STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT 1

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

Petitioners-Respondents,

v.

Appeal No. 2015AP001152
Mil. Co. Case No. 15-CV-2800

DAVID A. CLARKE, JR.,

Respondent-Petitioner-Appellant.

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

BRIEF OF THE PETITIONERS-RESPONDENTS

ATTORNEYS FOR PETITIONERS-RESPONDENTS:

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CERTIFICATE OF SERVICE

I certify that I have sent via messenger this 28th day of September, 2015, three true and accurate copies of the Brief of the Petitioners-Respondents, along with this and the other attached Certifications to the following counsel:

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I have submitted an electronic copy of this Brief 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 September 28, 2015.

Dated this 28th day of September, 2015.

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Subscribed and sworn to before me
this 28 day of September, 2015

Sandra J. Gannon
Notary Public, State of Wisconsin
My Commission expires: 6/7/19

SANDRA J. GANNON NOTARY PUBLIC STATE OF WISCONSIN

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I. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

(1). Whether 8 C.F.R. §236.6 expressly prohibits the disclosure of information concerning prisoners who are in the custody of the Milwaukee County Sheriff who are the subjects of I-247 forms sent by ICE to the Sheriff since November 20, 2014?

The trial court did not have the opportunity to address this issue because it is being raised for the first time on appeal and was never raised below.

(2). Whether the public policy enunciated in § 19.31, Wis. Stats., mandating "a presumption of complete public access" out weighs a public policy favoring categorical deference to "law enforcement sensitive" information?

The trial court answered YES.

II. STATEMENT REGARDING ORAL ARGUMENT AND PUBLICATION

The Petitioners-Respondents agree with the Respondents-Petitioners-Appellant's assertion that oral argument would be unnecessary in this matter. The issues presented by this appeal are simple and require a straightforward application of well-settled law. Therefore, under §809.22(2)(a)(1), Wis. Stats., the appeal may be submitted on briefs without oral argument.

The Petitioner-Respondent agrees that publication of the decision would be appropriate pursuant to §809.23(1)(a)(5), Wis. Stats.

III. STATEMENT OF THE CASE

The material facts in this case are entirely undisputed. On February 5, 2015, Voces submitted an open records request to Milwaukee County Sheriff David Clarke requesting, *inter alia,* copies of all Form I-247 immigration detainer forms received by the Sheriff from U.S. Immigration Customs and Enforcement ("ICE") since November 2014. (R. 1:2). As of April 1, 2015, Sheriff Clarke had failed to produce the requested I-247 forms in his possession, so Voces de la Frontera filed a Writ of Mandamus in Milwaukee County Circuit Court.

The I-247 forms at issue state as follows:

> It is requested that you maintain custody of the subject for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays, beyond the time when the subject would have otherwise been released from your custody to allow DHS to take custody of the subject. *This request derives from federal regulation 8 C.F. R. § 287.7.*

(Appellant's Appendix, Ex. 1)(emphasis added).

For purposes of this appeal, the relevant paragraphs of 8 C.F. R. § 287.7, state as follows:

> (d) *Temporary detention at Department request.* Upon a determination by the Department to issue a detainer for an alien not otherwise detained by a criminal justice agency, such agency shall maintain custody of the alien for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays in order to permit assumption of custody by the Department.
>
> (e) *Financial responsibility for detention.* No detainer issued as a result of a determination made under this chapter I shall incur any fiscal obligation on the part of the Department, until actual assumption of custody by the Department, except as provided in paragraph (d) of this section.

Federal appellate courts interpreting the scope of detainer requests issued pursuant to 8 C.F. R. § 287.7 have held that I-247 forms are mere requests to local law

