No. 14AP2536

In The Supreme Court of Wisconsin

DEMOCRATIC PARTY OF WISCONSIN AND CORY LIEBMANN,
PETITIONERS-RESPONDENTS,

v.

WISCONSIN DEPARTMENT OF JUSTICE AND KEVIN POTTER,
RESPONDENTS-APPELLANTS-PETITIONERS.

On Appeal from the Dane County Circuit Court,
The Honorable Richard G. Niess, Presiding,
Case No. 14CV2937

CORRECTED OPENING BRIEF OF THE WISCONSIN DEPARTMENT OF JUSTICE AND KEVIN POTTER

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INTRODUCTION

There is no stronger proponent of Wisconsin's Open Records Law than the Wisconsin Department of Justice. In June 2015, the Department established the Office of Open Government, which helps facilitate timely and accurate access to public records. Among other services, the Office provides useful tools, templates, and information to interested citizens, helping to ensure that Wisconsin is a national leader in open government. *See Office of Open Government, Wisconsin Department of Justice,* https://www.doj.state.wi.us/office-open-government/office-open-government (last visited Feb. 22, 2016).

At the same time, the Department recognizes that there are certain, rare situations where disclosure of a record would cause grave harm to the public interest, even after taking into account the Open Records Law's extremely laudable purposes. The present case is such an instance.

This case involves the requested release of two video-recorded trainings given to a limited audience of prosecutors, explaining how to investigate, catch, and prosecute sexual predators. The Department opposes release of these videos because it concluded—after careful deliberation—that these videos, if made public, would both help sexual predators evade the law and cause great harm to the victims.

Beyond this immediate damage to the public interest that would result from the release of these two videos, the

Department is concerned about the long-term implications of such disclosure. Mandating release of these videos would undermine the State's ability to train prosecutors and police officers in the future. As a practical matter, forcing release may well mean that future trainers will provide less useful techniques and that any such trainings may no longer be videotaped. This would deprive prosecutors and police, including those unable to attend such trainings in person, of critical tools for protecting the citizens of Wisconsin.

ISSUES PRESENTED

1. Can the Department of Justice maintain the confidentiality of two video-recorded trainings given to a limited audience of prosecutors on how to investigate, catch, and prosecute sexual predators?

The circuit court and court of appeals answered, no.

ORAL ARGUMENT AND PUBLICATION

By granting the Department of Justice's petition for review, this Court has indicated that the case is appropriate for oral argument and publication.

STATEMENT OF THE CASE

A. The two videos at issue in this case involve presentations given by then-Waukesha County District Attorney Brad D. Schimel at the Wisconsin State Prosecutors Education and Training conferences. The

Department of Justice sponsors these conferences semiannually to allow prosecutors[1] to develop their skills by openly sharing techniques and strategies. Attendance at the conferences is limited and does not include members of the public, criminal defense attorneys, private attorneys, or the media. R. 15. Sessions are sometimes videotaped for prosecutors who are unable to attend, but the recordings are not made publically available. R. 15 ¶ 3.

The first presentation, given in 2009, is an overview of investigations and prosecutions of online child predators and child pornographers, including advice on best practices for catching predators. R. 4, 2009.[2] The presentation contains multiple examples from sensitive cases. *E.g.*, R. 4, 2009 at 8:10–10:30, 12:35–13:40, 47:00–41, 54:56–56:50, 1:02:32–1:03:30, 1:11:10–54. It discusses what undercover officers can and cannot say when trying to catch sexual predators, and specific strategies for what undercover officers can do to generate evidence for trial. R. 4, 2009 at 4:26–5:02, 13:45–14:05, 20:06–27, 20:30–21:00, 22:36–23:19, 23:35–24:17. The presentation also extensively reviews the types of evidence that are most helpful to proving the elements of various sex crimes. R. 4, 2009 at 5:30–7:12,

[1] The audience during the two presentations also included some law enforcement and crime victim witness personnel. R. 15 ¶¶ 3–10, 12, 13.

[2] The videos are on a DVD that the circuit court placed under seal and are labeled according to their dates. R. 3, 4. The video from 2013 is in two parts.

7:45–8:07, 9:29–10:00, 10:44–11:36, 12:30–37, 14:07–14:53, 15:29–37, 19:52–20:02, 54:45–56, 57:43–54, 1:01:24–38. It discusses technology and how to identify who created or accessed particular files. R. 4, 2009 at 7:47–8:03, 43:10–49, 44:07–44:50, 46:00–30, 55:20–56:15, 1:08:30–56. Finally, the presentation surveys certain litigation defenses and how to overcome them. R. 4, 2009 at 14:52–19:45, 25:52–29:00, 42:16–49:12.

