STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2014AP2536

DEMOCRATIC PARTY OF WISCONSIN
and CORY LIEBMANN,

Petitioners-Respondents,

v.

WISCONSIN DEPARTMENT OF
JUSTICE and KEVIN POTTER,

Respondents-Appellants.

ON APPEAL FROM AN ORDER OF THE CIRCUIT COURT FOR DANE COUNTY, CASE NO. 14-CV-2937, THE HONORABLE RICHARD G. NIESS PRESIDING

BRIEF AND APPENDIX OF RESPONDENTS-APPELLANTS

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STATEMENT OF THE ISSUE

The public records balancing test requires weighing the public interest in disclosure against nondisclosure. The cases recognize a public interest in nondisclosure of prosecutorial files and the information they contain about law enforcement investigations and prosecutorial strategies. At issue here are videos from a prosecutors training seminar, where a DA discussed investigations, strategies, and crime victims. Must the videos be released under the public records law?

The circuit court answered: Yes.

STATEMENT OF THE CASE

This appeal comes after the Democratic Party of Wisconsin (DPW) obtained a writ of mandamus requiring release of prosecutor training videos kept by the Wisconsin Department of Justice (DOJ). The request was for video presentations by then-Waukesha County DA Brad Schimel at Wisconsin State Prosecutors Education and Training conferences. DOJ declined to release those videos pursuant to the public records law, Wis. Stat. §§ 19.31-19.39, and its balancing test (R.2).

DOJ sponsors the conferences semiannually to aid prosecutors, and some public employees who assist them, with building skills and freely sharing information and strategies that will help them with their duties (R.15). Attendance at the conferences is limited, and does not

include members of the public, criminal defense or private attorneys, or the media (R.15 ¶¶ 3-13). Sometimes sessions are videotaped to provide a resource for prosecutors who were not in attendance (R.15 ¶¶ 3, 9-11). Those recordings, however, are not made publically available (R.15 ¶ 9).

The public records request pertained to two videos from these conferences, one from 2009 and the other from 2013. The 2009 video was an overview of investigations and prosecutions of online child predators and child pornographers, including advice on best practices and tips for catching predators (R.4, 2009).[1] The 2013 video was a detailed discussion of a sexual assault case where a high school student posed as a female online, obtained graphic pictures from male classmates, and, in some instances, extorted sexual acts (R.4, 2013).

Based on the public records balancing test in Wis. Stat. § 19.35(1)(a), DOJ determined that it was not in the public interest to disclose the videos (R.2). The circuit court disagreed and ordered their release, but stayed that order pending this appeal (R.21; R-A APP. 001-002).

[1] The videos are on a DVD that the circuit court placed under seal and are labeled according to their dates. The video from 2013 is in two parts.

ARGUMENT

DOJ believes that it is not in the public interest to release videos of a DA providing instruction to other prosecutors, and those who aid them, about how to effectively catch sexual predators. There is a compelling public policy favoring free discussion of this information to train a limited audience. It facilitates effective crime-fighting, a goal that is undermined if videos of the presentations are subject to general dissemination. The presentations include local prosecutorial strategies to catch and prosecute sex offenders who prey on minors online. They also contain details about minor victims and their private traumas. The public interest is not served by releasing information that predators may use to avoid detection and prosecution, or by further subjecting victims to public attention. DOJ therefore asks this Court to reverse the circuit court.

I. Legal principles

Custodians of public records conduct a balancing test to "'weigh the competing interests involved and determine whether permitting inspection would result in harm to the public interest which outweighs the legislative policy recognizing the public interest in allowing inspection.'" *John K. MacIver Inst. for Pub. Policy v. Erpenbach*, 2014 WI App 49, ¶ 13, 354 Wis. 2d 61, 848 N.W.2d 862 (citation omitted). This Court's review is *de novo*. *Id.* ¶ 14.

II. DOJ properly applied the balancing test.

DOJ's decision not to disclose rests on two main rationales. First, it is in the public interest to facilitate the sharing of information among prosecutors without undermining the expectation of a limited audience. Second, both videos, but especially the 2013 video, contain information and commentary about traumatic events that, if made publically available, risks additional embarrassment to the victims and discourages cooperation by victims in the future.

A. The public interest is best served by allowing trainings and exchanges of strategy among prosecutors to be limited to the intended audience.

Wisconsin courts have recognized the important role of law enforcement in society, and disfavor disclosure of investigatory materials or materials outlining covert operations and strategic prosecutorial decisions. DOJ believes the same interests support nondisclosure here because the training videos contain detailed discussions of a local prosecutor's techniques and strategies about efforts to catch sexual predators.