enforcement agencies to continue custody of a prisoner and such requests are not mandatory orders. *Galarza v. Szalczyk,* 745 F.3d 634, 640-645 (3rd Cir. 2014)(listing cases). The language of 8 C.F.R.. § 287.7(e), makes clear that local law enforcement agencies that cooperate with I-247 detainer requests do not relinquish custody and the subject of the detainer requests continues in state custody "until actual assumption of custody by the Department." Accordingly, as the Ninth Circuit has explained, "'the bare detainer letter alone does not sufficiently place an alien in INS custody to make habeas corpus available.'" *Campos v. I.N.S.*, 62 F.3d 311, 314 (9th Cir. 1995) (quoting *Garcia v. Taylor*, 40 F.3d 299, 303 (9th Cir. 1994) (superseded by statute on other grounds, as recognized in Campos)); *United States v. Female Juvenile, A.F.S.*, 377 F.3d 27, 35 (1st Cir. 2004) ("[A]n INS detainer is not, standing alone, an order of custody. Rather, it serves as a request that another law enforcement agency notify the [Immigration and Naturalization Service] before releasing an alien from detention so that the INS may arrange to assume custody over the alien."); *Zolicoffer v. United States Dep't of Justice*, 315 F.3d 538, 540 (5th Cir. 2003) (collecting cases, including Campos, and agreeing that absent an order of removal, "prisoners are not 'in custody' for purposes of 28 U.S.C. § 2241 simply because the INS has lodged a detainer against them"). In short, the detainer is only a notification that a removal decision will be made at some later date. *Campos*, 62 F.3d at 313-14. The bottom line is that receipt of an I-247 form by a local law enforcement agency does not convert a state prisoner into a federal detainee in the custody of ICE.

On April 2, 2015, Sheriff Clarke provided redacted copies of twelve I-247 forms received by his office between November 20, 2014 and March 31, 2015. The twelve I-

247 forms contained the following redactions: (1). Subject ID; (2). Event #; (3). File No.; (4). Nationality; and (5). a series of three different boxes out of 12 boxes pertaining to immigration status. (R.6 at p. 3-30). On April 7, 2015, Sheriff Clarke agreed to unredact the nationality information. (R.7 at p. 3).

During the evidentiary hearing on May 6, 2015, Catherine Trimboli was the sole witness who testified on behalf of Sheriff Clarke in her capacity as the Captain in charge of the open records division of the Milwaukee County Sheriffs Office. (R.19 at 30:19-22). In that position, Captain Trimboli has been delegated the responsibility of being the custodian of the records for the Sheriff and was the designated officer in charge of the records at issue in this case. (R. 19 at 30:23-25 and 31:1-5).

That testimony revealed that it is undisputed that the requested I-247 forms are records within the meaning of Wisconsin's open records statute. Captain Trimboli testified that the first thing she does when she receives an open records request is to determine whether the information sought constitutes a record, and in this case, she determined that the requested I-247 forms were, in fact, records in the possession of Sheriff Clarke. (R.19 at p. 51:8-14).

After she determined that the request was, in fact, for "records," in the possession of the Sheriff, Captain Trimboli testified that she next determined whether or not a statutory exception to the disclosure of the record was listed in the open records statute. (R. 19 at 51:21-25, and 52:1-3). In this regard, Captain Trimboli testified as follows:

> Q. So you pulled out Section 19.36 and you look at those exceptions that are listed there to determine whether any apply to this?
>
> A. Correct.
>
> Q. And you did that in this case?

A. Correct.

Q. On March 31, 2015, correct?

A. Correct.

Q: And you determined that none of those statutory exceptions applied; isn't that right?

A. Correct.

(R.19 at 52:4-14).

Captain Trimboli then testified that the next step was to determine whether there is a common law exception that applies:

Q. So then the next step is to determine whether there is a common law exception that applies, correct?

A. Correct.

Q. And you did that as well, correct?

A. Yep.

Q. And you determined that none of the common law exceptions apply, isn't that right?

A. Correct.

(R. 19 at 52:15-22).

Captain Trimboli, then testified about her understanding of the balancing test under the statute:

Q. So you had to balance the interest in secrecy for the information versus the interest in public access, disclosure and transparency of that information, isn't that right?

A. Yea. We call it either disclosing and or nondisclosing the document, correct.

Q. You call it what?

A. Either disclosing a document or not disclosing a document. We don't call it secrecy.

Q. But if you don't disclose a document, it's secret, right?

A. In your opinion, yes.

Q. How about in the opinion of the millions of immigrant workers in the United States? Is it secret to them?

A. If they don't have it, I guess so.

Q. Okay. All right. So - - And it wasn't until after all of that was done that you call ICE and say, ICE, do you want to redact anything here?