The second presentation, given in 2013, is a detailed discussion of a sexual assault case in which a high school student posed as a female online, obtained graphic pictures from his male classmates, and used them to extort sexual acts. R. 4, 2013. This presentation includes intimate details about the offender's manipulation of the victims and the devastating toll these tactics took on the victims and their families. R. 4, 2013 Part 1 at 17:03–21:58, 38:22–46:17, 52:22–Part 2 00:17, Part 2 at 03:00–07:30, 10:24–11:18, 12:20–44, 13:35–14:08. It also describes a particularly traumatic effect on one victim; something the Department of Justice believes has never been publically disclosed. R. 4, 2013 Part 2 at 06:15–07:30.

The 2013 presentation discusses techniques that law enforcement should use to catch and convict sexual predators. It explains how the police first identified the suspect. R. 4, 2013 Part 1 at 15:24–16:06. The presentation gives tips for convincing possible suspects to talk to the police, R. 4, 2013 Part 1 at 23:03–43, 26:08–23, and

examines some challenges faced when trying to extract information from technology, R. 4, 2013 Part 1 at 28:45–29:08, 33:21–55, 46:17–46:50. It includes expert observations on what to charge and when, R. 4, 2013 Part 1 at 29:43–31:15, 31:55–32:15, Part 2 at 1:23–2:15, along with factors that influenced plea negotiations, R. 4, 2013 Part 2 at 12:20–13:10. Finally, the presentation discusses some weaknesses in police procedures that might allow defendants or their counsel to get access to prosecution files too quickly. R. 4, 2013 Part 2 at 14:48–16:25.

B. In September of 2014, during the election campaign for Wisconsin Attorney General, the Democratic Party of Wisconsin submitted a request under Wisconsin's Open Records Law, Wis. Stat. §§ 19.31–19.39, seeking recordings of any training presentations given by then-candidate Brad D. Schimel. R. 2:7–8. Only the two videos described above matched the request. R. 2:15. After very carefully weighing the public policies for and against disclosure under Wisconsin's Open Records Law, the Department of Justice declined to produce either video, explaining that it made this decision in order to prevent sexual predators from evading the law and to protect the victims of the sex crimes. R. 2:15–18.

C. On October 21, 2014, the day after receiving the Department of Justice's response, the Democratic Party sought a writ of mandamus in the Dane County Circuit Court that would require release of the two videos. R. 1, 2.

In conducting the public interest balancing test mandated by the Open Records Law, the circuit court dismissed the Department of Justice's concerns about undermining law enforcement's efforts to catch sexual predators because, in the court's judgment, the methods discussed were not "particularly novel." App. 15, 18. The court also discounted the potential harm to victims based on the view that past media attention had already taken its toll. App. 8, 11–13. The circuit court did, however, acknowledge that release would "show[ ] nothing that can be considered misconduct on the part of any of the presenters." App. 18.[3] The court ordered the videos to be released, but stayed that order pending appeal, keeping the videos confidential during litigation. App. 1–2, R. 23.

The court of appeals affirmed the circuit court, agreeing with its reasoning. App. 19–25. The court of appeals similarly stayed disclosure pending further review by this Court. App. 26–27.

STANDARD OF REVIEW

"The application of the Open Records Law to undisputed facts is a question of law that [this Court] review[s] de novo." *Hempel v. City of Baraboo*, 2005 WI 120, ¶ 21, 284 Wis. 2d 162, 699 N.W.2d 551.

[3] Although the circuit court in this particular passage was discussing the 2009 video, the court's description of the 2013 video similarly reveals that the court did not find or suggest that this video contained any misconduct whatsoever. App. 8–13.

SUMMARY OF ARGUMENT

Evaluating a request under the Open Records Law begins with determining "whether the open records law applies," which requires "look[ing] at the statutory language of that law, along with its statutory and common law exceptions." *Linzmeyer v. Forcey*, 2002 WI 84, ¶ 10, 254 Wis. 2d 306, 646 N.W.2d 811. The parties in this case agree that the videos are records, as defined by Wis. Stat. § 19.32(2), and that none of the statutory exemptions apply. *E.g.*, Wis. Stat. §§ 19.35(1)(am)1–3, 19.36(1)–(13).

I. Before releasing any record subject to the Open Records Law, the record's custodian must "determine whether the presumption of openness is overcome by another public policy concern, [by] apply[ing] the balancing test articulated by this court in *Woznicki v. Erickson*, 202 Wis. 2d 178, 549 N.W.2d 699, and *Newspapers, Inc. v. Breier*, 89 Wis. 2d 417, 279 N.W.2d 179 (1979). That is, [the custodian] must weigh the public policies not in favor of release against the strong public policy that public records should be open for review." *Linzmeyer*, 2002 WI 84, ¶ 12. This is a "fact-intensive," "case-by-case" analysis in which the custodian has "substantial discretion." *Hempel*, 2005 WI 120, ¶ 62.

