STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

VOCES DE LA FRONTERA, INC. and
CHRISTINE NEUMANN-ORTIZ,

Petitioners-Respondents,

v.

Appeal No. 2015AP001152
Milwaukee County Case 2015CV002800

DAVID A. CLARKE JR.,

Respondent-Petitioner-Appellant.

APPEAL FROM THE JUDGMENT OF THE
MILWAUKEE COUNTY CIRCUIT COURT
THE HONORABLE DAVID L. BOROWSKI PRESIDING

BRIEF AND APPENDIX OF RESPONDENT-PETITIONER-APPELLANT

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STATEMENT OF ISSUE FOR REVIEW

Whether Milwaukee County Circuit Court Judge David L. Borowski erred in issuing a writ of mandamus ordering Sheriff David A. Clarke Jr. and the Milwaukee County Sheriff's Office to produce unredacted immigration detainer forms (I-247s) received from the U.S. Immigration and Customs Enforcement (ICE), a component of the U.S. Department of Homeland Security, under Wisconsin's Public Records Law, Wis. Stat. §§ 19.31-19.37, and applicable federal laws and regulations.

STATEMENT OF ORAL ARGUMENT AND PUBLICATION

Respondent-Petitioner-Appellant does not believe oral argument would be necessary in this matter, as the case can be adequately developed and analyzed through written briefs.

The Court's opinion will likely meet the criteria for publication under Wis. Stat. § 809.23, in that the opinion of the Court will provide clarity on an important question of law involving substantial public interest.

STATEMENT OF THE CASE

This case involves an open records request made by Voces de la Frontera, Inc., and its Executive Director Christine Neumann-Ortiz, for unredacted copies of federal immigration detainer forms (I-247s) that were in the possession of Milwaukee County Sheriff David A. Clarke Jr. and the Milwaukee County Sheriff's Office ("MCSO"). On June 15, 2015, Milwaukee County Circuit Court Judge David L. Borowski granted a writ of mandamus ordering the production of unredacted copies of the federal immigration documents in the possession of MCSO. Sheriff Clarke thereafter filed this appeal on the basis that the requested documents are exempt from production under Wisconsin's Public Records Law, as guided by federal laws and regulations.

Voces de la Frontera, Inc. ("Voces") is a non-profit organization organized to advance the civil rights, electoral participation and economic conditions of Wisconsin's Latino community. R.1:1[1]. Christine Neumann-Ortiz is its Executive Director and has held that position since 2005. R.19:6. The organization is involved in a broad immigration rights movement that seeks to decriminalize certain policies and to protect the

[1] Citations containing a number after the colon refer to specific page(s) in the cited document.

rights of both legal and illegal immigrants. R.19:6. They advocate against the deportation of immigrants based on the purported disruption it creates for families, the trauma it creates for children and the fear it instills of law enforcement. R.19:6.

On February 5, 2015, Voces and Neumann-Ortiz submitted a written records request to Milwaukee County Sheriff David A. Clarke Jr. requesting, *inter alia,* copies of all immigration detainer forms (Form I-247s) received by MCSO from the U.S. Immigration and Customs Enforcement ("ICE"), a component and the investigative arm of the U.S. Department of Homeland Security ("DHS"). R.1:2. The request sought all immigration detainer forms that were received by MCSO from ICE since November 20, 2014. R.1:2.

The Form I-247[2] was provided by ICE to local law enforcement agencies, and it requested that the local agency notify ICE about the proposed release date for a specific alien and maintain custody of said alien for a period of time not to exceed 48 hours (excluding weekend and holidays) after he or she would be released from local custody, so that the individual could subsequently be taken into custody by ICE for

[2] DHS no longer uses the Form I-247. It was replaced in June 2015 by the I-247N (Request for Voluntary Notification of Release of Suspected Priority Alien) and the I-247D (Immigration Detainer – Request for Voluntary Action).

immigration purposes. R.1:2; R.3:3-4; R. 19:7. ICE issued a Form I-247 to individuals in local law enforcement custody who ICE had reason to believe were aliens subject to removal from the United States. R.3:3-4. As indicated above, the Form I-247 requested that the local law enforcement agency hold the individual in custody for an additional 48 hours after the individual ceased to be in custody on state-related charges. R.3:9. As explained by Ms. Neumann-Ortiz, an individual subject to the ICE detention hold "could potentially be undocumented or deportable." R.19:7.