A. No. It was all during the process. When I looked at the at the form and determined that there was not state law based on the statute, then we conduct a balancing test. If I look at a document and I see that there may be law enforcement sensitive or personally identifiable information on it, that is then the next step in determining if the information is releasable.

Q: How can you, a record custodian, conduct a balancing test when you don't know anything about the information that's being redacted?

A. I would ask somebody who knows what the information is.

Q. But how are you able to evaluate that information and the desire for secrecy of that that information or nondisclosure of that information versus public access to that information if you don't know anything about it?

A. If it's concurring with another law enforcement agency, we would take that - - another law enforcement agency telling us that something is a law enforcement sensitive identifier.

Q. So you just take their word for it? You don't scrutinize it to determine whether or not it has any merit? They say redact this, you redact it?

A. Yes. . . . .

(R. 19 at 52:23 – 54:15)

At no point during the proceedings below did the Respondent-Appellant ever mention, much less argue that 8 C.F.R § 236.6 precluded disclosure of the requested I0247 forms. The first mention of 8 C.F.R § 236.6 by the Respondent-Appellant is on this appeal, thus, the trial court below has not had an opportunity to consider whether that federal regulation applies. However, as demonstrated below, it does not apply because 8 C.F.R.. § 236.6, by its terms, only applies to a state or local government entity that "holds any detainee *on behalf* of the Service." (emphasis added).

IV. ARGUMENT

A. §§19.36(1) and (2), Wis. Stats., do not incorporate 8. C.F.R. § 636.6 which has been relied upon by the Sheriff for the first time on appeal.

There can be no dispute that the twelve I-247 forms, including the withheld redacted information, are records in the custody of Sheriff Clarke. §19.32(2), Wis. Stats. Nor can it be disputed that Sheriff Clarke is an authority subject to the provisions §19.35(1), Wis. Stats. Sheriff Clarke does not contend that the redacted information is exempt from disclosure under Wisconsin law, except to the extent that §§19.36(1) and (2), Wis. Stats., "passes-through" applicable federal law that in turn would exempt the redacted information. However, in construing the scope of the limitations on public access to public records, it bears keeping in mind both the letter and the spirit of the public policy on which §19.35(1), Wis. Stats. is grounded:

> **§19.31 Declaration of policy.**
>
> In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them. Further, providing persons with such

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

Therefore, the provisions of §§19.36(1) and (2), Wis. Stats., must be "***construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business.***" §19.31, Wis. Stats. This means the following language of §§19.36(1) and (2), Wis. Stats., must be construed as narrowly as possible:

> **§19.36 Limitations upon access and withholding.**
>
> (1) Application of other laws. Any record which is ***specifically exempted*** from disclosure by state or federal law or authorized to be exempted from disclosure by state law is exempt from disclosure under s. 19.35 (1), except that any portion of that record which contains public information is open to public inspection as provided in sub. (6).
>
> (2) Law enforcement records. Except as otherwise provided by law, ***whenever federal law or regulations require*** or as a condition to receipt of aids by this state require that any record relating to ***investigative information obtained for law enforcement purposes be withheld from public access, then that information is exempt from disclosure*** under s. 19.35 (1). (emphasis added)

Consistent with the governing public policy, only those federal laws that ***"specifically exempt"*** or ***"require***" the redacted information to be ***"withheld from public access"*** are passed-through by §§19.36(1) and (2), Wis. Stats., as exceptions to the open record mandate. Sheriff Clarke argues for the first time on appeal that his redactions are governed by 8 C.F.R. § 236.6. However, by its explicit terms, 8 C.F.R. § 236.6 does not apply to information about prisoners who are not in the custody of the United States:

> 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.

It bears notice that 8 C.F.R. §236.6 prohibits *anyone* from making public "the name of, or other information relating to" any detainee held on behalf of ICE. In other words, 8 C.F.R. governs the secrecy of information about federal immigration detainees housed in state, local or private facilities. The regulation does not apply to specific forms or categories of documents.