A. A showing that disclosure of a record would reveal "techniques and procedures" from past "investigations or prosecutions"—such as a prosecutor or police training—is generally sufficient to overcome the "presumption of

openness." *See Linzmeyer*, 2002 WI 84, ¶¶ 12, 41. Such records require "special care" due to their "particularly sensitive" nature, *id.* ¶ 26, and face only "a relatively low bar . . . to justify withholding" under the analogous federal open records law, *Blackwell v. FBI*, 646 F.3d 37, 42 (D.C. Cir. 2011). Broad release of such records—especially training presentations revealing prosecutor and police techniques—is particularly contrary to the public interest because this would undermine the ability to conduct effective training in the future.

Applying these principles to the two videos at issue in this case, it becomes clear that disclosure would undermine the "strong public interest in investigating and prosecuting criminal activity," *Linzmeyer*, 2002 WI 84, ¶ 30, by enabling sexual predators to evade the law and by limiting open discussion during law enforcement training.

B. Releasing the videos is also contrary to the public interest in protecting victims. The rights of victims are given special protection in Wisconsin, having been enshrined in the Constitution and multiple laws. *See* Wis. Const. art. I, § 9m; Wis. Stat. chs. 949, 950. Based upon its deep experience with victims, the Department of Justice reasonably concluded that disclosure of these videos—especially the 2013 video—would undermine this public interest in victims' rights by retraumatizing victims of sexual crimes and discouraging other victims from coming forward.

II. The 2013 video is also exempt from disclosure under the common-law exception for a prosecutor's case file, recognized in *State ex rel. Richards v. Foust*, 165 Wis. 2d 429, 477 N.W.2d 608 (1991). This video is a lengthy, oral account of a single prosecution, by the prosecutor himself. The account should be treated as functionally equivalent to a prosecutor's case file for Open Records Law purposes.

ARGUMENT

I. The Public Interest Balance Favors Keeping Both The 2009 Video And The 2013 Video Confidential

There are two critical reasons for keeping the 2009 and 2013 videos confidential under the Open Records Law's public interest balance test. "[H]arm to [the] public interest [from disclosure would] outweigh[ ] the public interest in opening the records to inspection," *Linzmeyer*, 2002 WI 84, ¶ 25, because disclosure would (A) undermine the ability of police and prosecutors to catch and prosecute sexual predators, and (B) cause harm to the victims of these predators. When these two interests are considered together, the public interest case against release becomes even more powerful.

A. The Public's Interest In Thwarting Criminals, Including Sex Predators, Outweighs The Interest In Releasing These Particular Videos

1. Training Materials That Reveal Law Enforcement Techniques Will Usually Overcome The Open Records Law's Presumption Of Disclosure

Law enforcement training materials that discuss strategies and techniques will usually overcome the Open Records Law's laudable presumption of disclosure for three important reasons: (1) their disclosure reveals "techniques and procedures" from past "investigations or prosecutions," *Linzmeyer*, 2002 WI 84, ¶ 41, (2) they would normally be non-disclosable under Freedom of Information Act exemption 7(E), 5 U.S.C. § 552(b)(7)(E), and (3) keeping training videos such as these confidential will allow law enforcement personnel to freely exchange information without fear of its release ultimately undermining their efforts. Of course, each law enforcement training record must still be analyzed on a "case-by-case basis," *Hempel*, 2005 WI 120, ¶ 62, but these considerations help to guide that inquiry.

a. Disclosure of law enforcement training materials that reveal "techniques and procedures" from past "investigations or prosecutions" is generally contrary to the public interest. *See Linzmeyer*, 2002 WI 84, ¶ 41.

In *State ex rel. Richards v. Foust*, this Court held that a prosecutor's case files are exempt from disclosure under a common law exception to the Open Records Law, even if the files are closed. 165 Wis. 2d 429. This Court based its holding in part on public policy grounds. *Id.* at 435. For example, this Court found it important to protect district attorneys' "broad prosecutorial discretion," noting that courts only check this discretion when there is an "aura of discrimination." *Id.* at 434. This Court also expressed concern that files might contain "historical data leading up to the prosecution," which should "be protected if continuing cooperation of the populace in criminal investigations is to be expected." *Id.* at 435. Since *Foust*, this Court has "reaffirm[ed] that documents integral to the criminal investigation and prosecution process are protected from being open to public inspection." *Nichols v. Bennett*, 199 Wis. 2d 268, 275 n.4, 544 N.W.2d 428 (1996) (citation omitted); *see also Woznicki*, 202 Wis. 2d at 194–95.

