STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II
Appeal No: 2014AP2536-FT

DEMOCRATIC PARTY OF WISCONSIN
and CORY LIEBMANN,

Petitioners-Respondents,

v.

WISCONSIN DEPARTMENT OF JUSTICE
and KEVIN POTTER,

Respondents-Appellants.

BRIEF OF PETITIONERS-RESPONDENTS

On Appeal From The Circuit Court For Dane County
The Honorable Richard G. Niess Presiding
Case No. 2014CV2937

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STATEMENT OF STANDARD OF REVIEW

As recently set forth in *John K. MacIver Inst. for Pub. Policy, Inc. v. Erpenbach,* 2014 WI App 49, ¶ 16, 354 Wis. 2d 61, 848 N.W.2d 862, this court emphasized:

> The legislature has declared that:
>
> [I]t is ... the public policy of this state that *all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them*.... [P]roviding persons with such information is declared to be an essential function of a representative government.... To that end, [WIS. STAT. §§] 19.32 to 19.37 shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business. The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.
>
> WIS. STAT. § 19.31 (emphasis added). This statement "is one of the strongest declarations of policy to be found in the Wisconsin statutes." *See Zellner*, 300 Wis. 2d 290, ¶49. Following this declaration, Wisconsin maintains a "strong presumption of complete openness with regard to public records." *Id.*, ¶ 55.

When no factual disputes exist, this Court's review is *de novo*. *Id.*, ¶ 14.

STATEMENT OF THE ISSUES

1. Did the record custodian fail to overcome the strong presumption of openness of public records? The Court of Appeals, after reading Judge Niess's bench decision and then viewing the disputed video records, should affirm.

STATEMENT OF THE CASE[1]

With the following additions, the Democratic Party of Wisconsin ("the DPW") and Cory Liebmann ("Liebmann") do not take issue with the Wisconsin Department of Justice's ("the DOJ") statement of the case.

The DPW challenged the DOJ's assertion that statements by the presenter in the video records were made to a restricted audience of law enforcement, prosecutors and staff, noting various defense attorneys by name who attended the conferences, including several known to the Dane County Circuit Court as criminal defense attorneys in Dane County. (R. 25: 8.) The DOJ's response to the court's inquiry (R. 25: 18, 21-22.) shows the DOJ essentially fails to dispute this fact.

ARGUMENT

The 2012 version of Wisconsin Attorney General J.B. Van Hollen's compliance outline begins by reminding its readers:

> [I]t is declared to be the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them. Wis. Stat. § 19.31. This is one of the strongest declarations of policy found in the Wisconsin statutes. *Zellner v. Cedarburg Sch. Dist*. ("*Zellner I*"), 2007 WI 53, ¶ 49, 300 Wis. 2d 290, ¶ 49, 731 N.W.2d 240, ¶ 49.

[1] Petitioners-Respondents' counsel has never viewed the records at issue. At the hearing on this matter, the DPW expressly sought to view the records under its proposed protective order, to allow for redactions, preferably via negotiation, or, alternatively, after an in camera hearing with counsel and the court. Wis. Stat. § 19.37(1)(a). After the court viewed the tapes, it determined that the entire record could be released, and the DPW's motion was rendered moot. Any representations made by counsel in this brief as to the contents of video records are based upon either the trial court record or publicly available written materials presented at the conferences.

It continues: Providing citizens with information on the affairs of government is:

> [A]n essential function of a representative government and an integral part of the routine duties of officers and employees whose responsibility it is to provide such information. To that end, ss. 19.32 to 19.37 shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business. The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.

Wis. Stat. § 19.31.