The cases cited by the Respondent-Appellant are entirely consistent and support the argument that 8 C.F.R. §236.6 *only* apples to the confidentiality of all information about detainees who are in the custody of the Department of Homeland Security. In *Belbachir v. United States,* 2012 WL 5471938 (an unreported case) a federal judge upheld the confidentiality of certain information about immigration detainees who were in the actual custody of the United States pursuant to 8 C.F.R. §236.6. Nothing in *Belbachir* even implies that information about a state prisoner who might become an immigration detainee of the federal government in the future is governed by 8 C.F.R. §236.6.

Similarly, in *American Civil Liberties Union of New Jersey v. County of Hudson,* 352 N.J. Syper. 44, 799 A.2d 629 (NJ App. 2002), the court was dealing with INS detainees in the custody of the federal government who were being housed in the Hudson

County Correctional Center and Passaic County Jail "pursuant to long-standing contracts between the INS and the counties." *Id.*, at 56-58. The INS prisoners housed in the Hudson County jail in 2002 were not similarly situated to the Milwaukee County prisoners who were the subjects of the twelve I-247 forms at issue in this case. The Milwaukee County prisoners were not federal detainees, rather they were local prisoners who ***might*** in the future become federal immigration detainees, . . . maybe.

Another case cited by the Respondent-Appellant, *Ricketts v. Palm Beach County Sheriff,* 985 So.2d 591 (Fla. Dist. Ct. App. 2008), involved a petition for a writ of *habeas corpus* by an individual who had been in the custody of the county sheriff for state criminal charges. The *habeas* petitioner claimed a Fourth Amendment violation based on his continued detention purely on the basis of the receipt of an I-247 form sent by ICE to the local sheriff, which was then followed up by an I-203 form. *Id.* at 592. The *Ricketts* Court noted that "[t]he jail receives monetary consideration pursuant to a contract with the federal government for holding federal prisoners, which consideration begins to run after the detainee is booked pursuant to the form I-203." *Id.* The *Ricketts* Court held: "we agree with the trial court that the appellant cannot secure habeas corpus relief from the state court on the legality of his federal detainer. The constitutionality of his detention pursuant to both the I-247 and I-203 federal forms is a question of law for the federal courts." Nothing in the *Ricketts* decision implies that 8 C.F.R. §236.6 applies to persons over whom the federal government has not taken custody.

Similarly, the final case relied upon by the Respondent-Appellant also involved the confidentiality of information about a federal prisoner who had been arrested by ICE and was housed in a Connecticut state correctional facility pursuant to an

"intergovernmental service agreement" between ICE and the state correctional center. *Commissioner of Correction v. Freedom of Information Commission,* 307 Conn 53, 57, 52 A.3d 636 (2012). After his release, the ICE detainee sought records regarding his detention from the state correctional center pursuant to the state open records law. *Id.* Since he had been a person in the custody of ICE, 8 C.F.R. §236.6 was held to preempt the state open records law and precluded the disclosure of the information sought. The Connecticut Supreme Court noted that the notices in the Federal Register explaining 8 C.F.R. §236.6 referred to INS detainees being held in non-federal facilities and that the regulation was intended to ensure that the disclosure of information about INS detainees, wherever housed, would be subject to a uniform federal policy. *Id.,* at 70. Nothing in the decision implies that 8 C.F.R. §236.6 applies to information about state prisoners over whom ICE might take custody in the future.

The distinction regarding whether a person is in the custody of the Sheriff or of ICE is critical to the question of whether §19.36(1) and (2), Wis. Stats. applies to this case. If the federal regulation, 8 C.F.R.. § 236.6, applies to prisoners held by local law enforcement agencies who are NOT in the custody of ICE or DHS, then §19.36(1) and (2), Wis. Stats., might apply as an exception to Wisconsin's open records statute. That issue was never litigated at the trial court level. However, 8 C.F.R.. § 236.6 does not apply to information on the I-247 forms unless the information relates to a person in the custody of ICE who is housed in a state or local facility. Nothing in the record implies that the twelve prisoners who were the subjects of I-247 forms were being held by Sheriff Clarke on behalf of ICE. In other words, they were not federal prisoners being housed at the Milwaukee County jail. Therefore, §§ 19.36(1) and (2), Wis. Stats., do not apply as

exceptions to Wisconsin's open records statute because that federal regulation does not "specifically exempt" or "require" the redacted information on the I-247 forms to be "withheld from public access." Federal regulation 8 C.F.R. § 236.6 simply does not apply to this case.