In *Linzmeyer v. Forcey*, 2002 WI 84, this Court invoked similar concerns under the public policy balancing test, even where the *Foust* common law exception for prosecutor's files did not apply. Law enforcement records, this Court emphasized, can be "particularly sensitive regardless of whether or not the underlying investigations are on-going." *Linzmeyer*, 2002 WI 84, ¶ 26. They "are generally more likely than most types of public records to have an adverse effect on other public interests if they

are released." *Id.* ¶ 30. And there is a "strong public interest in investigating and prosecuting criminal activity." *Id.* Therefore, when considering law enforcement records that are outside of *Foust*'s common law exception, balancing the public policies for and against release requires "special care." *Id.* ¶ 26.

Notably, many of the reasons for releasing the particular records in *Linzmeyer* explain why *not* disclosing training materials will be appropriate in most cases. *Linzmeyer* ordered the release of records of a completed police investigation of a school teacher, but cautioned that its result was atypical. *Id.* ¶¶ 1, 38. The teacher's reason for nondisclosure—that he would be personally embarrassed—was not a relevant public policy consideration. *Linzmeyer*, 2002 WI 84, ¶¶ 34–36. Further weighing in favor of release, the allegations involved "possible inappropriate interactions" with students. *Id.* ¶ 37. Finally, there was "no threat that techniques and procedures for law enforcement investigations or prosecutions would be revealed if the Report [was] disclosed." *Id.* ¶ 41. In the case of training videos disclosing law enforcement techniques, however, these reasons will generally—but not always—cut in the other direction.

b. *Linzmeyer* is also instructive because it "[a]ppl[ied]" federal law to reach its conclusion; specifically, Exemption 7 of the federal Freedom of Information Act, 5 U.S.C. § 552(b)(7), which "exempts law enforcement records from

public disclosure under [various] circumstances." 2002 WI 84, ¶¶ 32, 33. As *Linzmeyer* explained, Exemption 7 "provide[s] a framework that records custodians can use to determine whether the presumption of openness in law enforcement records is overcome by another public policy." *Id.* ¶ 33.

Of particular relevance here, Exemption 7(E) excludes "records or information compiled for law enforcement purposes"[4] that "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." 5 U.S.C. § 552(b)(7)(E). Federal cases interpreting this provision recognize that it sets "a relatively low bar for [an] agency to justify withholding," *Blackwell*, 646 F.3d at 42, "only requir[ing] that the [agency] demonstrate logically how the release of the requested information might create a risk of circumvention of the law." *Mayer Brown LLP v. IRS*, 562 F.3d 1190, 1194 (D.C. Cir. 2009) (citation omitted). "In short, the exemption looks not just for circumvention of the

[4] "[L]aw enforcement purposes" include "more than just investigating and prosecuting individuals *after* a violation of the law," they also include "proactive steps"—like training—"designed to prevent criminal activity and to maintain security." *Pub. Emp. for Envtl. Responsibility v. U.S. Section, Int'l Boundary & Water Comm'n, U.S.-Mexico*, 740 F.3d 195, 203 (D.C. Cir. 2014) (quoting *Milner v. Dep't of the Navy*, 562 U.S. 562, 582 (2011) (Alito, J., concurring)).

law, but for a risk of circumvention; not just for an actual or certain risk of circumvention, but for an expected risk; not just for an undeniably or universally expected risk, but for a reasonably expected risk; and not just for certitude of a reasonably expected risk, but for the chance of a reasonably expected risk." *Id.* at 1193.

While the Department of Justice does not believe that Exemption 7(E) caselaw must be applied directly to the Open Records Law in all of its details, the principle that this exemption creates "a relatively low bar for [an] agency to justify withholding," *Blackwell*, 646 F.3d at 42, "provide[s] a framework that records custodians can use to determine whether the presumption of openness in law enforcement records is overcome by another public policy," *Linzmeyer*, 2002 WI 84, ¶ 33.

c. General public policy also strongly favors allowing law enforcement to freely exchange techniques and tips without fear that criminals will obtain that information. Prosecutors and police officers should be permitted to be open and candid with each other, so they can be more effective in fighting crime. If the requirements for confidentiality are set too high, however, future teaching prosecutors and police officers will face a difficult choice. The more information they include in their presentations, the more likely it will be held exempt from disclosure—but it will also be more likely to cause damage to their efforts if released. Rather than trying to predict where courts will

draw the line, future presenters may simply withhold the best strategies, or keep the discussion abstract and avoid important details. Alternatively or in addition, trainers may ask the Department of Justice and other state bodies not to record their presentations, eliminating a useful tool for prosecutors and police who are unable to attend the relevant presentations or conferences.

In short, the public is best served when law enforcement can openly share what does and does not work in a limited training setting. And the need for an open and confidential space for discussion is all the more important when law enforcement is being trained on how to protect Wisconsin's children from sexual predators.

