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STATE OF WISCONSIN
SUPREME COURT

Appeal No. 2015AP001152

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

Petitioners-Respondents,

v.

DAVID A. CLARKE, Jr.

Respondent-Petitioner-Appellant-Petitioner.

On Appeal from Milwaukee County Circuit Court
The Honorable David L. Borowski, Presiding
Milwaukee County Case No. 15-CV-002800

Non-Party Brief of the Wisconsin Freedom of Information Council, Wisconsin Newspaper Association, and Wisconsin Broadcasters Association

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Christa Westerberg
BENDER WESTERBERG LLC

Counsel for the Wisconsin Freedom of Information Council, Wisconsin Newspaper Association and the Wisconsin Broadcasters Association
SBN 1040530
10 East Doty Street,
Suite 800
Madison, WI 53703
Tel. 608.310-3560
Fax. 608.441.5707
westerberg@benderwesterberg.com

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This case asks whether redacted information on federal immigration forms in the possession of the Milwaukee County Sheriff must be withheld under the Wisconsin Open Records law, Wis. Stat. § 19.31 *et seq*. ("Open Records Law"). Respondent-Petitioner-Appellant Petitioner Sheriff David A. Clarke ("Clarke") overapplies federal law to claim the information must remain redacted, obscuring the straightforward provisions of the Open Records law that mandate release. Clarke also discounts the presumption of access under Wisconsin law in favor of weak and unsupported reasons for non-disclosure. *Amici curiae* the Wisconsin Freedom of Information Council, Wisconsin Newspaper Association and Wisconsin Broadcasters Association (collectively, "Amici") urge this Court to affirm the court of appeals and direct disclosure of the unredacted immigration forms.

ARGUMENT

I. FEDERAL LAW HAS A LIMITED ROLE IN THIS CASE

The parties extensively cite federal immigration regulations and the United States Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), but this is actually a state

law case. Federal law plays only a bit part, and must be interpreted against the broad policy in favor of access in Wisconsin's Open Records Law.

The Open Records Law applies to various state and local authorities defined in Wis. Stat. 19.32(1). For these authorities, the legislature has declared the state's official policy of maximal public access to government information. Wis. Stat. § 19.31. This Court has recognized that "[the] statement of policy in § 19.31 is one of the strongest declarations of policy to be found in the Wisconsin statutes." *Zellner v. Cedarburg Sch. Dist.*, 2007 WI 53, ¶49, 300 Wis. 2d 290, 731 N.W.2d 240 (citing *Munroe v. Braatz*, 201 Wis. 2d 442, 549 N.W.2d 451 (Ct. App. 1996)).

The federal government has its own records access law in the FOIA, but it does not apply to the states. Rather, it applies to federal agencies, 5 U.S.C. § 552(f), necessarily excluding local governments and police departments, among others, *e.g.*, *Willis v. U.S. Dep't of Justice*, 581 F. Supp. 2d 57, 67-68 (D.D.C. 2008); *State* ex rel. *Hill v. Zimmerman*, 196 Wis. 2d 419, 428 & n.6, 538 N.W.2d 608 (Ct. App. 1995). Exemptions to release

under the FOIA are thus inapplicable to local or state government decisions to release documents under a state open records law, as Wisconsin and other jurisdictions have recognized. *E.g.*, *State* ex rel. *Lank v. Rzentkowski*, 141 Wis. 2d 846, 856 & n.5, 416 N.W.2d 635 (Ct. App. 1987); *Bradley v. Saranac Bd. of Educ.*, 565 N.W.2d 650, 656-57 (Mich. 1997); *Queen v. W. Va. Univ. Hosp.*, 365 S.E.2d 375, 382 (W.Va. 1987).

