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

REPLY BRIEF OF THE WISCONSIN DEPARTMENT OF JUSTICE AND KEVIN POTTER

BRAD D. SCHIMEL
Attorney General

MISHA TSEYTLIN
Solicitor General
State Bar #1102199

LUKE N. BERG
Deputy Solicitor General

Wisconsin Department of Justice
17 West Main Street
P.O. Box 7857
Madison, Wisconsin 53707-7857
tseytlinm@doj.state.wi.us
(608) 267-9323

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In its opening brief, the Department of Justice explained why it concluded, after careful deliberation, that releasing these particular training videos would undermine two critical public-policy interests: (1) catching and prosecuting criminals, especially sexual predators, and (2) protecting the victims of these predators.

With regard to thwarting criminals, the Department explained that the training videos discuss specific law-enforcement strategies that, if released, would help predators evade the law. Opening Br. 15–21. Ordering release would also hinder candid conversation at future trainings and/or lead to trainings no longer being recorded. Opening Br. 21–22. The Department supported these arguments with timestamped citations to the videos, Opening Br. 16–21, and citations to *Linzmeyer v. Forcey*, 2002 WI 84, 254 Wis. 2d 306, 646 N.W.2d 811, and federal Exemption 7(E) caselaw, Opening Br. 15–21.

And as to protecting victims, the Department explained that releasing these videos would cause grave harm to victims, pointing to specific timestamped citations and its own experience with victims. Opening Br. 23–27. The Department added that the 2009 video is protected from disclosure as an oral account of a prosecutor's casefile, under the exception this Court recognized in *State ex rel. Richards*

v. Foust, 165 Wis. 2d 429, 477 N.W.2d 608 (1991). Opening Br. 27–29.

The response brief does not address most of the Department's arguments and entirely fails to respond to the timestamped citations in the Department's brief. This lack of specificity is telling because the Department permitted opposing counsel to view the videos twice in preparation for the response brief, with the understanding that the specific techniques and information about victims could not be disclosed. Counsel could have addressed the Department's timestamped citations without revealing the specific contents of the videos, just as the Department did in its opening brief. The response brief also does not even attempt to answer the Department's argument about the negative long-term consequences—in terms of undermining training of prosecutors and police—that would result from the forced disclosure of these videos.

Rather than responding to the Department's specific arguments, the response brief merely cites the Open Records Law's general principles, quotes the lower courts at length, and then makes a couple of meritless arguments:[1]

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[1] In its statement of the case, the response brief claims that the Department "conceded at trial that the tapes would not impact its ability to prosecute sensitive crimes or that these particular videos would result in re-victimization." Response Br. 5. This is simply false. The Department has consistently argued that disclosure of these videos would undermine its ability to prosecute sexual predators and would harm crime victims. *See, e.g.*, Resp. App. 26:1–9. The statement section also relates the trial court's question about some prosecutors

First, the response brief argues that the Department is improperly attempting to "federalize Wisconsin's public records law." Response Br. 9–13. But the Department made clear that it is not asking this Court to adopt wholesale FOIA Exception 7(E) and its caselaw. Opening Br. 14. Rather, the Department's argument is based upon the same public interest this Court recognized in *Foust* and *Linzmeyer*: protecting law enforcement techniques from disclosure, in the context of these particular records. Opening Br. 10–12. Having said that, this Court in *Linzmeyer* specifically recognized that FOIA Exemption 7 is "a framework that records custodians can use to determine whether the presumption of openness in law enforcement records is overcome by another public policy." 2002 WI 84, ¶ 33. The response brief's failure to respond to the Department's FOIA Exemption 7 cases is an admission by silence that the two videos at issue in this case would not be disclosed under that "framework."

Second, the response brief claims that the Department's reliance on *Linzmeyer* is misplaced because "*Linzmeyer* was primarily concerned with whether disclosure would jeopardize an ongoing police investigation." Response Br. 11. But this Court in *Linzmeyer* began its general

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switching to defense attorneys. Response Br. 7; Resp. App. 22:5–9. But there is no way to prevent ex-prosecutors from using, in a general way, what they learned in confidential training. This case is about whether this critical information should also be broadcast to the public, including to would-be sexual predators attempting to hide their crimes.

discussion of law enforcement records by emphasizing that they "can be particularly sensitive *regardless of whether or not the underlying investigations are on-going*." 2002 WI 84, ¶ 26 (emphasis added). Interference with an ongoing investigation is certainly a significant concern, but only one of the reasons that law enforcement records require "special care." *Id.* In general, law enforcement records are "more likely than most types of public records to have an adverse effect on other public interests if they are released." *Id.* ¶ 30. Furthermore, *Linzmeyer* placed special emphasis on the fact that no "techniques and procedures for law enforcement investigations or prosecutions would be revealed." *Id.* ¶ 41. In stark contrast, the videos at issue here reveal a number of strategies that local law enforcement finds particularly effective. Opening Br. 15–20.