Captain Catherine Trimboli was designated by Sheriff Clarke as the records custodian for the MCSO and was involved in the production of the records requested. R.19:30-31. Some initial delays occurred in connection with the open records request based on MCSO's requirement that a prepayment be provided, covering the costs of the open records request, and the withdrawal of other records requests that had been made by Voces. R.1:2-3; R.18:5-6. The adjusted required prepayment of $300 was not received by MCSO from Voces until March 11, 2015. R.1:3.

On March 31, 2015, DHS/ICE notified Cpt. Trimboli that the federal Privacy Act, 5 U.S.C. § 552a, and the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, both pieces of federal legislation required the

redaction of specific items of sensitive personally identifiable information contained on the Form I-247s. R.3:12-13; R.4:5. ICE requested that the following information be redacted from the forms: A Number (File No.), FBI number, Date of Birth, Immigration Status, Citizenship/ Nationality, Subject ID and Event No. R.3:12. Cpt. Trimboli thereafter notified Voces on March 31, 2015, that production could not take place until April 8, 2015, in order to provide her with adequate time to consider the redactions requested by DHS/ICE. R.1:6. The short delay was necessary to allow her time to analyze ICE's request and to balance the interest of the public in disclosure against the interest of the governmental agency in withholding the requested information. R.4:4; R.19:54-55.

On April 1, 2015, before the requested documents could be produced, Voces filed an action in Milwaukee County Circuit Court seeking the issuance of a writ of mandamus compelling the production of the subject documents. R.1. The case was assigned to Milwaukee County Circuit Court Judge David L. Borowski, who, on April 1, 2015, issued an order to show cause why the writ should not be entered, and scheduled the matter for a hearing on April 2, 2015. R.2.

On April 2, 2015, the circuit judge heard arguments by counsel and, following an in-chambers conference and as a form of compromise, counsel for Sheriff Clarke agreed to produce redacted I-247 forms in Sheriff Clarke's possession by the end of the business day. R.18:27-29. The requested I-247 forms, with an initial set of redactions, were provided to Voces by Sheriff Clarke that afternoon. R.7:2. The initial document production included the redaction of the following information from the I-247s: File No. (A-number or Alien number), Subject ID's, Event No., Nationality, and information regarding immigration enforcement history/status. R.4:6; R.6:3-30; R.19:41-42. After further consultation with DHS/ICE, however, the records custodian decided not to redact the nationalities of the subjects on the I-247 forms. R.4:7; R.19:42-43, 61-62. A revised production, which included the nationalities of the detainees, was thus made by MCSO on April 7, 2015. R.7:3; R.15:2. Ultimately, the records custodian provided the requested I-247 forms to Voces with the following limited redactions: File No. (A-number or Alien number), Subject ID's, Event No. and information regarding immigration enforcement history/status.

The limited information actually redacted by Sheriff Clarke was less than what was suggested by ICE, as the federal agency also suggested redacting the dates of birth from the I-247 forms. R.3:12; R.19:62. However, the records custodian determined that this information should be provided as it is frequently included in public records available on the Wisconsin Court System Circuit Court Access Program (CCAP) and the Office of the Sheriff Inmate locator website. R.4:6-7; R.19:62. The remaining subjects were redacted as they were identified by ICE as containing personally identifiable and/or sensitive law enforcement information. R.3:12; R.14:2-3; R.19:31-33, 40.

After the production of the redacted documents, the issue of whether the redactions were appropriately made was submitted to the circuit court on written briefs, and oral arguments were presented to the court on May 6, 2015. R.19. Testimony was presented at this May 6, 2015 hearing from Cpt. Trimboli, during which she provided justification for redacting the sensitive and personally identifiable information from the law enforcement records based on the request from DHS/ICE. R.19:31-38. Evidence was also presented on how the personally identifiable information could be used for fraudulent purposes if the information landed in the wrong hands.

R.19:76-77. This included individuals seeking to use someone else's personally identifiable information to obtain illegal entry into the United States and commit identity theft or other forms of misrepresentation to obtain benefits. Id.

On June 3, 2015, Judge Borowski ordered Sheriff Clarke to produce the unredacted immigration documents by the end of the day on Friday June 5, 2015. R.20. The trial court stated as follows: "I'm ordering the Sheriff's Department, specifically Sheriff Clarke, within 72 hours, so by Friday, to turn over the documents in an unredacted fashion." R.20:25.