Furthermore, the FOIA is different and less expansive than the Open Records Law. Wisconsin laws "reflect a strong policy of transparency and access," *Sands v. Whitnall Sch. Dist.*, 2008 WI 89, ¶68, 312 Wis. 2d 1, 754 N.W.2d 439, and the state has "more effectively enforced" its public records statute than "federal courts have enforced the [FOIA]," *In re Wis. Family Counseling Servs, Inc.*, 95 Wis. 2d 670, 672-73, 291 N.W.2d 631, 633-34 (Ct. App. 1980) (footnote omitted). "Unquestionably, the lesser effectiveness of the federal courts is due in part to the consignment of Congress of nine categories of information to the exemption discretion of federal agencies." *Id.*

Clarke accuses Petitioner-Respondent Voces de la Frontera ("Voces") of "circumvent[ing] federal law by

requesting the I-247 forms from [the county] rather than directly from the federal government," and claims that exemptions under FOIA "protect the disclosure" of the I-247 forms. (Clarke Opening Br. at 11.)[1] However, Clarke's argument that requesters can only obtain records from the agency that generated them is entirely unsupported, and it would defy both the policies of the FOIA and the Open Records law to confine requesters to such a bureaucratic and illogical rule. Furthermore—and as the federal government presumably understood in this case—a federal agency that releases a record into the public domain waives future claims that FOIA exemptions apply to the record. *See, e.g.*, *Cottone v. Reno*, 193 F.3d 550, 553-54 (D.C.Cir. 1999); *Starkey v. U.S. Dep't of Justice*, 238 F. Supp. 2d 1188, 1193-94 (S.D. Cal. 2002).[2]

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[1] Clarke did not previously argue that the federal FOIA exemptions applied. (*See* App.B-12 & n.4.)

[2] Notably, neither Clarke nor the federal government has claimed the I-247 forms or redacted information are exempt from disclosure as "inter-agency" or "intra-agency" privileged communications under FOIA Exemption 5, which protects some records shared by the federal government with certain outside entities. 5 U.S.C. § 552(b)(5). Clarke could not meet this standard in any case. *See U.S. Dep't of Interior v. Klamath Water Users Protective Assoc.*, 532 U.S. 1, 8-11 (2001).

At most, federal law is relevant to Open Records Law cases in two discrete situations: 1) when a federal law—not including a FOIA exemption—"specifically exempts" or "requires" the record to remain confidential, Wis. Stat. § 19.36(1), (2), or 2) as non-binding guidance when, for example, a custodian applies the balancing test to law enforcement records, *Linzmeyer v. Forcey*, 2002 WI 84, ¶¶32-33, 254 Wis. 2d 306, 646 N.W.2d 881. *Amici* discuss these scenarios in turn.

II. FEDERAL REGULATIONS DO NOT MANDATE DENIAL OF THE REDACTED INFORMATION.

Clarke contends that federal immigration regulations at 8 C.F.R. § 236.6 shield the redacted information in the immigration forms from disclosure by way of Wis. Stat. §§ 19.36(1) and (2). However, the regulation he cites does not apply by its plain language.

Courts interpreting exemptions to the Open Records Law must observe the legislature's statutory presumption that government records are public. Wis. Stat. § 19.31. "Any exceptions to the general rule of disclosure must be narrowly construed." *Fox v. Bock*, 149 Wis. 2d 403, 411,

438 N.W.2d 589 (1989); *Hathaway v. Jt. Sch. Dist.*, 116 Wis. 2d 388, 397, 342 N.W.2d 682 (1984) ("unless the exception is explicit and unequivocal, it will not be held to be an exception").

Wis. Stat. §§ 19.36(1) and (2) reinforce this directive:

> **(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) . . . .
>
> **(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).

Id. (emphasis added). The legislature's choice of words like "specifically exempted" and "require" means confidentiality provisions from other laws must give records custodians "no other option" but to withhold the information. *See Citizens for Responsible Dev'p v. City of Milton*, 2007 WI App 114, ¶14, 300 Wis. 2d 649, 731 N.W.2d 640 (interpreting analogous open meetings law) ("a government may have a valid reason for *desiring* to

close its meetings that nevertheless fails to establish closed meetings are *required*").