The entire ICE I-247 detainer program is voluntary and many jurisdictions have declined to participate. As the record below demonstrates the Milwaukee County Board passed a resolution signed by the County Executive urging the Sheriff not to participate in the program. (R. 6, Exhibits_5 and 6; *see also* R.9).

Furthermore, the entire argument regarding the applicability of 8 C.F.R.. § 236.6, was not raised below and therefore is waived and cannot be considered at the appellate level. . In the case of *In Re Rehab of Seg. Account of Ambac Assur. Corp.*, 2012 WI 22, ¶¶ 21-24, 339, Wis.2d 48, 66-68 (2012)(citations omitted), the Court reiterated the applicable and well established waiver rule:

> "The concept that an issue not raised in circuit court, is deemed waived is one of long standing. In a 1917 case, this court stated, "One of the rules of well-nigh universal application established by courts in the administration of the law is that questions not raised and properly presented for review in the trial court will not be reviewed on appeal. The practice of this court is not to consider an issue raised for the first time on appeal."

Further supporting the waiver argument is the fact that the Sheriff voluntarily produced copies of the I-247 forms with the names of the detainees un-redacted as well as much other personally identifying information. However, the plain language of 8 C.F.R.. § 236.6 requires that the name of the detainee not be disclosed. The Sheriff never claimed that the names of the detainees that are the subject of the I-247 forms were subject to required confidentiality pursuant to 8 C.F.R.. § 236.6. Accordingly, the Sheriff

has voluntarily produced the partially redacted I-247 forms.

B. The Wisconsin open records balancing test does not support non-disclosure of the redacted information on the I-247 forms because the Respondent-Appellant has failed to even articulate a counter-veiling public policy served by making that information secret.

In this case, as demonstrated by the testimony of the Respondent-Appellant's record custodian, Captain Trimboli, an initial determination was made that the requested information was a "record" within the meaning of the statute, and no statutory or common law exceptions apply. (R. 19 at 51:8 to 52:22). Therefore, "[i]n the absence of a statutory or common law exception, the presumption favoring release can only be overcome when there is a public policy interest in keeping the records confidential." *Linzmeyer v. Forcey,* 2002 WI 84, ¶11, 254 Wis.2d 306, 316 (2002). The Wisconsin legislature has articulated a particularly strong presumption in favor of disclosure and has mandated that "[t]o that end, §§ 19.32 to 19.37, Wis. Stats., shall be construed in every instance with a presumption of complete public access," and "[t]he denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied." § 19.31, Wis. Stats. "This presumption reflects the basic principle that the people must be informed about the workings of their government and that openness in government is essential to maintain the strength of our democratic society." *Linzmeyer,* at ¶15, 254 Wis.2d at 318.

It is the duty of the records custodian to specify the reasons for not disclosing a record and it is the Court's role to decide whether the reasons that are asserted are sufficient. *Fox v. Bock,* 149 Wis.2d 403, 416 (1989)("If the custodian decides not to allow inspection, he must state specific public policy reasons for the refusal. These

reasons provide a basis for review in the event of court action. The custodian must satisfy the court that the public policy presumption in favor of disclosure is outweighed by even more important public policy considerations."). Finally, it is the burden of the party seeking nondisclosure to show that the "public interests favoring secrecy outweigh those favoring disclosure." *Id.*, at 416.

Here, the records custodian testified bluntly that the routine practice of the Milwaukee County Sheriff's office is to subordinate the balancing test, without scrutiny, to any assertion by any law enforcement agency that the requested information is "law enforcement sensitive." (R. 19 at 52:23 – 54:15). That constituted the principal basis for not disclosing the requested information at issue in this case. Captain Trimboli testified bluntly in this regard:

> Q. So you just take their word for it? You don't scrutinize it to determine whether or not it has any merit? They say redact this, you redact it?
>
> A. Yes. We work with other law enforcement agencies and if they tell me one of their numbers that I don't know what it is, is law enforcement sensitive, yes, I believe them.