On June 4, 2015, counsel for Sheriff Clarke made an emergency motion to the circuit court to stay the enforcement of the writ of mandamus pending an appeal to the Wisconsin Court of Appeals. R.21. In response to the motion, Judge Borowski issued an oral ruling on June 4, 2015, in which he declined to grant the Respondent's motion to stay the enforcement of the writ of mandamus during the pendency of any appeal. R.21:11-12. However, upon stipulation of the parties, and in order to provide Sheriff Clarke the opportunity to file an appeal, Judge Borowski stayed the matter until June 12, 2015. R.21:12.

On June 10, 2015, Sheriff Clarke filed a Petition for Leave to Appeal the Circuit Court's Order with this Court, along with an emergency motion for a stay of the trial court's order granting the writ of mandamus. R.10; R. 11. On June 11, 2015, this Court ordered that the motion for a temporary stay be granted; that the written order reflecting the circuit court's oral ruling be entered within three days; and that Sheriff Clarke file a Notice of Appeal within five days. R.12. The circuit court thereafter entered, as ordered by this Court, a written order granting the writ of mandamus on June 15, 2015. R.13. Sheriff Clarke filed a Notice of Appeal with this Court on June 17, 2015. R.16.

ARGUMENT

I. STANDARD OF REVIEW

This case involves the application of Wis. Stat. §§ 19.35 and 19.36, to an undisputed set of facts. The application of a statute to a particular set of facts presents a pure question of law. *Oshkosh Northwestern Co. v. Oshkosh Library Bd.,* 125 Wis. 2d 480, 485, 373 N.W.2d 459, 462 (Ct. App.1985). As such, this Court is not bound by the trial court's conclusions and should review this matter under the *de novo* standard. *First Nat'l Leasing Corp. v. City of Madison,* 81 Wis. 2d 205, 208, 260 N.W.2d 251, 253 (1977). More specifically, where a circuit court reviews a petition for a writ of mandamus by interpreting Wisconsin's Public Records Law and applies that law to undisputed facts, the Court of Appeals should review the circuit court's decision under a *de novo* standard. *Seifert v. School District of Sheboygan Falls*, 2007 WI App 20, ¶ 16, 305 Wis. 2d 582, 740 N.W.2d 177; *ECO, Inc. v. City of Elkhorn*, 2002 WI App 302, ¶ 15, 259 Wis. 2d 276, 655 N.W.2d 510.

II. THE I-247 FORMS REQUESTED BY VOCES ARE NOT SUBJECT TO DISCLOSURE UNDER THE WISCONSIN PUBLIC RECORDS LAW.

A. Federal regulation specifically protects the disclosure of the requested federal immigration documents.

This is a case involving the Wisconsin Public Records Law, Wis. Stat. §19.31, *et seq*. for the production of federal immigration detainer forms in the possession of the MCSO and Sheriff Clarke. In requesting the documents from MCSO, rather than directly from the federal government, Voces sought to circumvent federal regulations and federal law that either expressly prohibits the production of the records without proper redactions or weighed strongly against the production. Even though the request was made to MCSO under the Wisconsin Public Records Law, it was nevertheless appropriate for the MCSO records custodian to consider federal laws and regulations in determining whether the records should be produced, as the documents in question originated from a federal agency. Based on Wisconsin law and related federal regulations and FOIA exceptions, Sheriff Clarke and MCSO properly redacted certain information from the I-247 forms.

In determining whether a particular record should be disclosed under Wisconsin's Public Records Law, a two-step approach is used. First, the

record custodian must determine whether the Public Records Law applies to the record. *Linzmeyer v. Forcey*, 2002 WI 84, ¶ 10, 254 Wis. 2d 306, 646 N.W.2d 811. If it does, the second step is determining whether there is a statutory or common law exception that would exempt the production of the record. *Id.* There is no dispute that the immigration documents at issue are "records" under the law, so the only question presented to the Court is whether there is a statutory or common law exception that would protect or prohibit their disclosure.