Voces argues that 8 C.F.R. § 236.6 is inapplicable because its exemption provisions are limited to immigration documents for detainees that local law enforcement is holding on behalf of the federal government. (Voces Resp. Br. at 9-10.) Clarke responds that the regulation's language "does not distinguish between immigration detainees" in state custody for whom an immigration hold has been requested and those held at a local facility while "formally in the custody of the federal government." (Clark Reply Br. at 2.)

Clarke does not explain how the language of the regulation supports his interpretation, instead citing policy reasons for why he believes "the federal regulation *should* be applicable" and "federal law *should* control." (*Id*. at 3-4 (emphasis added)). Setting aside these policy arguments, the regulation clearly only applies to records for detainees held "on behalf of the [U.S. Immigration & Customs Enforcement] Service" (hereinafter "ICE" or "the Service"). 8 C.F.R. § 236.6. The regulation does not apply to records of detainees that the federal agency has

requested to be held, or detainees who could be held in the future, but detainees actually held "on behalf of the Service." *See id*. While the federal government could have employed broader language in its regulations, it did not, and Clarke is accordingly obliged to follow the language as written.

As the court of appeals well explained, the detainees at issue here were not being held by the county on behalf of the Service, and the exemption to disclosure in 8 C.F.R. § 286.6 did not apply. (App.B.-013-016.) This was thus not a situation where Clarke had "no choice" but to redact the forms due to the federal law, and indeed, he released most of the document. (App.B.-019-020.) Even ICE apparently did not advise that 8 C.F.R. § 236.6 mandated nondisclosure. (*See* Clarke Reply Br. at 8-11.)

Federal law did not "specifically exempt" the I-247 forms here from full disclosure or "require" confidentiality, and Wis. Stat. § 19.36(1) and (2) do not apply.

III. THE REDACTED INFORMATION SHOULD BE RELEASED UNDER THE BALANCING TEST.

Without a statutory basis for redacting the I-247 forms, Clarke turns to the balancing test, which allows non-disclosure of records in "exceptional case[s]." Wis. Stat. § 19.31. This is not an exceptional case.

A. Clarke Improperly Employed a Blanket Exception to Disclosure When Conducting the Balancing Test.

To satisfy the balancing test, "public policy interests favoring nondisclosure [must] outweigh the public policy interests favoring disclosure, notwithstanding the strong presumption favoring disclosure." *Hempel v. City of Baraboo*, 2005 WI 120, ¶63, 284 Wis. 2d 162, 699 N.W.2d 551. Records custodians who perform this test must consider "'all the relevant factors'" and exercise their discretion in a fact-intensive analysis. *Id*. ¶¶62-63 (quoting *Woznicki v. Erickson*, 202 Wis. 2d 178, 192, 549 N.W.2d 699 (1996)). Should the custodian decide not to allow inspection, he or she "must state specific public-policy reasons for the refusal," which "provide a basis for review in the event of a court action." *Newspapers, Inc. v. Breier*, 89 Wis. 2d 417, 427, 279 N.W.2d 179 (1979).

Amici agree with the lower courts that Clarke, acting through records custodian Captain Trimboli, did not properly conduct the balancing test. According to her own testimony, Captain Trimboli failed to exercise her discretion as to the redacted material, accepting at face value the representation of federal employees that they would not release the material under federal disclosure laws. (App.B.-004-005, 021.) This is a procedural failing in the first instance. *See Hempel*, 284 Wis. 2d 162, ¶¶62-63.

Furthermore, the Wisconsin legislature has not made a determination that these federal exceptions apply under the state Open Records Law, *see* Section I, *supra*, or that records custodians can defer to federal employee preferences about disclosure as a "routine practice." (App.B-012 n.4.) The Milwaukee County Sheriff's office—"indeed, any municipality, cannot implement a policy that provides for a blanket exception from the Open Records law." *Hempel*, 284 Wis. 2d 162, ¶71.