(R. 19 at 54:12 to 18).

In other words, the record establishes that Sheriff Clarke, in effect, has fabricated a presumption that is *per se* dispositive of the balancing test: any assertion that information contained in a record in the possession of the Sheriff that is deemed "law enforcement sensitive" will automatically outweigh the statutory presumption of openness. No knowledge about the nature, purpose, or character of the information is necessary. In Sheriff Clarke's office there is no balancing, rather there is carte blanche deference:

Q. And what does law enforcement sensitive numbers mean?

A. That it's sensitive to the law enforcement agency and, therefore, it's privy to their - - whatever it may be; an investigation or what have you.

Q. Why is it sensitive?

A. I couldn't tell you that. ICE is the one who considered it law enforcement sensitive.

Q. So you do not have any basis that you can assert for why this information is law enforcement sensitive, right?

A. Based on the requests from another law enforcement agency, that's the reason why we believe it to be law enforcement sensitive.

Q. But you don't know anything about their thinking about it?

A. No.

(R. 19 at 40:13 to 41:3)

Q. You just took whatever they said and redacted? You just took whatever they said and redacted whatever they wanted?

A. We took what another law enforcement agency said as a request and, yes, we redacted it based on their request.

(R. 19 at 42:8-13).

Thus, the record establishes that Sheriff Clarke has unilaterally abrogated the open records balance test in favor of a process of his own design; one in which the interests of law enforcement *per se* outweigh the statutory public policy of openness.

Now, at the appellate level, Sheriff Clarke is making a slightly more nuanced, but not more persuasive argument. It is argued that four specific exemptions to the federal Freedom of Information Act, 5 U.S.C §§ 552(b)(6), (b)(7)(A), (b)(7)(C), and (b)(7)(E) allow withholding of the type of information redacted on the twelve I-247 forms. See Brief of Respondent-Appellant, at pp. 21 to 29. However, Sheriff Clarke fails to apply

any facts from the record to the factors listed in the noted FOIA exemptions. Instead, at page 23 of his brief, Sheriff Clarke states that ICE has notified his office that when responding to a FOIA request for I-247 forms, ICE redacts certain "sensitive and personally identifiable information" including "Subject ID, Event ID, File number or A-number, and information regarding immigration enforcement history/status." In support of this assertion, Sheriff Clarke cites to the record at R. 3:12. However, a review of the referenced citation reveals that it is an e-mail to Captain Trimboli dated March 31, 2015, from an ICE employee named Brandon Bielke who wrote:

> "Per the Privacy Act (Title 5 USC § 552a) sensitive personally identifiable information includes the following specific to the I-247: A Number (File No.), FBI Number, Date of Birth, Immigration Status, and Citizenship/Nationality. The Subject ID and Event # are law enforcement sensitive identifiers specific to administrative immigration proceedings."

(R. 3:12).

There is no testimony from any ICE representative anywhere in the record regarding whether the requested information is *per se* to be redacted. Brandon Bielke's e-mail only characterizes certain information as "sensitive" and therefore, presumably potentially subject to evaluation for release under the cited statute. Significantly, there is no evidence anywhere in the record that ICE invoked 8 C.F.R. §236.6 as being applicable or of any of the subjects of the I-247 forms as being actually subjected to federal custody. There is only a citation to an e-mail by an out of court declarant that does <u>not</u> actually say that the requested information would be redacted by ICE if a FOIA request would have been made to ICE for the requested information. That a given federal agency might in a given hypothetical situation redact certain law enforcement or personally identifiable information in response to a FOIA request is of no value in evaluating whether a

significant public policy would be harmed by the release of the information such that the public policy in favor of openness would be outweighed.