While there is a strong presumption favoring the production of governmental records under Wisconsin law, the presumption is not absolute. *Kroeplin v. Wisconsin Dep't of Natural Res.*, 2006 WI App. 227, ¶ 13, 297 Wis. 2d 254, 267, 725 N.W.2d 186 (*citing Hathaway v. Joint School Dist.*, 116 Wis. 2d 388, 396-397, 342 N.W.2d 682 (1984)). Several specific statutory exceptions to the Wisconsin Public Records Law are applicable here.

Specifically, Wis. Stat. § 19.36(1) provides that "[a]ny record which is specifically exempted from disclosure by state and federal law or authorized to be exempted from disclosure by state law is exempt from disclosure under s. 19.35(1)..." Additionally, Wis. Stat. § 19.36(2)

exempts from disclosure all law enforcement records that are required to be withheld from public access by federal law or regulation.

Form I-247 is a federal law enforcement record containing information about removable aliens that no state or local government should disclose pursuant to 8 C.F.R. § 236.6. This federal regulation expressly protects the confidentiality of information concerning immigration detainees in local custody and supersedes any state law to the contrary. 8 C.F.R. § 236.6 provides that information obtained by a local law enforcement agency concerning an immigration detainee remains in the control of the federal agency (here ICE) and can only be subject to public disclosure pursuant to the provisions of applicable federal laws (such as the Freedom of Information Act), regulations and executive orders. The precise language contained in the federal regulation is as follows:

> No person, including any state or local government entity or any privately operated detention facility, that houses, maintains, provides services to, or otherwise holds any detainee on behalf of the Service (whether by contract or otherwise), and no other person who by virtue of any official or contractual relationship with such person obtains information relating to any detainee, shall disclose or otherwise permit to be made public the name of, or other information relating to, such detainee. Such information shall be under the control of the Service and shall be subject to public disclosure only pursuant to the provisions of applicable federal laws, regulations and executive orders. Insofar as any documents or other records contain such information, such documents shall not be public records. This section applies to all persons and information identified or described in it, regardless of when such persons obtained such information, and applies to all requests for public

> disclosure of such information, including requests that are the subject of proceedings pending as of April 17, 2002.

8 C.F.R. § 236.6. This regulation clearly applies where the immigration detainees (and records relating to the detainees) are in the custody of a local law enforcement agency. *See, Belbachir v. U.S.,* 2012 WL 5471938 (N.D. Ill. 2012) (noting that the redaction of names and other information related to immigration detainees was proper under 8 C.F.R. § 236.6); *American Civil Liberties Union of New Jersey, Inc. v. County of Hudson,* 352 N.J. Super. 44, 86-89, 799 A.2d 629 (2002) (interpreting 8 C.F.R. § 236.6 in connection with a request to counties under the state Public Records Law to produce immigration detainee records). The prohibition against state and federal disclosure set forth in 8 C.F.R. § 236.6 applies to I-247 forms, as the regulation covers all information relating to the immigration detainees received by a local law enforcement agency. *Ricketts v. Palm Beach County Sheriff,* 985 So. 2d 591, 592 (Fla. Dist. Ct. App. 2008) (noting that requested federal immigration documents including I-247s were not disclosed based on the application of 8 C.F.R. § 236.6).

The court's analysis of this regulation in *County of Hudson,* supra, is compelling. The case involved a civil liberties group that sued two counties, who had held detainees for the Immigration and Naturalization

Service (INS)[3] in their jails, to disclose copies of records pertaining to each person detained pursuant to New Jersey's Public Records Law. 352 N.J. Super. at 59-61. After the trial court initially ordered the production of the records, 8 C.F.R. § 236.6 was enacted – an emergency regulation promulgated by Attorney General John Ashcroft in direct response to the lower court's ruling in *County of Hudson.* The regulation superseded the court's ruling and required that counties holding immigration detainees for the federal government were prohibited from disclosing detainee information, regardless of what state law provided.

