STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Case No. 2014AP2536-FT

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

REPLY BRIEF OF RESPONDENTS-APPELLANTS

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The question here is whether the public records law requires disclosure of prosecutor training videos intended for a limited audience. Although the general rule is to disclose records, that rule has a limit. As the balancing test recognizes, not everything should be made public when other important interests are at stake. This is one such instance. The public good is best served by promoting the exchange of strategies in prosecutor training seminars without dissemination to the public at large.

I. It is not in the public interest to release prosecutorial strategies.

The videos should remain nonpublic because they discuss prosecutorial strategies meant for a limited audience. The precedent supports nondisclosure in these circumstances, and DPW offers no persuasive argument to the contrary.

In *Linzmeyer v. Forcey*, 2002 WI 84, 254 Wis. 2d 306, 646 N.W.2d 811, the supreme court explained that records should be exempt from disclosure for two reasons that are applicable here: where a record "'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 (citation omitted and emphasis added).

Here, both of these exceptions apply. The videos discuss techniques and procedures for investigations and prosecutions. In addition, dissemination of this kind of information could risk circumvention: the presentations narrate strategies for catching online predators, including tips for undercover officers (*E.g.*, R. 4, 2009 at 13:50-24:00, 26:00-28:30, 44:30-49:00, 54:45-56:30, 01:07:00-01:14:00).

DPW does not directly address these exceptions. Rather, it makes three other contentions, but none of them hold up to scrutiny.

First, DPW points out that the videos contain comments by a district attorney who is now the Attorney General. DPW asserts that this means the videos should be public because DAs and attorneys general are public figures (Resp. Br. 7). But that reasoning ignores *State ex rel. Richards v. Foust*, 165 Wis. 2d 429, 431-32 (1991), which held that closed DA files are not subject to disclosure. DAs are always public figures, but they also serve an important safety role that may be undermined by disclosure of certain information.

This case is about whether a discussion of law enforcement techniques should be available to the public at large. It is not about official misconduct. Indeed, the circuit court made clear that the videos show "nothing that can be considered misconduct," but rather contain techniques and tips (R. 25:59).

Second, DPW asserts that the videos should be nonpublic only if "the particular strategies and investigative techniques were somehow novel and unique to Wisconsin prosecutors and investigators" (Resp. Br. 8). But that test is not grounded in the precedent and, indeed, it is unlikely that it would ever be met. *See Linzmeyer*, 254 Wis. 2d 306, ¶¶ 32-33 (discussing disclosure of techniques, but not requiring the technique be one-of-a-kind).

The right question is whether there is a public interest in keeping from Wisconsin perpetrators the strategies selected by local prosecutors and law enforcement. The point is that, out of the universe of possible strategies, a perpetrator would know which ones Wisconsin authorities favor and when and how they tend to use them. It is reasonable to conclude that this kind of information, in the wrong hands, risks thwarting efforts by law enforcement. Further, to the public's detriment, making this information public will chill the sharing of techniques among prosecutors going forward.[1]

Third, DPW contends that the audience for the prosecutor trainings was not restricted, meaning that there is nothing to protect from disclosure (Resp. Br. 2, 9).

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[1] DPW asserts that DOJ did not submit an affidavit restating these reasons (Resp. Br. 5). But there was no need to submit such an affidavit. The question is whether DOJ properly balanced the public policies when deciding that the videos should remain nonpublic. Those reasons were stated in the response letter DOJ provided to DPW (R. 2:15-18).

That premise is incorrect. The record shows that the attendance was limited to prosecutors, those working for them or in related governmental positions, and presenters (R. 15:1-4). Attendance was not allowed for the media, private attorneys, or the public (R. 15:3).

At a hearing before the circuit court, counsel for DPW represented that a few prosecutors who attended past trainings were now private attorneys who sometimes do criminal work (R. 25:8). But that anecdote—that some prosecutors eventually left for private practice—does not change that those people were provided the strategies in their former prosecutorial capacity. It remains true that the public at large had no access.

In a related contention, DPW inaccurately suggests that written outlines provided at the trainings are publically available online (Resp. Br. 2 n.2, 9). DPW asserts: "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*" (Resp. Br. 9, emphasis added). What DPW omits is that the access is restricted.

The presentation outlines are kept in a controlled access portion of WILENET, which is an acronym for a secure law enforcement network administered by DOJ (R. 15:3). To access the secured area, a person must be a judge or have a law-enforcement-related job, must submit a written request including a social security number, and, in

many instances, the request must come from a chief administrator or official. *See Wilenet Access Policy, available at* https://wilenet.org/html/access.pdf (visited Feb. 20, 2014). When accessing the restricted area, users are informed that the information is restricted and that dissemination is prohibited (R. 25:21-22).[2] Thus, there is not online public access to the written materials. Further, the materials are outlines; they do not provide the full narration and commentary contained in the video presentations.

II. It is not in the public interest to disclose commentary about victims provided in a prosecutorial training.

DOJ's second reason for keeping the videos nonpublic relates to victim privacy. Both videos discuss particular crimes and investigations and, especially with the 2013 video, the focus is on the victimization process in a specific case.

DPW does not argue that victim privacy is unimportant. Instead, it contends that the general contents of the videos are already public, negating any victim concerns (Resp. Br. 8-9). DOJ disagrees with that proposition both as a matter of fact and policy.

First, DOJ disagrees that the contents of the videos are already available. The purpose of the presentations was

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[2] Before the circuit court, DPW did not explain how it could have properly obtained the materials from WILENET, and it provides no explanation on appeal.

to provide narrations of investigations and victimization from the point of view of the prosecutor and to deliver this to a limited professional audience. In other words, the purpose was to provide something different than the media provides. DPW points to a GQ Magazine article with "re-created" depictions of events, and also to the criminal complaint[3] (R. 10:10). But these documents do not provide the same verbatim exchanges between the perpetrator and victims presented in the video and, importantly, they are not narrated by the prosecutor.

Second, DOJ disagrees that ongoing victim impacts should be disregarded. "[M]inimiz[ing] further suffering by crime victims" is an established public policy in Wisconsin. *Schilling v. State Crime Victims Rights Bd.*, 2005 WI 17, ¶ 26, 278 Wis. 2d 216, 692 N.W.2d 623. DPW too casually disregards the effect of new disclosures years after the events have passed and wounds have begun to heal. Wisconsin policy sensibly recognizes that victims should be allowed to move on from trauma (R. 16:2-3). *See id.*

This is a case where the balancing test properly creates an exception to the rule. Impacts on victims add to what is already a compelling reason for nondisclosure: limiting the distribution of prosecutors' techniques and tips used to catch sexual predators. Disclosure would undermine

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[3] To avoid further online distribution of the complaint, DOJ is not providing the web address in this brief (*see* R. 14:14).

the very goals that collaboration among prosecutors seeks to promote, and risk putting victims through renewed trauma.

CONCLUSION

DOJ requests that this Court reverse the circuit court's order for a writ of mandamus.

Dated this 26th day of February, 2015.

Respectfully submitted,

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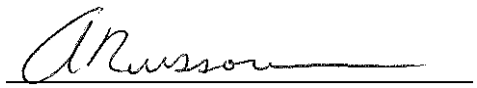
[4] Attorney General Brad D. Schimel did not participate in the preparation or filing of this brief.

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 1,396 words.

Dated this 26th day of February, 2015.



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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 26th day of February, 2015.

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