In *State ex rel. Richards v. Foust*, 165 Wis. 2d 429 (1991), the Wisconsin Supreme Court addressed whether closed prosecutorial files should be exempt from public disclosure, and concluded that they should be. *Id.* at 431-32. The court explained that, notwithstanding the general

presumption in favor of disclosure, the DA's files should not be disclosed. *See id.* at 433-34. This result was dictated by the common law and public policy concerns. The court found a longstanding tradition of protecting DA files and their "historical data leading up to the prosecution," including information about investigations, which should be protected "if continuing cooperation of the populace in criminal investigations is to be expected." *Id.* at 435.

A similar emphasis on protecting law enforcement investigations and strategies is found in *Linzmeyer v. Forcey*, 2002 WI 84, 254 Wis. 2d 306, 646 N.W.2d 811, which analyzed disclosure of a police investigation of a school teacher. The supreme court recognized that "[r]eports of police investigations, despite being public records, can be particularly sensitive regardless of whether or not the underlying investigations are on-going." *Id.* ¶ 26. The court also observed that "[l]aw enforcement records are generally more likely than most types of public records to have an adverse effect on other public interests if they are released," and reiterated "a strong public interest in investigating and prosecuting criminal activity." *Id.* ¶ 30.

Importantly, the court went on to list public policies weighing against disclosure, including where it "'would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected

to risk circumvention of the law.'" *Id.* ¶¶ 32-33 (quoting with approval a federal Freedom of Information Act framework and applying it).

Under the facts in *Linzmeyer*, neither those policies nor any other policy justifying nondisclosure was present. The teacher's reason for nondisclosure—that he would be personally embarrassed—was not a relevant public policy consideration. *Id.* ¶¶ 34-36. Weighing in favor of release were the facts that the alleged statements were "made publically" and the investigation was about interactions with students at school. *Id.* ¶ 37.

The court, however, cautioned that the result in the case was not typical. *Id.* ¶ 38 ("this is not an attribute of many police reports"). Indeed, unlike here, there was "no threat that techniques and procedures for law enforcement investigations or prosecutions would be revealed if the Report [was] disclosed." *Id.* ¶ 41. That was because the investigation merely consisted of interviews and not "a sting operation or undercover operation that would require secrecy to protect the identity of particular sources and techniques." *Id.*

Applied here, the governing principles in *Richards* and *Linzmeyer* show that nondisclosure was the right result. The video presentations contain matter consistent with a prosecutor's file *plus* additional DA insights and commentary that, if anything, make nondisclosure even more important. These videos do not just generally discuss

techniques, but rather reveal thought processes and strategies of local Wisconsin prosecutors.

The 2009 presentation is titled "Prosecution & Common Defenses in Online Child Exploitation Cases." The premise was to provide prosecutors insider tips, with real-world case examples, to help catch online predators that prey on minors. For example, the presentation included specific discussion of what technological evidence is most helpful to gather and preserve, and about charging decisions (*E.g.*, R.4, 2009 at 21:00, 26:00-28:30, 44:30-47:00, 01:07:00-01:14:00). The presentation also discussed how to avoid detection when law enforcement is attempting to catch an online predator (*E.g.*, R.4, 2009 at 13:50-22:00; 23:00-24:00). There were tips on tracking file access and using other technology implicated in child pornography prosecutions (*E.g.*, R.4, 2009 at 44:30, 46:00-49:00, 54:45-56:30, 1:09:00-01:11:00). And the presentation included firsthand examples of crimes and commentary and impressions from the DA (*E.g.*, R.4, 2009 at 08:00-10:00).

The 2013 presentation—called "Victim Confidentiality"—similarly provided insight by walking through the investigation process, narrating a particular case where a predator used online resources to abuse and exploit dozens of minors (R.4, 2013). The presentation provided a step-by-step account of the investigatory process, strategies, and charging decisions, and discussed how the offender operated, including intimate details and verbatim

exchanges with victims that highlighted how young victims are manipulated (*E.g.*, R.4, 2013 Part 1 at 17:00-22:00, 28:00-34:30, 38:00-46:00, 46:30-47:00, 51:00-53:00; 2013 Part 2 at 01:00-07:30, 13:30-14:00).

Although *Richards* did not address prosecutor training seminars specifically, it did address the value society places on keeping prosecutorial files—and the information that they contain—from public view, regardless whether they are closed. Indeed, subsequent cases have clarified that it is not the location of the information that matters, but rather its substance. *See Nichols v. Bennett*, 199 Wis. 2d 268, 274, 544 N.W.2d 428 (1996) (cautioning against elevating "form over substance" when applying the public records law). And *Linzmeyer* explained that the topics here—discussions of undercover operations and other specialized investigatory techniques—are the kinds of information that should not be disclosed.