On appeal in *County of Hudson*, it was argued that the newly promulgated federal regulation pre-empted state law and specifically prohibited the production of the requested information. In analyzing 8 C.F.R. § 236.6, the Superior Court of New Jersey first found the regulation was duly promulgated within the scope of authority delegated to the Commissioner by Congress. *Id.* at 86. It was noted the right to regulate matters relating to immigration and naturalization resided exclusively within the purview of the federal government; the State has no

[3] INS ceased to exist under that name on March 1, 2003, when most of its functions were transferred to three new entities – U.S. Citizenship and Immigration Services (USCIS), U.S. Immigration and Customs Enforcement (ICE), and U.S. Customs and Border Protection (CBP) – within the newly created Department of Homeland Security, as part of a major government reorganization following the September 11, 2001 attacks.

constitutionally recognized role in the area. *Id.* at 87-88. The court thus concluded that 8 C.F.R. § 236.6 preempted state law and controlled the type of information the counties could release concerning immigration detainees. *Id.* at 78, 89. Because information relating to the immigration detainees was not subject to production under the state's open records law, the superior court reversed the trial court's decision, which had ordered the production of the immigration records. *Id.* at 89. This decision directly supports MCSO and Sheriff Clarke's position that 8 C.F.R. § 236.6 protects the production of the immigration detainer information in response to a state open records request and required the redaction of the information presently at issue.

A decision not to produce information relating to immigration detainees was also upheld by the Connecticut Supreme Court in *Commissioner of Correction v. Freedom of Information Commission*, 307 Conn 53, 52 A.3d 636 (2012), where the Freedom of Information Commission sought the copy of a printout from the state of a database maintained by the Federal Bureau of Investigation (FBI) relating to a detainee in state custody on alleged immigration violations. The State Department of Corrections refused to provide the requested information on

the basis that the production was barred by the operation of 8 C.F.R. § 236.6. After a lengthy series of appeals, the matter landed with the Connecticut Supreme Court, which specifically addressed the question of whether the regulation only protected the disclosure of federal information on detainees *currently* in custody, or whether it applied to both *current* and *former* detainees. The court noted the importance of uniform public policies concerning immigration detainees and the importance of preventing adverse impact on ongoing investigations and investigative methods. *Id.* at 70-71. Based on its reading of the regulation, Connecticut's highest court concluded that the regulation precluded the disclosure of information relating to immigration detainees, regardless of whether the detainee was still in custody or had been released. *Id.* at 74. In reaching that conclusion, the court stressed that 8 C.F.R. § 236.6 effects matters involving immigration and national security, which are matters that are exclusively within the purview of the federal government. *Id.* at 80 (*citing Hudson,* supra, 352 N.J. Super. at 76).

The application and scope of 8 C.F.R. § 236.6 was also addressed by an Illinois district court in *Belbachir*, supra. The case involved a request to submit certain information concerning immigration detainees to the court

under seal in connection with several court motions. 2012 WL 5471938, at 1-2. The district court noted that the names of the immigration detainees and other information was properly received by the court under seal pursuant to 8 C.F.R. § 236.6. *Id.* at 3. In finding that the magistrate judge properly received the records under seal, the district court stressed the privacy concerns that 8 C.F.R. § 236.6 sought to protect were significant. *Id.* The court affirmed the magistrate judge's decision to seal the records. *Id.*

By its express terms, 8 C.F.R. § 236.6 trumps any state open record laws, as the regulation pertaining to immigration and naturalization is within the exclusive jurisdiction of the federal government. *Plyler v. Doe,* 457 U.S. 202, 225, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982); *see also U.S. Chamber of Commerce v. Whiting,* 563 U. S. 582, 131 S. Ct. 1968, 1974, 179 L. Ed. 2d 1031 (2011) ("Power to regulate immigration is unquestionably exclusively a federal power."). 8 C.F.R. § 236.6 thus exempts from disclosure immigration related documents and information on detainees maintained or received by local law enforcement agencies.

B. The balancing test also supports non-disclosure of redacted information on I-247 forms.

Assuming *arguendo* that 8 C.F.R. § 236.6, as applied through the Wisconsin Public Records Law, does not prohibit the disclosure of the redacted immigration detainee information, the balancing test under Wisconsin's open records law would nevertheless support redactions on the I-247 immigration detainer forms.

Where neither a statute nor a common law creates a blanket exception to the production of requested records, the records custodian must decide whether the strong presumption favoring access and disclosure is overcome by some even stronger public policy favoring limited access or nondisclosure. *Linzmeyer,* 2002 WI 84 at ¶ 11 (*citing Woznicki v. Erickson,* 202 Wis. 2d 178, 192-93, 549 N.W.2d 699 (1996)). To determine whether the presumption of openness is overcome by another public policy concern, the balancing test articulated by the court in *Woznicki* and *Wisconsin Newspress, Inc. v. Sch. Dist. of Sheboygan Falls,* 199 Wis. 2d 768, 776, 546 N.W.2d 143 (1996) must be employed.

