those few cases, an Arizona District Court held that federal law on background checks did not preempt state laws (including state defamation and negligence laws), observing that "no one alleges the goal of Congress was to have inaccurate and unreliable background checks."). *Gaona v. US Investigations Servs. Prof'l Servs. Div., Inc.*, 2013 WL 1748361, at *7 (D. Ariz. Apr. 23, 2013)

CIB contends (at 26) the first factor, real, significant differences between the two classes of innocent people, is satisfied because "it makes sense to provide reports when someone searches for an alias." However, CIB does NOT return reports on Teague only when a requester seeks an alias. CIB returns the misleading report regardless of whether the requesters asked for aliases. If CIB means it "makes sense" to CIB to always treat name-based requests as if they were requests about criminals, rather than requests about innocent people, CIB's choice of means reflects CIB's belief about what a requestor **should** have asked for and **should** receive rather than what the requester asked for or any characteristic of the class of innocent people.

CIB next asserts (at 26) the "distinction is germane to the "purpose" because it is a "useful first step in detecting a trick." Here CIB's rationale appears to be that its alias policy logically induces requestors to figure out whether the report is about the person about whom the information was sought and **then** determine the true identity of the person with whom they are dealing. The far more obvious inference is that the subject of the report is (or might possibly be) a criminal, and a risk averse requestor will treat them as a criminal. Rather than the "trick" being detected, the victim is re-victimized.

Ensuring that tricksters do not provide false names to potential employers **would be** a proper state goal, but CIB's alias name policy does not logically promote that goal. That point is illustrated by *State ex rel. Grand Bazaar Liquors, Inc. v. City of Milwaukee*, 105 Wis.2d 203, 212, 313 N.W.2d 805, 810 (1982). *Grand Bazaar* invalidated on equal protection grounds an ordinance requiring applicants for Class A liquor licenses to receive 50% of their income from on-premises liquor sales. The claimed purpose of the ordinance was to limit the number of new liquor licenses. The discrimination among the class of applicants (grocery stores, with non-liquor sales greater than 50%, and liquor stores with more than 50% of sales from

liquor) failed because the means was not germane to the purpose of limiting the number of liquor licenses. "First, there is no evidence in the record to demonstrate … any public need to limit the number of new liquor licenses. Second, we note … the Common Council retains the ultimate right to limit the number of licensed establishments, with or without this ordinance." *Id*. "[U]ltimately … the ordinance only discriminates among applicants for a license; it does not limit the number of licenses issued." *Id*.

As in *Grand Bazaar,* CIB provided no evidence of any public problem with requesters being duped by tricksters using the same aliases and date of birth as they previously used during past police contacts. The trickster need simply invent a new alias or date of birth to thwart completely the purported governmental purpose. As in *Grand Bazaar,* CIB could directly address the problem it identifies by requiring more information about record subjects in its standard forms, thus making it harder for job seekers to "dupe" employers. Instead, CIB's alias policy, like the liquor license ordinance discriminating against grocery stores, merely discriminates against some innocent people without increasing the accuracy of name-based criminal background checks.

CIB's argument (at 26) that all searches are "subject to the same algorithms or human intervention," ignores the uncontroverted facts. CIB's system of sort of close name and sort of close birth date matching, with its inability to distinguish among alias and master names and its reliance on employee discretion to determine whether a match is close enough, means "the same algorithms or human intervention" produce unpredictable responses. Sometimes a name-based request for Teague produces a "no criminal history found result," and sometimes a variant name and date of birth within the same month (Teague) produces a false criminal record and sometimes it dies not (Mary Meyer; Christopher Peterson) See App. Brf, at 6, n.3.

Finally, CIB claims (at 26) "Teague implicitly concedes the public has an interest in learning of criminal histories" and "receiving a report based on an alias serves that purpose." Plaintiffs agree there is a legitimate government purpose in accurate background check reports about the person about whom the information is sought. That interest is not furthered in any way by an alias policy that guarantees that requests for reports on innocent victims of identity theft will inaccurately associate them with a criminal record. Any alleged public interest in receiving reports "quickly and relatively easily" is not significant if the costs of speed are increased systemic inaccuracy and discriminating against innocent victims of CIB's alias name policy.

IV. DENYING INNOCENT IDENTITY THEFT VICTIMS CLEAN CRIMINAL HISTORY REPORTS IS "STIGMA PLUS."

CIB's response to Teague's Due Process Clause claim attacks arguments Teague did not make.

With respect to the trial, Teague argued the circuit court's finding that the reports are not stigmatizing is "clearly erroneous" because (a) CIB offered no evidence about how the general public understands the reports; (b) the only evidence from actual users (Koehn and Sheets) was that they understood Teague's reports as referring to Teague (not Parker); and (c) Teague's experts explained exactly why average readers would reach that conclusion. App. Br., 30-31.