2. Revealing The Law Enforcement Techniques In The 2009 and 2013 Videos Would Undermine The "Strong Public Interest In Investigating And Prosecuting Criminal Activity"

Applying the above-described principles to the two videos at issue in this case demonstrates that the videos' disclosure would be contrary to the public interest.

a. The 2009 presentation, titled "Prosecution & Common Defenses in Online Child Exploitation Cases," includes information that sexual predators could use to evade the law, such that disclosing the video would undermine the "strong public interest in investigating and prosecuting criminal activity." *Linzmeyer*, 2002 WI 84, ¶ 30.

Guidance for undercover officers. The 2009 presentation discusses what undercover officers can and cannot say when trying to catch sexual predators, and specific strategies for what undercover officers can do to generate evidence for trial. R. 4, 2009 at 4:26–5:02, 13:45–14:05, 20:06–27, 20:30–21:00, 22:36–23:19, 23:35–24:17. *Linzmeyer* specifically cautioned that "undercover operation[s] . . . require secrecy to protect . . . techniques." 2002 WI 84, ¶ 41. Releasing undercover techniques to the public would alert criminals as to flags to watch out for to detect undercover police. *See Kortlander v. Bureau of Land Mgmt.*, 816 F. Supp. 2d 1001, 1014 (D. Mont. 2011) ("Knowing how law enforcement plans and executes undercover operations is the type of information that, if made public, could allow for planning criminal activity to avoid detection.").

Identifying the strongest evidence. The presentation reviews the types of evidence that are most useful to proving the elements of various sex crimes. R. 4, 2009 at 5:30–7:12, 7:45–8:07, 9:29–10:00, 10:44–11:36, 12:30–37, 14:07–14:53, 15:29–37, 19:52–20:02, 54:45–56, 57:43–54, 1:01:24–38. Disclosing this information would reveal to sexual predators which parts of their trail are most important to cover up. For example, one court allowed the FBI to withhold its "strategy for using a particular type of evidence" because it might "instruct criminals on how best to maintain operational security when conducting their criminal

activities." *Abdeljabbar v. Bureau of Alcohol, Tobacco & Firearms*, 74 F. Supp. 3d 158, 183 (D.D.C. 2014) (citation omitted).

Extracting evidence from computers. The presentation discusses technology and how to identify who created or accessed particular computer files. R. 4, 2009 at 7:47–8:03, 43:10–49, 44:07–44:50, 46:00–30, 55:20–56:15, 1:08:30–56. Disclosing this information may well give child pornographers and their customers important insights into how best to hide the evidence of their crimes. Courts have approved the withholding of "forensic examination procedures" for computers because releasing such information could "expos[e] computer forensic vulnerabilities to potential criminals." *Blackwell*, 646 F.3d at 42 (citation omitted).

Strategies for prosecuting sex criminals. The presentation reviews common litigation defenses and how to overcome them. R. 4, 2009 at 14:52–19:45, 25:52–29:00, 42:16–49:12. If predators learn about local law enforcement's "perceived litigation hazards," they will know "how to best structure [a crime] so as to avoid the maximum enforcement efforts of [law enforcement]." *Mayer Brown LLP*, 562 F.3d at 1194.

b. The 2013 presentation is a detailed study of a particular sexual extortion case. Releasing this video would undermine the "strong public interest in investigating and prosecuting criminal activity." *Linzmeyer*, 2002 WI 84, ¶ 30.

Methods of catching sex criminals. The presentation explains how the police first identified the suspect. R. 4, 2013 Part 1 at 15:24–16:06. Although the particular offender's mistakes seem relatively obvious in hindsight, a case study of the mistakes of one sexual predator—if disclosed to the public—could help other would-be predators avoid similar mistakes in the future. *See McQueen v. United States*, 264 F. Supp. 2d 502, 521 (S.D. Tex. 2003) (upholding the exclusion of documents that "detail[ed] how an agent was able to detect" tax evasion because disclosure might "enable others to . . . avoid or at least to delay detection").

Tools for interrogating suspects. The presentation includes strategies for convincing possible suspects to talk to the police. R. 4, 2013 Part 1 at 23:03–43, 26:08–23. Release of such information might prepare criminals for what to watch out for when interacting with police. *See Miller v. DOJ*, 562 F. Supp. 2d 82, 124 (D.D.C. 2008) (holding that revealing the "type of information used to develop [psychological] profiles" could enable suspects to "develop countermeasures").

Extracting evidence from computers. The 2013 presentation discusses forensic examination of technology, and what made it easier or more difficult for investigators to extract information. R. 4, 2013 Part 1 at 28:45–29:08, 33:21–55, 46:17–46:50. Knowing what tactics local law enforcement has a difficult time with might encourage

others to use similar techniques, frustrating time-sensitive investigatory efforts. *See Blackwell*, 646 F.3d at 42.