The records custodian must balance the strong public interest in disclosure of the record against the public interest favoring nondisclosure. *State ex rel. Journal Co. v. County Court for Racine County*, 43 Wis. 2d 297, 305, 168 N.W.2d 836. The custodian must identify potential reasons for denial, based on public policy considerations indicating that denying access is or may be appropriate. Those factors must be weighed against public interest in disclosure. In other words, the records custodian must determine whether the surrounding circumstances create an exceptional case not governed by the strong presumption of openness. *Hempel v. City of Baraboo*, 2005 WI 120, ¶ 63, 284 Wis. 2d 162, 699 N.W.2d 551. An "exceptional case" exists when the circumstances are such that the public policy interests favoring nondisclosure outweigh the public policy interests favoring disclosure, notwithstanding the strong presumption favoring disclosure. *Hempel*, 284 Wis. 2d 162, ¶ 63. It is the burden of the party

seeking nondisclosure to show that "public interests favoring secrecy outweigh those favoring disclosure." *C.L. v. Edson*, 140 Wis. 2d 168, 182, 409 N.W.2d 417 (Ct. App. 1987). It is important to remember that the identity of the requester and the purpose of the request are not part of the balancing test. *See Kraemer Bros., Inc. v. Dane County*, 229 Wis. 2d 86, 102, 599 N.W.2d 75 (Ct. App. 1999).

The DOJ's assignment of error rests upon two rationales: (1) files and strategies used by prosecutors and law enforcement investigators discussed in the recorded presentations, if released as public records, would impermissibly affect the public interest in suppressing crime; and (2) release would reveal sensitive personal information to the detriment of minors who were crime victims, outweighing the presumption of openness. The circuit court reviewed the material and decided otherwise.

The circuit court stated:

> Every time I do an open records request, I always start by looking once again at the declaration of policy under se. 19.31 because…it amazes me how strong the legislature has valued the people's right to the records of government…and I'm going to read that. It says:
>
> In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be in the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them. Further, providing persons with such information is declared to be an essential function of a representative government and an integral part of the routine duties of the officers and employees whose responsibility is to provide such information. To that end, sections 19.32 through 19.37 shall be construed in every instance with a

> presumption of complete public access consistent with the conduct of governmental business. The denial of public access generally is contrary to the public interest and only in an exceptional case may access be denied.

(R. 25: 46-47; R-A App. 005-006.)

The circuit court concluded that the DOJ did not meet its burden of showing that this is an exceptional case.

The circuit court noted that "the balancing question is fact intensive." (R. 25: 22.). *See Kroeplin v. Wisconsin DNR,* 2006 WI App 227, 297 Wis. 2d 254, 725 N.W.2d 286 (the balancing test must be done on a "case-by-case" inquiry). The DOJ's application of this balancing test is subject to de novo review. *John K. MacIver Inst. for Pub. Policy, Inc. v. Erpenbach,* 2014 WI App 49, 354 Wis. 2d 61, 848 N.W.2d 862. The basis for not according any weight to the record custodian's balancing decision is clear: "Records requested may well relate to the custodian himself or herself…In short, a custodian personally may view a records request as being favorable or unfavorable to his or her own interests or those of someone close to him or her. The courts generally provide a more disinterested forum." *Id.,* Footnote 4.

As to facts supporting "an exceptional case," the DOJ provides no persuasive explanation. As the circuit court noted, the claim that release of the records would negatively impact prosecution of perpetrators of sensitive crimes against children was never asserted as fact in the DOJ's evidentiary affidavits. (R. 25: 22-23.) More importantly, after reviewing the actual

DVD recordings, the court found not that disclosure would harm victims but rather that the public would greatly benefit from the informative discussions about these crimes against children via use of the internet. The DOJ's response is unconvincing, merely suggesting that the public can get this helpful information from plenty of other sources, a few of which it referenced. (Respondents-Appellants' brief, pp. 9-10.)

The DOJ relies upon *Linzmeyer v. Forcey*, 2002 WI 84, 254 Wis. 2d 306, 646 N.W.2d 811, to support its claim that the case "emphasizes the protection of prosecutors and law enforcement investigations and strategies." Its reliance upon that case is misplaced. *Linzmeyer* dealt with a police investigation of a public school teacher into whether he had engaged in inappropriate conduct with a number of his female students. *Id*., ¶ 4. The case reiterates the following general principles:

> As we have consistently recognized, the clearly stated, general presumption of our law is that all public records shall be open to the public…this presumption reflects the basic principle that the people must be informed about the workings of their government and that openness in government is essential to maintain the strength of our democratic society…Here [as is true in the present appeal] the parties do not dispute the fact that the Report is a public record as defined by s. 19.32(2). So as with other public records, we begin with the strong presumption favoring release of the Report.