CIB does not challenge Teague's claim that CIB offered no evidence about how members of the public (non-police, non licensing agency employees) read the reports. Instead, CIB asserts (at 32-33) plaintiff's evidence is "irrelevant" or not compelling, because the experts (and, by implication, the actual users) had not worked in law enforcement and were not familiar with criminal history record reports. CIB misses the point because this case is **not** about how law enforcement reads the

reports. It is about how ordinary users understand CIB's reports, which is exactly what plaintiffs' evidence established without any contradiction or impeachment. Any contrary finding about how ordinary users understand CIB's reports is clearly erroneous.

As to law, "stigma" does not require that every ordinary reader understand CIB's reports as being about Teague. CIB's assertion (at 30) that the "fact that someone might decide [Teague] has a criminal record despite the disclaimers" would not support a claim against CIB mischaracterizes the law of defamation. *See Restatement (Second) of Torts*, §564 ("A defamatory communication is made concerning the person to whom its recipient correctly, **or mistakenly but reasonably**, understands that it was intended to refer.") No matter what CIB intended or believed about the reports in this case, if some ordinary readers reasonably believe the report is about the person about whom the information was requested, then the reports are defamatory and "stigmatizing" for due process purposes.

As to the "plus," CIB's repeated equation of "tangible harm" with the loss of particular jobs simply ignores the growing line of government database cases. The "plus" of "stigma plus" does not always require proof an individual was denied a specific job. When the State goes into the business of issuing credentials such as "clean" criminal history reports, an innocent person who is denied that credential suffers an alteration of status. Thus, the "plus" in Teague's case is appropriately analogized, not to the loss of government employment, but to those individuals stigmatized by being wrongfully placed on the child abuse and sex offender registries. The "plus" – or "tangible loss"— here, as it is in those cases, is the status change accompanying the stigmatizing reports generated by government databases.

Finally, this Court should ignore CIB's request, (at 31-32), to find that Teague received enough "process" through the

letter issued by the CIB. The circuit court did not address the balancing required by *Mathews v. Eldridge*, 424 U.S. 319 (1976), and should be given that opportunity on remand.

V. CIB'S ALIAS POLICY VIOLATES SUBSTANTIVE DUE PROCESS.

Despite CIB's claims, Teague identified (at 38) a fundamental right protected by substantive due process -- the right not to be treated as a criminal until proven guilty in a fundamentally fair proceeding. S*ee United States v. Stein*, 435 F. Supp. 2d 330, 360-61 (S.D.N.Y. 2006). *See also,* 2 Ronald D. Rotunda & John E. Nowack, *Treatise on Constitutional Law Substance and Procedure* § 15.7 (4th ed. 2010) (Identifying fundamental rights, per the United States Supreme Court, as falling into six substantive categories: (1) the right to freedom of association; (2) the right to vote; (3) the right to interstate travel; (4) **the right to fairness in the criminal process (which includes the right to counsel and the right of access to the courts);** (5) the right to procedural due process; and (6) the right to privacy including personal rights such as freedom of choice in marital decisions).

Teague is thus not asking this Court to invent a new fundamental right. Rather, the Court is asked to recognize that CIB's policy infringes on an established fundamental right in an historically new context created by the State's decision to use its criminal database like a Google search. Substantive due process jurisprudence grows. *See. e.g., Kitchen v. Herbert*, 755 F.3d 1193, 1218 (10th Cir. 2014) (the fundamental right to marry is not limited to couples of the opposite sex and involves personal freedoms beyond those associated with procreation). See also, *Obergefell v. Hodges*, 576 U.S.____ (2015), *slip opinion* ("the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples")*; Troxel v. Granville,* 530 U.S. 57, 72-73 (2000)(recognizing that while grandparent visitation is "new" phenomenon, the context for evaluating its

constitutionality is the long-established fundamental right of parents to make child rearing decisions).

This Court should recognize that the liberty interest in not being made a criminal through "unjust procedures" encompasses more than freedom from imprisonment. It also includes a right to be free from stigmatizing associations with a criminal conviction history not one's own when that association is made systematically by the state agency charged with maintaining the state's archive of criminal history information, which agency knows the innocent citizen has no criminal record because the citizen has **already** proved that fact to the agency.

CONCLUSION

For the reasons stated above, the Court should reverse and remand for further proceedings.

Dated at Milwaukee, Wisconsin this 2nd day of July, 2015.

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I hereby certify that this reply brief conforms to the rules contained in s. 809.19(8)(b) and (c) as modified by the court's order for a brief and appendix produced with a proportional serif font. The length of this brief is 2,991 words.

Dated this 2nd day of July, 2015, in Milwaukee, Wisconsin.

s/ Jeffery R. Myer
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