

STATE OF WISCONSIN
IN SUPREME COURT

No. 2014AP2536-FT

DEMOCRATIC PARTY OF
WISCONSIN and CORY
LIEBMANN,

Petitioners-Respondents,

v.

WISCONSIN DEPARTMENT OF
JUSTICE and KEVIN POTTER,

Respondents-Appellants-Petitioners.

PETITION FOR REVIEW AND APPENDIX

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INTRODUCTION

This case presents an important opportunity to clarify how the public records law should apply to law-enforcement-related records and records concerning crime victims. This is a topic that will affect law enforcement entities and crime victims statewide. Although the public records law gives rise to a strong presumption of disclosure, this Court has previously recognized that the presumption comes with limits when appropriate for the public good. This case presents the question whether disclosure is required for training videos from a limited-access prosecutor training seminar discussing prosecutorial techniques as well as victims of sex crimes. The court of appeals ruled that the public interest will be best served by disclosure, but the Wisconsin Department of Justice (DOJ) disagrees that the court struck the right balance.

The public is best served when prosecutors, and those who assist them, may exchange techniques and tips in a training setting without those comments being disseminated publicly. That promotes an environment where prosecutors and other law enforcement will be most effective because they may share what does, and does not, work best when prosecuting child sex predators and other criminals. Discussions about strategies and techniques for locating, investigating, apprehending, and trying criminals often include information that is best kept out of the hands of criminals or would-be criminals. Further, the videos in

question include discussions about sex crimes against minors. Although no names are used, the topics discussed are inherently sensitive, and publicizing that information runs the real risk of re-exposing victims to the traumas suffered in the past, and of disclosing some unique information and commentary.

These two considerations—protecting victims and ensuring that prosecutorial training strategies are not disseminated—were the bases for DOJ’s denial of the open records request. The circuit court and the court of appeals, however, concluded that these interests did not justify nondisclosure, and ordered that DOJ turn over two training videos.

That approach stands to significantly impact law enforcement and the public. This case turns on the balancing of public policies, and a decision from this Court addressing these significant concerns will help guide the courts and law-enforcement records custodians statewide. It may also help clarify what deference is due to a law-enforcement records custodian responding to a request for sensitive information. DOJ therefore respectfully asks that this Court grant the petition for review.

ISSUES PRESENTED FOR REVIEW

1. The public records law contemplates that some records should not be disclosed because it would be contrary to the public interest, and courts recognize the public importance of protecting crime victims and law enforcement techniques. Here, DOJ determined that releasing videos from prosecutors' training seminars would not be in the public interest because the videos contained discussions of crime victims and law enforcement strategy. Was DOJ's rationale sufficient to overcome the presumption of disclosure?

Court of appeals ruled, No.

2. This Court has previously stated that records custodians have "substantial discretion" in evaluating whether the public interest would be harmed by disclosure of certain records. DOJ exercised that discretion in the law-enforcement context to conclude that the public interest would be harmed by disclosure of sensitive information about crime victims and law enforcement techniques and strategies. Should DOJ's reasons, grounded in law enforcement functions, be entitled to greater deference than was afforded below?

Court of appeals implicitly ruled, No.

3. The open records law provides that if a records custodian determines that certain information is not

subject to disclosure, the custodian shall redact from the record any such information. Here, DOJ believed that neither video in question should be disclosed, and denied access to any portion of the videos. If a final ruling in this case results in an order for disclosure, should DOJ be given the opportunity to analyze the videos in light of that ruling for possible redaction?

This issue is only ripe if a final ruling in this litigation requires disclosure. The court of appeals was not asked to and did not address the issue of partial redaction.

CRITERIA SUPPORTING REVIEW

The Court should grant this petition for review because this case satisfies multiple criteria that this Court considers when evaluating whether a petition presents “special and important reasons” warranting review.