Third, the response brief suggests that the Department's analysis should "not [be] accord[ed] any weight" because "the subject of the records request is the same public official who is performing the balancing test." Response Br. 10.[2] This Court has held that records custodians have "substantial discretion," and has never suggested that this principle does not apply where the records custodian created the record. *Hempel v. City of*

[2] Attorney General Schimel gave the presentations at issue in his prior capacity as Waukesha County District Attorney. It was the previous Wisconsin Attorney General who denied the Open Records Law request and litigated the case in the trial court. R. 2:15–18.

Baraboo, 2005 WI 120, ¶ 62, 284 Wis. 2d 162, 699 N.W.2d 551. Indeed, the records custodian is *normally* the party involved in creating the record itself. Wis. Stat. § 19.33(1) ("An elective official is the legal custodian of *his or her records* and the records of *his or her office* . . . .") (emphasis added). In addition, given the Department of Justice's extensive experience prosecuting sexual predators and protecting their victims, its analysis should be given special weight. *See* Opening Br. 25–26.

Fourth, the response brief asserts that the Department is asking for a "vast exception" from the Open Records Law. Response Br. 13. Yet the Department is only asking this Court to hold that training materials intended for a limited audience and discussing law enforcement techniques will usually—not always—overcome the Open Records Law's presumption of disclosure. Opening Br. 10–15. The Department made crystal clear that it is not asking for any sort of blanket exception: "each law enforcement training record must still be analyzed on a 'case-by-case basis.'" Opening Br. 10 (quoting *Hempel*, 2005 WI 120, ¶ 62).

Fifth, the response brief argues that releasing the videos will not harm victims because "much of the information regarding the crime[s] ha[s] been made public." Response Br. 13–15. However, the 2013 video contains at least one heartbreaking detail about a victim that the Department believes has never been disclosed. Opening Br. 25. And regardless of past public attention, the Depart-

ment's extensive experience with crime victims has shown that even "*redisclosures* [can] caus[e] those past humiliations to reoccur, remind[ ] victims of their trauma, [and] caus[e] new public attention." Aff. of Jill J. Karofsky, R. 16 ¶¶ 7, 12.[3] The Department hopes and believes that the Court will agree that both videos—especially the 2013 video—include significant content that would be *extremely* upsetting for victims to relive. Furthermore, crime victims are often very sensitive to public attention, and fear of disclosure can cause some victims not to report crimes. R. 16 ¶¶ 5, 11. In the case discussed in the 2013 video, for example, only one of 39 victims came forward. Releasing these videos would legitimize victims' fears and could dissuade future victims from reporting sexual crimes. Opening Br. 26–27.

Finally, the response brief mischaracterizes the Department's argument that the 2013 video falls within the case-file exception from *Foust*, claiming that the Department is seeking protection for "*any* record including a discussion of

[3] The response brief casts aspersions on the Department's affidavit for not specifically discussing the videos. Response Br. 15. It is true that the affidavit of Jill J. Karofsky, head of the Department's crime victim services office, did not take any position on whether either of the two videos at issue should be disclosed, and, indeed, did not discuss the videos at all. Opening Br. 24, 26; R. 16. The affidavit merely explains to the courts, as a general matter, that redisclosure of the details of a sensitive crime can be devastating to victims and can discourage future victims from reporting crimes, based upon Karofsky's extensive experience in this area. It is the Department as a whole—not Karofsky—that concluded that these generally applicable considerations militate against disclosure of these particular videos.

a closed prosecution." Response Br. 16. The Department's argument is that this particular presentation went into so much detail about one specific case that it, in essence, revealed the contents of a prosecutor's case file. Opening Br. 27–29. As this Court has explained, "the nature of the [records]" matters for purposes of the *Foust* exception, because "[t]o conclude otherwise would elevate form over substance." *Nichols v. Bennett*, 199 Wis. 2d 268, 274–75, 544 N.W.2d 428 (1996).

CONCLUSION

The decision of the court of appeals should be reversed.

Dated this 28th day of March, 2016.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General

MISHA TSEYTLIN
Solicitor General
State Bar # 1102199

LUKE N. BERG
Deputy Solicitor General

Wisconsin Department of Justice
17 W. Main Street
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-9323
(608) 261-7206 (Fax)
tseytlinm@doj.state.wi.us

Attorneys for Respondents-Appellants-Petitioners

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 1578 words.

Dated this 28th day of March, 2016.

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MISHA TSEYTLIN
Solicitor General

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 28th day of March, 2016.

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MISHA TSEYTLIN
Solicitor General