DOJ submits that the circuit court did not properly take these concerns into consideration under the balancing test. Rather, the court seemed to reason that, unless a custodian can demonstrate that an investigatory or prosecutorial technique has never been discussed by anyone in any forum (the internet, television shows, etc.), then it should be disclosed (R.25:55-56; R-A APP. 014-015). But that is the wrong question.

The Court in *Richards* and *Linzmeyer* did not suggest that the question was whether a technique or strategy was

in some sense discussed by someone on the internet. Indeed, the information on the videos here is not the equivalent of searching for something worldwide on the internet or watching a Hollywood-produced television show. Rather, the disclosure of *local* prosecutorial techniques is something very different. A predator's knowledge of the strategies that authorities in his area use is a much different proposition than knowing that, somewhere in the world, someone else might be employing a technique. And, here, steps were taken to limit the availability of the discussions. Attendance at the conferences was controlled and limited, and access to the videos of the presentations is likewise limited (R.15 ¶¶ 3-13).

Further, the circuit court's reasoning in favor of disclosure—that the videos contain publically useful information—is misplaced (R.25: 52-53, 58; R-A APP. 011-012, 017). It may be true that, in an abstract sense, the videos contain some information that could be useful to families that want to protect their children. Indeed, at that level of abstraction, the same could be said of some information in prosecutors' files, but that does not make those files subject to disclosure. Rather, like a prosecutor's files, these videos contain the information in a light intended for prosecutors to help guide their work, and wide disclosure could do potential harm. Families seeking to protect their

children may obtain relevant information through sources designed to help the public, of which there are many.[2]

Finally, the implications of the circuit court's decision are troubling. Under the court's reasoning, it is hard to imagine that any governmental training presentation would be protected from public view, as the court's approach largely turned on whether the videos were informative. That view improperly downplayed the nature of the information. There is a strong public interest in protecting this kind of prosecutorial exchange and training and allowing it to be limited to those involved in prosecutions. To hold otherwise would likely mean the end of videotaping these kinds of presentations for future use by prosecutors—to avoid having perpetrators learn local strategies—and indeed appears likely to curtail practices by other governmental entities that deal in trainings for sensitive or confidential matters.

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[2] One example is found on DOJ's website, which also includes links to additional resources. *See Protecting Children From Online Predators*, *available at* http://www.doj.state.wi.us/media-center/2012-ag-columns/protecting-children-online-predators.

B. The public interest is served by keeping sensitive information about minor victims from public disclosure or prominent redisclosure.

DOJ believes the foregoing provides ample reason to withhold the videos. There also is a second reason: the presentations contained sensitive information about actual cases and minor victims. Wisconsin rightly values victims' rights and privacy, and that value, especially when combined with the policies discussed above, further supports DOJ's nondisclosure.

The Wisconsin Constitution, art. I, § 9m, requires that crime victims be treated with "fairness, dignity and respect for their privacy." The importance of protecting crime victims is also reflected in the Wisconsin statutes, including chapters 949 (victim compensation) and 950 (rights of victims) and, in turn, through the services provided by DOJ's Office of Crime Victim Services.

The Wisconsin Supreme Court has likewise recognized that it matters to the balancing test if there are "public effects of the failure to honor the individual's privacy interests." *Linzmeyer*, 254 Wis. 2d 306, ¶ 31. And courts have recognized a public policy of "minimiz[ing] further suffering by crime victims." *Schilling v. State Crime Victims Rights Bd.*, 2005 WI 17, ¶ 26, 278 Wis. 2d 216, 692 N.W.2d 623.

Indeed, it is the experience of the Office of Crime Victim Services that victims are highly concerned about

their privacy and about details of the crimes being distributed publically, both during and after prosecutions and investigations (R.16 ¶¶5-7). The mere fact of redisclosure of details can cause new trauma, as the victims often have sought to put the events and public attention in their past (R.16 ¶¶7, 12). Importantly, this can adversely affect not only the victims of the crime in question, but also future victims and prosecutions, as the system relies on victims' willingness to come forward, and that willingness may decrease if other victims' information is publically disseminated (R.16 ¶¶ 9-11).

These values have application here, as the 2009 video, in discussing strategies for dealing with online child exploitation and pornography, included specific examples from cases (*E.g.*, R.4, 2009 at 08:00-10:00). The concern is even more pronounced with the 2013 video. That video is a walkthrough of an alarming series of sex offenses from a DA's inside perspective. It includes intimate details and commentary on the events and the interactions between the victims and the offender (*E.g.*, R.4, 2013 Part 1 at 17:00-22:00, 38:00-46:00; Part 2 at 03:00-06:00, 13:30-14:00). In addition to commentary on the victimization that occurred, the video includes a description of traumatic aftereffects on a victim, something that DOJ believes has not been disseminated publically (R.4, 2013 Part 2 at 06:30-07:30).