It is up to the records custodian – and ultimately the court – to balance the competing public interest in disclosure versus non-disclosure. *Milwaukee Journal Sentinel v. Wisconsin Dep't of Admin.,* 2009 WI 79, ¶

56, 319 Wis. 2d 439, 476, 768 N.W.2d 700 (balancing a question of law for the court). "Accordingly the balancing test must be applied with respect to each individual record" and "on a case-by-case basis... to determine whether a particular record should be released." *Id.* (internal citations omitted).

There is a strong presumption under Wisconsin law to protect the confidentiality and privacy of law enforcement records that could hurt the public interest or the individual subject to the release. This is expressly codified in the Wisconsin Public Records Law, as well as recognized by the courts. For instance, in *Linzmeyer*, 2002 WI 84, ¶¶ 30-31, the court noted that there is a strong public interest in investigating and prosecuting criminal activity, and when the release of records would interfere with an on-going prosecution or investigation, the general presumption of openness would likely be overcome. *Id.* at ¶ 30. There also exists a strong public interest in protecting individual's privacy and reputation. *Id.* at ¶ 31. This public interest, the court noted, arises from the public effects of the failure to honor the individual's privacy interests, and not the individual's concern about embarrassment. *Id.*; *see also Woznicki*, 202 Wis. 2d at 187; *Newspapers, Inc. v. Breier,* 89 Wis. 2d 417, 430, 279 N.W.2d 179 (1979).

Federal law (the Freedom of Information Act) also supports the non-disclosure of certain information on federal immigration forms. The Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, provides that law enforcement records or information compiled for law enforcement purposes are exempt from production (either in whole or in part) to the extent that the production of such law enforcement records or information:

> (A) could reasonably be expected to interfere with enforcement proceedings,
>
> (B) would deprive a person of a right to a fair trial or an impartial adjudication,
>
> (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy,
>
> (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source,
>
> (E) 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, or

(F) could reasonably be expected to endanger the life or physical safety of any individual.

5 U.S.C. § 552(b)(7).

In conducting the balancing test required under Wisconsin law, it is appropriate to consider the FOIA exemptions relating to the production of public records. Indeed, the Wisconsin Supreme Court held that the policies and exemptions of FOIA codified at 5 U.S.C. § 552(b)(7) are among the factors that "provide a framework that records custodians can use to determine whether the presumption of openness in law enforcement records is overcome by another factor." *Linzmeyer*, 2002 WI 84, at ¶¶ 32-33. The Supreme Court even touted these FOIA exemptions for law enforcement records as "concisely list[ing] the factors that support . . . public policies" that weigh against disclosure of police records. *Id. at* ¶ 32. The use of federal law to provide guidance to a records custodian employing the balancing test is consistent with Wisconsin law, which exempts from disclosure "[a]ny record which is specifically exempt from disclosure ... by federal law," and any law enforcement records, whenever federal law or regulation require, "relating to investigative information obtained for law enforcement purposes." Wis. Stat. § 19.36(1) and (2). Reliance on these federal factors under FOIA is particularly appropriate here, as the

documents at issue are federal immigration forms that happen to be in the custody of a local law enforcement agency.

Specifically, there are three FOIA exemptions set forth in 5 U.S.C. § 552(b)(7) that are particularly applicable to the information contained in the federal I-247 detainer forms. As indicated above, subsection (b)(7) protects certain categories of information contained in law enforcement records. Specifically, exemption (b)(7)(A) provides that records or information that could reasonably be expected to interfere with enforcement proceedings may not be subject to disclosure, in whole or in part; exemption (b)(7)(C) exempts from disclosure records that could reasonably be expected to constitute an unwarranted invasion of personal privacy; and exemption (b)(7)(E) protects records compiled for law enforcement purposes, the release of which would disclose techniques and/or procedures for law enforcement investigative purposes. Also to be considered is FOIA exemption (b)(6) which allows the withholding of personnel and medical files and similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy. Records that apply to or describe a particular individual, including investigative records, qualify under this exemption.

Consistent with the FOIA, the U.S. Immigration and Customs Enforcement (ICE) notified MCSO that when responding to a FOIA request for immigration detainer forms (I-247), the agency would redact certain sensitive and personally identifiable information. R.3:12; R.14:2-3. This request specifically included the four subjects at issue in this litigation: Subject ID, Event ID #, File number (or A-number) and information regarding immigration enforcement history/status. R.14:2-3.