Prosecutorial charging decisions. The presentation discusses what to charge and when. R. 4, 2013 Part 1 at 29:43–31:15, 31:55–32:15, Part 2 at 1:23–2:15. Publicly disclosing signs of a pending charge might encourage some criminals to flee or to destroy evidence. This Court has also recognized the importance of protecting prosecutors' "broad prosecutorial discretion," including whether "to charge or not to charge, and . . . how to charge." *Foust*, 165 Wis. 2d at 434.

Considerations during plea negotiations. The presentation identifies factors that can significantly influence a prosecutor's leverage in plea negotiations. R. 4, 2013 Part 2 at 12:20–13:10. Criminal defendants "would love to have access to the settlement guidelines from their local [prosecutor's] office." *Mayer Brown LLP*, 562 F.3d at 1196. Knowing this could "provide leverage to push for a more lenient deal (for instance, by giving the defendant knowledge about when a prosecutor may be bluffing)." *Id.* It could "also enter into the ex ante cost-benefit calculus of soon-to-be criminals when deciding whether to break the law in the first place." *Id.*

Exploitable weaknesses in police department procedure. The training reveals some weaknesses in local police department procedures that might allow defendants or their counsel to get access to case files more quickly. R. 4,

2013 Part 2 at 14:48–16:25. The problem with releasing this information to potential criminals is self-evident.

c. The circuit court dismissed these concerns because the techniques discussed were not, in the court's judgment, "particularly novel" and were "widely known in the media." App. 14–15. The court of appeals agreed that the law enforcement strategies were "already known or knowable in the public sphere." App 23.

But information about the specific tools that *local* law enforcement uses—how local undercover officers behave, when a local prosecutor is bluffing during plea negotiations, what technology can impede local investigators, or what particular evidence local law enforcement looks for—is far more valuable to a would-be criminal than general information available about techniques used by someone, somewhere else. It is impossible for sexual predators to know and evade all of the various tools that law enforcement has to catch them. What they can avoid, however, are the particular methods that their local law enforcement are taught to use.

After watching these videos, the next sexual predator will learn how to trip up local forensic examiners, R. 4, 2013 Part 1 at 46:17–46:50, and how to eliminate file-access information, R. 4, 2009 at 46:00–30. He will know the types of questions local undercover officers will ask to generate evidence for trial. R. 4, 2009 at 20:06–27. He will be better prepared for interactions with local police officers. R. 4,

2013 Part 1 at 26:08–23. He will realize when to hold out for a better plea deal. R. 4, 2013 Part 2 at 12:20–13:10. And he will know which evidence to destroy first, based on what local prosecutors find most useful. R. 4, 2009 at 5:30–7:12, 7:45–8:07, 9:29–10:00, 10:44–11:36, 12:30–37, 14:07–14:53, 15:29–37, 19:52–20:02, 54:45–56, 57:43–54, 1:01:24–38.

Courts have recognized that even common techniques and procedures may be exempt "if disclosure of the circumstances of their use could lessen their effectiveness." *Hale v. DOJ*, 973 F.2d 894, 902–03 (10th Cir. 1992), *overruled on other grounds by* 2 F.3d 1055 (10th Cir. 1993); *accord McGehee v. DOJ*, 800 F. Supp. 2d 220, 236–37 (D.D.C. 2011); *Piper v. DOJ*, 294 F. Supp. 2d 16, 30 (D.D.C. 2003). "[I]f an individual knows which investigative techniques [law enforcement] employs in [a particular] type of investigation and how effective [it] believes those techniques to be, perpetrators may be able to circumvent the law and avoid detection in the future." *Rosenberg v. U.S. Dep't of Immigration & Customs Enf't*, 959 F. Supp. 2d 61, 80 (D.D.C. 2013).

It is especially problematic in the training context for open records analysis to turn on what a court will decide about how widely known the procedures being discussed are. Presenters will rarely have the time and resources to survey media, the literature, and the caselaw to determine whether the techniques they plan to discuss are sufficiently "commonly known" for purposes of the analysis favored by

the lower courts in the present case. Given the unpredictability of whether the presentation will be required to be released under the Open Records Law, presenters may simply limit their discussions or ask that they not be recorded. Either result would greatly harm the public interest.