Because Clarke has failed to articulate any or sufficient reasons for withholding the redacted materials, the Court's inquiry should stop there. *Breier*, 89 Wis. 2d at 427 ("[I]t is not the trial court's . . . role to hypothesize

reasons or to consider reasons for not allowing inspection which were not asserted by the custodian."). In the balancing test context especially, where no clear statutory exception or prior legislative determination applies regardless of the custodian's analysis, the custodian must be held to his or choices. *See Journal Times v. City of Racine Bd. of Police & Fire Comm'rs*, 2015 WI 56, ¶75, 362 Wis. 2d 577, 866 N.W.2d 563. The records should be produced. *Breier*, 89 Wis. 2d at 427.

B. The Balancing Test Favors Disclosure of the I-247 Form Redactions.

Should the Court reach Clarke's reasons for non-disclosure as asserted in litigation, it should find these reasons insufficient under the Open Records Law.

Clarke again overstates the applicability of federal law, claiming the balancing test "requires consideration of . . . FOIA [exemptions] found at 5 U.S.C. §552(b)(6) and (7)." These exemptions, relating to personal privacy and law enforcement records, respectively, are not "required" considerations under state law. At most, the factors in 5 U.S.C. § 552(b)(7)—along with prior Wisconsin caselaw—

provide 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*, 254 Wis. 2d 306, ¶33.

1. Releasing the Redacted Material Will not Interfere with Law Enforcement Operations

Clarke claims release of the I-247 form redactions could reasonably be expected to interfere with ongoing law enforcement proceedings, and that release may disclose techniques and/or procedures for law enforcement investigative purposes that are not commonly known. (Clarke Opening Br. at 27 (citing 5 U.S.C. § 552(b)(7)(A), (E).) The central concern here appears to be that if someone were to hack into the federal government's computer systems, the currently-redacted subject ID, file number, and event ID could be used to modify agency data. (Clarke Opening Br. at 29; Clarke Reply Br. at 12.)

These remote and generalized concerns are not enough to overcome the presumption in favor of access for the documents at issue. *Milwaukee J. Sentinel v. Dep't of Admin.*, 2009 WI 79, ¶65, 319 Wis. 2d 439, 768 N.W.2d 700. While records custodians do not necessarily have to

supply hard facts to support non-disclosure when responding to a requester, "[f]actual support for the custodian's reasoning is likely to strengthen the custodian's case before a circuit court." *Hempel*, 284 Wis. 2d 162, ¶79. Clarke supplies no such support.

Meanwhile, Wisconsin courts have repeatedly emphasized the importance of releasing law enforcement records to the public. *E.g.*, *Linzmeyer*, 254 Wis. 2d 306, ¶27 (discussing importance of public oversight of law enforcement); *Kroeplin v. DNR*, 2006 WI App 227, ¶¶44-52, 297 Wis. 2d 254, 725 N.W.2d 286, *rev. denied*, 2007 WI 59 (same). As one court has noted, the powers of arrest and custody are among the most "awesome weapons in the arsenal of the state" but are also powers that "may be abused." *Breier*, 436.

> It would appear to be a travesty of our judicial and law enforcement system to . . . permit persons to be held in custody without the public having the right to know why the individual is in custody or upon what or for what offense he is charged.

Id. at 437.

This logic applies to the redactions at issue here, which conceal information about detainees and the reasons ICE believes they must be detained beyond the normal period of state custody. (App.A-015-017.) For example, Clarke redacted information on whether the detainee has re-entered the country after a previous removal, has knowingly committed immigration fraud, poses a significant risk to national security or public safety, and whether the detainee has been served a warrant of arrest for removal proceedings. (App.A.-016-017.) Theoretical concerns about computer hacking do not overcome the presumption in favor of releasing data such as this, implicating public safety, detainee rights, and law enforcement oversight.

2. Releasing the Redacted Material Will not Violate Detainee Privacy

Clarke also claims that releasing the redacted material would compromise detainee privacy. (Clarke Opening Br. at 27-28 (citing 5 U.S.C. §§ 552(b)(7)(C), (b)(6)).

Wisconsin caselaw has only affirmed non-disclosure on the basis of personal privacy concerns when the public

interest in privacy demands it. *Linzmeyer*, 254 Wis. 2d 306, ¶33 (affirming release of police report containing allegations of inappropriate teacher conduct with students, even though the teacher was never arrested or charged and release could cause some embarrassment). Here, the circuit court thoroughly analyzed and rejected any claims that releasing numbers and other information unique to each detainee on the forms would lead to identity theft or other invasions of privacy. (App.A-017-019.)