In order to fall within the scope of the aforementioned 5 U.S.C. § 552(b)(7) exemptions, the information withheld must have been compiled for law enforcement purposes. The immigration detainer forms satisfy this threshold requirement. Pursuant to the Immigration and Nationality Act codified under Title 8 of the U.S. Code, the Secretary of Homeland Security is charged with the administration and enforcement of laws relating to the immigration and naturalization of aliens, subject to certain exceptions. *See* 8 U.S.C. § 1103. ICE is the largest investigative arm of DHS, and is responsible for identifying and eliminating vulnerabilities within the nation's borders. ICE is tasked with preventing any activities that threaten national security and public safety by investigating the people, money, and materials that support illegal enterprises. Here, we are

discussing immigration detainer forms, which allow ICE to work with local law enforcement entities to apprehend individuals who may be subject to removal from the United States for a variety of reasons. As the records in question allow ICE to perform its statutory mandated functions, the detainer forms are clearly law enforcement records.

FOIA exemption (b)(7)(E) protects records compiled for law enforcement purposes, the release of which would disclose techniques and/or 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. This exemption supports withholding internal identifying numbers on the immigration detainer forms (such as the "subject ID," "event ID," and "file number"). These numbers are used for internal tracking purposes by ICE. R.14:2. If this information was released, an individual who gains unauthorized access to the ICE system could illicitly modify data and circumvent law enforcement. Id. There is also significant risk of identity theft and fraud if such internal and sensitive personally identifiable information is shared; the public has an interest in reducing identity theft/fraud and protecting the national security, interests

not served by allowing access to this information. *See e.g., Flores-Figueroa v. U.S.*, 556 U.S. 646, 129 S. Ct 1886, 173 L. Ed. 2d 85 (2009). Additionally, the disclosure of this information serves no public benefit and would not assist the public in understanding how the agency is carrying out its statutory responsibilities. There is no compelling reason for Voces to have this information, as it is purely used for internal record keeping purposes. These numbers should therefore be withheld from production under Wisconsin law, as supported by the rationale set forth under section (b)(7)(E).

FOIA exemptions (b)(6) and (b)(7)(C) exempt from disclosure certain information that, if released, would constitute an unwarranted invasion of personal privacy. The assertion of these exemptions requires a balancing of the public's right to disclosure against the individual's right to privacy. The disclosure of information relating to particular immigration detainees, including their Alien number (file number) and immigration enforcement history/status, would be protected under subsections (b)(6) and (b)(7)(C). An Alien number is a unique number assigned by the federal government to an individual applying for an immigration benefit or who has a pending enforcement action. R.14:3. An A-number is by definition,

"a means of identification of an actual individual because they are assigned to a single person and, once used, are not assigned to anyone else." *U.S. v. Crounsset,* 403 F. Supp. 2d 475, 482 (E.D. Va 2005); *see also* 18 U.S.C. § 1028(d)(7)(A) (including Alien number as "means of identification" for purposes of fraud crimes). An A-number is similar to a social security number in that "[a]n INS A-File identifies an individual by name, aliases, date of birth, and citizenship, and all records and documents related to the alien are maintained in that file." *United States v. Blanco-Gallegos*, 188 F.3d 1072, 1075 n. 2 (9th Cir. 1999); *see also* R.14:3.

Federal courts have consistently interpreted (b)(7)(C) to hold that where a FOIA request for law enforcement records invokes the privacy interests of any third party mentioned in those records (including investigators, suspects, witnesses, and informants), the section (b)(7)(C) exemption applies unless there is an overriding public interest in disclosure. *See Barouch v. U.S. Dep't of Justice,* 962 F. Supp. 2d 30 (D.C. Cir. 2013)(*citing Schrecker v. DOJ,* 349 F.3d 657, 661 (D.C. Cir. 2003) and *Lewis v. DOJ,* 609 F. Supp. 2d 80, 84 (D.D.C. 2009)); *see also U.S. Dep't of Justice v. Reporters Committee for Freedom of Press,* et al., 489 U.S. 749, 109 S. Ct. 1468, 103 L. Ed. 2d 774 (1989). Indeed, as a general rule,

third-party identifying information contained in [law enforcement] records is 'categorically exempt' from disclosure." *Lazaridis v. U.S. Dep't of State,* 934 F. Supp. 2d 21, 38 (D.D.C. 2013); *see also*, *Stern v. FBI,* 737 F.2d 84, 91-92 (D.C. Cir. 1984) ("Exemption (7)(C) takes particular note of the 'strong interest' of individuals, whether they be suspects, witnesses, or investigators, 'in not being associated unwarrantedly with alleged criminal activity.").