A publically available video disclosing these things is likely to be highly upsetting to victims, regardless whether they are specifically identified (they are not in the videos), as it could bring these traumatic events back to the fore. (R.16 ¶¶ 7, 12). Indeed, in the past, the 2013 video's victims were identified by their contemporaries based on the initials and dates in the complaint (R.4, 2013 Part 2 at 03:00-04:00). Thus, at a minimum, it could be discerned by a viewer that the details in the video apply to someone in a set of identified victims. These kinds of disclosures are apt to play in the minds of current and future victims and potential witnesses, creating disincentives for those people to come forward.

The circuit court, in declining to give significant weight to these considerations, posited that the information was already available and, in turn, that this meant there was scant reason not to disclose. The court's reasoning was flawed on both accounts.

Regarding the case discussed in the 2013 video, it is true that there was past media attention, including an online magazine's posting of the redacted complaint. But that media attention was not the same as the contents of the video. The point of the presentations here was that the DA offered something more than is found in a magazine. The presentations were by the DA who oversaw the cases and were keyed to other prosecutors running cases. For example, the 2013 presentation provided exchanges

between the victims and the offender to demonstrate the mechanics of how a predator of this nature operates, and those details went beyond what was in the complaint and the articles provided by the petitioners to the circuit court (*E.g.*, R.4, 2013 Part 1 at 17:00-22:00, 38:00-46:00). And the presentation also included a prosecutor's commentary on the psychology of, and aftereffects on, the victims, which is available in no form to the general public (*E.g.*, R.4, 2013 Part 1 at 38:00-46:00; Part 2 at 03:00-06:00, 06:30-07:30).

Second, it is correct that having the very same information otherwise publically available "weakens" (but does not foreclose) a balance in favor of withholding. *Milwaukee J. Sentinel v. Wis. DOA*, 2009 WI 79, ¶ 61, 319 Wis. 2d 439, 768 N.W.2d 700. But, as discussed, the information—a DA that oversaw cases giving his impressions and strategies—is not the same information otherwise available.

Further, there is a value in avoiding redisclosure of traumatic information, especially when it relates to minor victims. *See Schilling*, 278 Wis. 2d 216, ¶ 26 (discussing the value of protecting victims from further suffering). Young victims of traumatic events understandably wish to put those events behind them. It stands to reason that public redisclosure of details—with the addition of commentary—will remind those victims of their trauma and perhaps cause new humiliations (R.16 ¶ 7). Before the circuit court, the petitioners provided no good reason to release this

publically, and DOJ believes there is none.

Rather, in applying the balancing test, the circuit court improperly discounted the harm to the victims of having details released (or rereleased), regardless whether a person is individually identified (R.25 at 48, 54; R-A APP. 007, 013). Further, the release of the video is still invasive because the wider group of individuals to whom the details apply is known.

Although, as a general matter, embarrassment of a person is not a public policy against disclosure, that is not the issue here. The issue here is about the recognized public policy of protecting *crime victims*, especially minors. Contrary to what the circuit court asserted, that is a proper consideration in the balancing test (R.25 at 48, 54; R-A APP. 007, 013). *See Linzmeyer*, 254 Wis. 2d 306, ¶ 31 (stating as relevant the "public effects of the failure to honor the individual's privacy interests"); *Schilling*, 278 Wis. 2d 216, ¶ 26 (public policy of "minimize[ing] further suffering by crime victims"). And the cases also recognize the public interest in avoiding disclosures that might discourage future victims and witnesses from coming forward, a goal that is undermined if courts do not recognize the potential harmful effects of disclosure and redisclosure. *See Linzmeyer*, 254 Wis. 2d 306, ¶ 31.

Thus, in addition to the importance of facilitating the detection of predators and keeping local investigatory techniques out of perpetrators' hands, there is a significant

concern with victim privacy. Especially when taken together, DOJ submits that these justifications provide ample reason not to disclose the videos, and that the circuit court erred when ordering otherwise.

CONCLUSION

For the reasons stated, DOJ respectfully requests that this Court reverse the circuit court's order for a writ of mandamus requiring disclosure of the videos.

Dated this 20th day of January, 2015.

Respectfully submitted,

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[3] Attorney General Brad D. Schimel did not participate in the preparation or filing of this brief.

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c), as modified by this Court's order, for a brief produced with a proportional serif font. The length of this brief is 3,206 words.

Dated this 20th day of January, 2015.

ANTHONY D. RUSSOMANNO
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

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.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 20th day of January, 2015.

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 20th day of January, 2015.

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