Finally, it is worth emphasizing that releasing these particular videos would uncover absolutely no wrongdoing by any public official, but would, instead, undermine laudable work by such civic-minded officials. The videos "show[ ] nothing that can be considered misconduct on the part of any of the presenters." App. 18. They reveal absolutely no "aura of discrimination" surrounding a charging decision, such that "checks [should] be placed" upon a district attorney's "broad prosecutorial discretion." *See Foust*, 165 Wis. 2d at 434. There are no "allegations . . . [of] possible inappropriate interactions" by public officials with minors, as there were in *Linzmeyer*. 2002 WI 84, ¶ 37. And no one claims that the investigative process revealed by the videos was "used inappropriately, [to] be harassing or worse." *Id.* ¶ 27. Instead, the videos are a laudable, public-minded effort to train prosecutors so that they can better protect the public. Releasing these videos would undermine the public's strong interest in such beneficial training. *See supra* Part I.A.1.c.

B. The Public's Interest In Protecting the Victims Of Sex Crimes Outweighs The Interest In Releasing These Particular Videos

Wisconsin has a strong public policy of protecting the victims of crime. So strong, in fact, that it is written into the Wisconsin Constitution: "This state shall treat crime victims . . . with fairness, dignity and respect for their privacy." Wis. Const. art. I, § 9m. This Court has used equally sweeping language: "[J]ustice requires . . . every effort to minimize 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. So has the Legislature: "[Wisconsin] has a moral responsibility to aid innocent victims of violent crime." Wis. Stat. § 949.001. Wisconsin statutes reflect this value by providing compensation for victims, Wis. Stat. ch. 949 and by carefully defining victims' rights, Wis. Stat. ch. 950.

In this case, there are two victim-rights-related reasons not to release the videos. Releasing the videos may cause additional trauma to the victims discussed and discourage future victims from reporting sexual crimes.

1. The videos should not be disclosed because of the public interest in protecting victims from being traumatized once again, after they thought their nightmare had ended.

The Department of Justice has a great deal of experience with crime victims through its Office of Crime

Victim Services.[5] That Office's interactions with victims have shown that they are highly concerned about public distribution of the details of the crimes, even after the case has closed. Aff. of Jill J. Karofsky, Executive Director of the Office of Crime Victim Services (Karofsky Aff.), R.16 ¶¶ 5–7. The mere redisclosure of details can be devastating, "causing those past humiliations to reoccur, reminding victims of their trauma, and causing new public attention." Karofsky Aff., R.16 ¶ 7. It can be "crushing" for victims to have people who know them learn about the crime (perhaps for the first time), especially when victims "believe they have put past events behind them." Karofsky Aff., R.16 ¶ 8. "[R]evisited coverage . . . can, and in my experience does, re-traumatize victims." Karofsky Aff., R.16 ¶ 12.

Federal courts have allowed agencies to redact or withhold information that could be traumatizing to victims. In *National Archives & Records Administration v. Favish*, for example, the United States Supreme Court upheld the nondisclosure of *additional* photographs of a suicide victim due to the trauma it could cause family members. 541 U.S. 157, 167 (2004); *see also Prison Legal News v. Exec. Office for U.S. Att'ys*, 628 F.3d 1243, 1248–49 (10th Cir. 2011). And in *Espino v. DOJ*, the District Court for the District of Columbia found that the FBI properly redacted

[5] *See Office of Crime Victim Services, Wisconsin Department of Justice*, https://www.doj.state.wi.us/ocvs/office-crime-victim-services (last visited Feb. 22, 2016).

lists of items recovered from a rape victim because releasing such information "could have emotionally damaging effects on the victim and her family." 869 F. Supp. 2d 25, 29–30 (D.D.C. 2012).

Both presentations—especially the 2013 presentation—contain information about traumatic events that, if made public, risks additional trauma to the victims. The 2009 presentation, in discussing strategies for dealing with online child exploitation and pornography, included specific examples from sensitive cases. *E.g.*, R. 4, 2009 at 8:10–10:30, 12:35–13:40, 47:00–41, 54:56–56:50, 1:02:32–1:03:30, 1:11:10–54. The concern is even more pronounced in the 2013 presentation. That presentation walks through an alarming series of sexual offenses, presenting many details that would be devastating for the victims and their families to have to relive. R. 4, 2013 Part 1 at 17:03–21:58, 38:22–46:17, 52:22–Part 2 00:17, Part 2 at 03:00–07:30, 10:24–11:18, 12:20–44, 13:35–14:08. It also describes a particularly traumatic effect on one victim, which the Department of Justice believes has never been publically disclosed. R. 4, 2013 Part 2 at 06:15–07:30.

The courts below discounted these concerns based on the belief that past media attention had already taken its toll on the victims. App. 8, 11–13, 22. With all due respect, these courts simply underestimated the serious trauma that redisclosure can cause, something that the Department of Justice has learned through its close work with such victims.