Sheriff Clarke goes on to argue at page 24 of his brief that FOIA exemption (b)(7)(E) supports redaction of records compiled for law enforcement purposes because "[i]f this information was released, an individual who gains unauthorized access to the ICE system could illicitly modify data and circumvent law enforcement." The Sheriff goes on to argue that "[t]here is also significant risk of identity theft and fraud is such internal and sensitive personally identifiable information is shared; the public has an interest in reducing identity theft/fraud and protecting national security, interests not served by allowing access to this information." There is absolutely no evidence in the record to support the assertion that release of the requested information might increase the risk of identity theft or fraud in some tangible way. Captain Trimboli never even mentioned fraud and when asked about whether the federal Freedom of Information Act and factors under that Act are considered to be valid factors in Wisconsin for public records balancing, she responded: "I am not aware. Sorry." (R. 19 at 63). Nevertheless, Sheriff Clarke insists such a policy concern is relevant, citing *Flores-Figueroa v. U.S.*, 555 U.S. 646 (2009). However, even a cursory review of that case lends no support to the argument. *Flores-Figueroa* is a case construing the scienter element of the federal statute, 18 U.S.C. § 1028A, making identity theft a crime. Nothing in the decision even implies that release of the redacted information in this case might contribute to the risk of identity theft or fraud.

Sheriff Clarke continues his parade of horribles, suggesting that because federal courts have in the past construed 5 U.S.C. § 552(b)(7)(C) to preclude release of law

enforcement records "unless there is an overriding public interest in disclosure," and "third party identifying information contained in [law enforcement] records is 'categorically exempt' from disclosure." Respondent-Appellant's brief at pp. 26-27. Again, without reference to facts in the record (because no such facts exist in the record) Sheriff Clarke seems to argue that Wisconsin courts should, by judicial fiat, abrogate the balancing test in favor of a similar "categorical exemption." However, such an argument is precluded by *Portage Daily Register v. Columbia County Sheriff's Department,* 2008 WI App 30, ¶ 17-20, 308 Wis.2d 357, 368-69 (Wis. App. 2008), in which the court rejected the argument that it would result in "dangerous potential" unless law enforcement agencies are given the same common-law exception given to a district attorney's prosecution records:

> Although a police report is generally categorically exempt from disclosure under *Foust* if it resides in a prosecutor's file, the Sheriff's Department has an independent responsibility to determine whether a police report should be withheld. Whereas a prosecutor may generally rely on the categorical exemption, the Sheriff's Department must make that determination on a case-by-case basis.

The *Portage Daily Register* Court held "that the Sheriff's Department did not state a legally specific policy reason for its denial" and therefore found the balancing test required disclosure.

Consistent with the holding in *Linzmeyer,* it is certainly permissible for the factors listed at 5 U.S.C. § 552(b))6) and (b)(7) of the federal Freedom of Information Act to be considered as a potential "framework that records custodians can use to determine whether the presumption of openness in law enforcement records is overcome by another public policy." *Linzmeyer,* at ¶33. In *Linzmeyer* the Wisconsin Supreme Court considered the case of a public school teacher and volleyball coach who objected to the

public release of a police report from "an investigation into allegations that he had made inappropriate statements to, and had engaged in inappropriate conduct with, a number of his female students." *Id.*, at ¶ 4. In applying the aforementioned framework, the *Linzmeyer* Court stated that "[t]he fundamental question we ask is whether there is a harm to a public interest that outweighs the public interests in inspection of the Report." *Id.*, at ¶ 24. The Court held: "Applying the framework to the present case, we conclude that the public interests in preventing disclosure do not outweigh the public interests in release of the information." *Id.*, at ¶ 33.

In this case Sheriff Clarke has utterly failed to marshall any facts in support of his argument that the potential exceptions under FOIA for certain law enforcement records merit consideration in the context of Wisconsin's open records balancing test. Similarly Sheriff Clarke did not identify, at the trial court level, any public policy that would be tangibly harmed by disclosure to an extent that justifies subordinating Wisconsin's strong blue sky public policy.

III. CONCLUSION

For the foregoing reasons, Voces de la Frontera and Christine Neumann Ortiz respectfully requests that the the order of the circuit court entering writ of mandamus compelling production of the twelve unredacted I-247 forms be affirmed.

Dated this 25th day of September, 2015.

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FORM AND LENGTH CERTIFICATION

I certify that this Brief of the Plaintiff-Respondent in response to the Defendants'-Appellants' Opening Brief of the Defendants-Appellants, conforms to the requirements set forth in §809.50(2), Wis. Stats., using a proportional serif font (Times New Roman, size 12) and contains 5,516 words.

Dated this 25th day of September, 2015.

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