The information concerning the immigration and enforcement history of a detainee on an I-247 form includes sensitive and private information involving their criminal history, whether they have been convicted of illegal entry into the U.S., whether they have returned to the U.S. after being deported, whether they have committed immigration fraud, and whether they pose a significant risk to national security. R. 3:9. Third-party individuals have a recognized privacy interest in not being publicly associated with immigration related investigations and/or actions, including whether they pose a threat to national security. Indeed, as a matter of policy, DHS extends privacy protections to aliens and protects the disclosure of such information, because disclosure without authorization could result in substantial harm, embarrassment, inconvenience, or

unfairness to an individual. *See* U.S. Department of Homeland Security, *Handbook for Safeguarding Sensitive Personally Identifiable Information*, (March 2012). *See* http://www.dhs.gov/xlibrary/assets/privacy/dhs-privacy-safeguardingsensitivepiihandbook-march2012.pdf (defining alien numbers as sensitive personally identifiable information) (last viewed July 27, 2015). The disclosure of this third-party information would constitute an unwarranted invasion of personal privacy and could subject the individuals to harassment and undue public attention. The individuals' privacy interest in the personally identifiable information contained on the immigration form outweighs any minimal public interest in the disclosure of the information. Note that none of the third parties in question in the present matter have consented to the release of any information on the detainer forms, or the detainer forms themselves.

The balancing test under Wisconsin's Public Record Law requires consideration of Wisconsin's presumption of privacy with respect to law enforcement records and personally identifiable information, as well as the FOIA factors found at 5 U.S.C. § 552(b)(6) and (b)(7). The I-247 immigration detainer form includes sensitive law enforcement information (subject ID, event ID, and A-number), and confidential personally

identifiable information (A-number and immigration enforcement history/status). There is a strong public interest in keeping this type of information protected from public view. There is no strong corollary public interest in these limited categories of information being disclosed to the public. Voces can engage in the advocacy that it seeks to perform based on the information provided and/or can contact the individuals who were subject to the immigration detention holds, if additional information is needed. As such, the balancing test under Wisconsin's Public Records law weighs in favor of nondisclosure and supports Sheriff Clarke's decision to redact the sensitive and confidential law enforcement information from the I-247 federal immigration forms.

CONCLUSION

Petitioners-Respondents are using the Wisconsin Public Records Law in an end run seeking to obtain protected federal documents that would be barred from disclosure under federal law. Even when the request is made of a local law enforcement agency in possession of these federal immigration forms under state law, federal regulation 8 C.F.R. § 236.6 and FOIA exemptions under 5 U.S.C. § 552(b)(6) and (b)(7) clearly supports protecting these records from disclosure. As such, the order of the circuit

court entering a writ of mandamus compelling the production of the unredacted I-247 forms must be reversed and the petition for the writ of mandamus must be dismissed.

Dated this 21st day of August, 2015.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel for Respondent-Petitioner-Appellant hereby certifies that on August 21, 2015, three copies of the Brief and Short Appendix of Respondent-Petition-Appellant were delivered by U.S. Mail to:

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Subscribed and sworn to before me
this 21st day of August, 2015.

Rachel J Halverson
Notary Public, State of Wisconsin.
My Commission expires: 03/12/2017

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19 for a brief produced with a proportional serif font: minimum printing resolution of 200 dots per inch, 13-point body text, 11-point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text.

The length of this brief is 6,963 words.

Dated this 21st day of August, 2015.

Oyvind Wistrom

-CERTIFICATE OF COMPLIANCE -
WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this Brief excluding the Appendix of Respondent-Petitioner-Appellant which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on August 21st, 2015.

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 21st day of August, 2015.

Oyvind Wistrom

Subscribed and sworn to before me
this 21st day of August, 2015.

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Notary Public, State of Wisconsin.
My Commission expires: 03/12/2017