See Karofsky Aff., R.16 ¶¶ 5–8, 12. This shows why "the legislature entrusted the records custodian with substantial discretion" in weighing the competing public interests. *Hempel*, 2005 WI 120, ¶ 62. This Court should give appropriate deference to the Department of Justice's unique role and experience protecting the victims of crime, and reaffirm the importance of "minimiz[ing] further suffering by crime victims." *Schilling*, 2005 WI 17, ¶ 26.

2. The videos should also remain confidential to avoid discouraging future victims from coming forward. If repeated traumatization becomes the rule under the Open Records Law, future victims will be less likely to report sexual crimes in the first place. This Court has cautioned that any "chilling effect" on victims caused by disclosure "must weigh in the [public interest] balance." *Hempel*, 2005 WI 120, ¶ 73; *see also Linzmeyer*, 2002 WI 84, ¶ 31.

Victims often "contact [the Office of Crime Victims Services] about privacy issues," and are "distressed because . . . the facts surrounding their victimization have been described in graphic detail, and the general public has access to those details." Karofsky Aff., R.16 ¶ 5. Many victims "would rather not report to the authorities than risk . . . humiliating details about an assault becoming public." Karofsky Aff., R.16 ¶ 11. And sexual predators "rely on victims' fears" to evade discovery and "to further prey on victims." Karofsky Aff., R.16 ¶ 11.

The case discussed in the 2013 presentation is a heartbreaking example: there were 39 separate victims before a single one came forward. R. 4, 2013 Part 1 at 47:01–15. The serious possibility that disclosure will contribute to similar fears—and possibly allow predators to repeat their crimes with impunity for years before anyone comes forward—should be given great weight in the public interest balancing.

3. Finally, contrary to the circuit court's conclusion, App. 11, the release of the videos will not be particularly useful to families seeking to protect their children. The presentations focus primarily on how to *catch* sexual predators, spending considerably less time on how the predators being discussed lured their victims. Notably, the Department of Justice provides many useful resources to help parents protect their children from criminals. *See Resources & Materials, Wisconsin Department of Justice*, https://www.doj.state.wi.us/dci/icac/resources-materials (last visited Feb. 22, 2016).

II. The 2013 Video Is Exempt From Disclosure As An Oral Account Of A District Attorney's Case File Under *Foust*'s Common Law Exemption

The 2013 presentation also falls within the logic of the common law exemption from disclosure for prosecutors' case files. In *State ex rel. Richards v. Foust*, this Court held that a prosecutor's case files are exempt from public disclosure under the Open Records Law, even if the files are closed.

165 Wis. 2d 429. This Court reached this conclusion because, *inter alia*, it was critically important to protect district attorneys' "broad prosecutorial discretion." *Id.* at 434. The Court also expressed concern that such files might contain "historical data leading up to the prosecution," which should "be protected if continuing cooperation of the populace in criminal investigations is to be expected." *Id.* at 435.

Foust's rationale applies to the video of the 2013 presentation. The video lasts for over an hour, and focuses upon a single case—a particularly sensitive one, involving the extortion of sexual acts from minors. It describes the background of the case, R. 4, 2013 Part 1 8:09–15:16, the investigation, R. 4, 2013 Part 1 15:17–50:03, the pattern of the crime, R. 4, 2013 Part 1 37:18–48:32, the charging decisions, R. 4, 2013 Part 1 at 29:43–31:15, 31:55–32:15, 50:04–Part 2 2:15, and the events following the charging announcement, R. 4, 2013 Part 2 2:16–14:47, including the plea negotiations, R. 4, 2013 Part 2 at 12:20–13:10. The video is essentially an oral account by the prosecutor—to a limited audience of other prosecutors—of his case file.

Although the video is not in the form of a physical case file, this Court has explained that only "the nature of the [records]" matters for purposes of the *Foust* exception, because "[t]o conclude otherwise would elevate form over substance." *Nichols*, 199 Wis. 2d at 274. The *Foust* court based its rule on protecting the district attorney's "broad

prosecutorial discretion," including whether "to charge or not to charge, and . . . how to charge." 165 Wis. 2d at 434. In the 2013 video, then-district attorney Schimel explains when and what he decided to charge in the case. R. 4, 2013 Part 1 at 29:43–31:15, 31:55–32:15, 50:04–Part 2 2:15. He talks at length about the background of the case and the investigation. R. 4, 2013 Part 1 8:09–50:03. In some ways, the presentation contains more information than some physical case files, since it includes the district attorney's thoughts and impressions.

CONCLUSION

The decision of the court of appeals should be reversed and the two videos should remain protected from public release. If, however, this Court concludes that only a portion of the videos should remain confidential, it should remand with instructions to allow the Department of Justice to redact those portions.

Dated this 24th day of February, 2016.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 6,515 words.

Dated this 24th day of February, 2016.

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

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.

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 24th day of February, 2016.

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