Id., ¶ 15.

Linzmeyer summarizes the balancing test necessary to overcome the presumption of openness. The Court stated that the "fundamental question we must ask is whether there is harm to a public interest that

outweighs the public interest in inspection of the Report. [W]e apply a balancing test on a case-by-case basis…" *Id*., ¶¶ 24-25.

In *Linzmeyer*, the Court considered a variety of factors in regard to the balancing test, noting:

> [1]…the process of police investigation is one where public oversight is important…[it]is an official responsibility of an executive government agency, and much like the ability to arrest, it represents a significant use of government personnel, time and resources. [2] The investigative process is one that, when used inappropriately, can be harassing or worse. [3] The investigating agency's decisions…are also discretionary, and are generally matters of public interest that support public release of the Report.

Id., ¶ 27.

In *Linzmeyer*, the subject of the record was a public school teacher, a public employee in a position of some visibility. The records in this case involve the Waukesha County District Attorney, who is now the state's Attorney General. His records, like the teacher's, should face public scrutiny. All officers and employees of government are, ultimately, responsible to the citizens who have a right to hold them accountable for the job they do. *Id*., ¶ 28. "…The mere fact that [a person] is a public employee does not weigh as strongly for release of the Report as it might if [he] were *an elected official, or if he were a more senior policymaking official…*(emphasis added)." *Id*., ¶ 29.

Ultimately, the *Linzmeyer* court ordered release of the records. This court should reach the same conclusion in this case: the presumption

prevails. Here, the circuit court viewed the recordings and rejected the DOJ's claim that the particular strategies and investigative techniques were somehow novel and unique to Wisconsin prosecutors and investigators. (R. 25: 47-59; R-A App. 006-018.)

The trial court also addressed the DOJ's claim that public interest would be served by keeping information, much of which is already public, from being "re-disclosed" to protect victims.

> Comments regarding victims' reactions, parents' reactions, how -- and then there was a great deal of detail without any identification of the victims, without any personal information about the victims other than what is in public record. The criminal complaint contains virtually everything that Mr. Schimel was talking about.

(R. 25: 50-51; R-A App. 009-010.)

The Trial Court also noted that much of the information regarding the crime had been made public:

> The fact that virtually every detail about the crimes with the exception of maybe, and I'm not even sure about this because I didn't read all 15,300 entries on the Internet. I did see that there were two pages of international coverage of this crime, and I went and took a look at several of them, the "New York Times," the "GQ" article, the "Milwaukee Journal Sentinel" which was quite extensive in their reporting of this case, and I found that they-- that they virtually covered the waterfront on this.

(R. 25: 52-53; R-A App. 011-012.)

As the court found, the videos merely repeat information that has been made public in several other venues: 1) the criminal complaint, a public document, provides detailed information; 2) the *Stancl* case has

received much publicity, including a large article in GQ magazine in which District Attorney Schimel is quoted (R. 10: Ex. A, pp. 9-12) and; 3) most notably the details of the presentation are set forth in written materials available on the WILENET electronic network available to anyone with access to it. (R. 12: Ex. D, p. 36.)

Existing public availability of the information contained in a record weakens any argument for withholding the same information pursuant to the balancing test. *See Milwaukee Journal Sentinel v. Wisconsin DOA*, 2009 WI 79, ¶ 61, 319 Wis. 2d 439, 768 N.W.2d 700 (union member names sought to be withheld were already publicly available in a staff directory).

CONCLUSION

For the reasons stated above, this Court should affirm the trial court's decision. If the Court's review of the video records reveals the need to redact certain personal identification information, this matter should be remanded to the trial court to order such appropriate redaction.

Respectfully submitted this 12th day of February, 2015.

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CERTIFICATION

I hereby certify:

This brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c), as modified by the Court's November 12, 2014 Order, for a brief produced with a proportional serif font. The length of the brief is 2,351 words.

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CERTIFICATE OF COMPLIANCE WITH 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. § 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.

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