Clarke again looks to the FOIA to suggest that third parties mentioned in law enforcement records are "categorically exempt" from disclosure under records laws, due to concerns for embarrassment and personal privacy. (Clarke Opening Br. at 32.) But as previously discussed, local records custodians cannot devise categorical exemptions to the Open Records law when applying the balancing test. *See* Section III.A., *supra*. The legislature has chosen to make an exception to disclosure only for law enforcement informants, but not all third parties who appear in law enforcement records. *See* Wis.

Stat. § 19.36(8).[3] In any case, the I-247 records do not implicate "third parties" or confidential informants.

Clarke has not met his burden to show the public's interest in redacting the information due to detainee privacy concerns outweighs the substantial public interest in disclosure.

3. The Public's Interest in Disclosure Outweighs the Public Interest in Non-Disclosure

Finally, Clarke faults Voces for failing to articulate reasons for disclosure. (Clarke Reply Br. at 14-15.) Yet Clarke ignores the extensive factual findings made by the circuit court in support of disclosure, including Voces' desire for public oversight of law enforcement and immigration law implementation, a "hot-button issue." (App.A-020-022.) The court found these interests "compelling." (*Id.*)

Clarke makes the unique argument that Voces would not understand some of the information, such as internal tracking numbers, and therefore that no public

[3] Clarke also cites Wis. Stat. § 19.35(1)(am) as a basis for non-disclosure, but that statute only applies to records that requesters seek about themselves and is not implicated here. (Clarke Reply Br. at 13.)

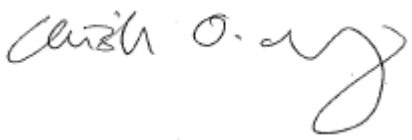
benefit is served by disclosing it. (Clarke Opening Br. at 30.) Obviously, allowing custodians to preemptively determine what requesters will "understand" or need is a dangerous approach that invites abuse. Greater public understanding of government cannot be achieved when presumed public ignorance is used to justify further non-disclosure.

The balancing test supports disclosure of the redacted I-247 forms.

CONCLUSION

For all of the foregoing reasons, Amici respectfully request that this Court affirm the court of appeals and direct disclosure of unredacted I-247 forms to Voces.

Dated this 1st day of September, 2016.



BENDER WESTERBERG LLC

Christa Westerberg

State Bar No. 1040530
10 East Doty St., Suite 800
Madison, WI 53703
Tel. 608.310.3560
Fax. 608.441.5707
westerberg@benderwesterberg.com

Attorney for the Wisconsin Freedom of Information Council, Wisconsin Newspaper Association, and the Wisconsin Broadcasters Association

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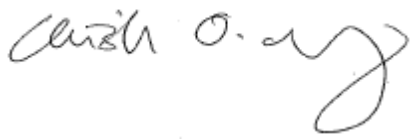

BENDER WESTERBERG LLC

Christa Westerberg
State Bar No. 1040530
10 East Doty St., Suite 800
Madison, WI 53703
Tel. 608.310.3560
Fax. 608.441.5707
westerberg@benderwesterberg.com

Attorney for the Wisconsin Freedom of Information Council, Wisconsin Newspaper Association, and the Wisconsin Broadcasters Association

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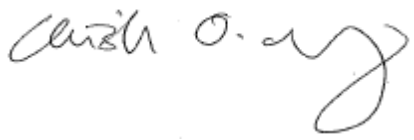

BENDER WESTERBERG LLC

Christa Westerberg
State Bar No. 1040530
10 East Doty St., Suite 800
Madison, WI 53703
Tel. 608.310.3560
Fax. 608.441.5707
westerberg@benderwesterberg.com

Attorney for the Wisconsin Freedom of Information Council, Wisconsin Newspaper Association, and the Wisconsin Broadcasters Association