First, this case presents a novel question, the resolution of which will have statewide impact, and a decision by this Court will help develop, clarify, or harmonize the law. Wis. Stat. § (Rule) 809.62(1r)(c)2. This case involves the question whether the public interest in protecting prosecutorial techniques and strategies and in protecting information about crime victims are sufficient to overcome the presumption of disclosure under the open records law. Previous cases support the idea that investigatory details in closed prosecutors’ files are not

subject to disclosure, that law enforcement techniques should not be revealed, and that Wisconsin public policy is to minimize further suffering by crime victims. These principles have not been applied by this Court to the topic of law enforcement training materials, and this Court's guidance is needed.

Second, this case presents a question of law of the type that is likely to recur unless resolved by the supreme court. Wis. Stat. § (Rule) 809.62(1r)(c)3. It is undeniable that there is value to training prosecutors and sharing useful information for effective law enforcement outcomes. Such efforts are made by law enforcement entities statewide, as evinced in the statewide program recorded in the videos in question here. Given the regularity and necessity of prosecutors' trainings, requests like the present one are likely to recur. Indeed, the reasoning employed by the lower courts here would likely impact sensitive training materials used or created by other governmental entities. Guidance is needed for such entities, especially law enforcement.

Third, the court of appeal's decision is in conflict with previous opinions by this Court. See Wis. Stat. § (Rule) 809.62(1r)(d). In *State ex rel. Richards v. Foust*, 165 Wis. 2d 429, 477 N.W.2d 608 (1991), this Court held that even closed prosecutors' files were not subject to disclosure because of the public importance of keeping historical data, witness statements, and on-the-ground investigatory

details private. In *Linzmeier v. Forcey*, 2002 WI 84, 254 Wis. 2d 306, 646 N.W.2d 811, this Court recognized the public importance of keeping “techniques and procedures for law enforcement investigations or prosecutions” from disclosure. *Id.* ¶ 41. The court of appeals decision—rejecting such bases for nondisclosure—is in tension with these and similar cases and this Court’s guidance is needed to resolve the conflict.

STATEMENT OF THE CASE

This appeal comes after the Democratic Party of Wisconsin (DPW) obtained a writ of mandamus requiring release of prosecutor training videos kept by DOJ. The request was for video presentations given by then-Waukesha County DA Brad Schimel at Wisconsin State Prosecutors Education and Training conferences. DOJ declined to release those videos pursuant to the public records law, Wis. Stat. §§ 19.31-19.39, and its balancing test. (R. 2.)

DOJ sponsors the conferences semiannually to aid prosecutors, and some public employees who assist them, with building skills and freely sharing information and strategies that will help them with their duties. (R. 15.) Attendance at the conferences is limited, and does not include members of the public, criminal defense or private attorneys, or the media. (R. 15, ¶¶ 3-13.) Sometimes sessions

are videotaped to provide a resource for prosecutors who were not in attendance. (R. 15, ¶¶ 3, 9-11.)

The public records request pertained to two videos from these conferences, one from 2009 and the other from 2013. The 2009 video was an overview of investigations and prosecutions of online child predators and child pornographers, including advice on best practices and tips for catching predators. (R. 4, 2009.)¹ The 2013 video was a detailed discussion of a sexual assault case where a high school student posed as a female online, obtained graphic pictures from male classmates, and, in some instances, extorted sexual acts. (R. 4, 2013.)

Based on the public records balancing test in Wis. Stat. § 19.35(1)(a), DOJ determined that it was not in the public interest to disclose the videos. (R. 2.) DPW sought a writ of mandamus in the circuit court. The court concluded that the balancing test required disclosure and ordered that the videos be released, but stayed that order pending this appeal. (R. 21; P-A App. 001-002.)

DOJ appealed, and on October 14, 2015, the court of appeals issued an order affirming the circuit court. In affirming, the court of appeals dissolved the stay that was in place. However, on October 16, 2015, DOJ moved the

¹ The videos are on a DVD that the circuit court placed under seal and are labeled according to their dates. The video from 2013 is in two parts.

court of appeals to reinstate a stay to preserve the status quo because DOJ intended to seek further review in this Court. After granting temporary relief, on October 21, 2015, the court of appeals found good cause to stay the effect of its order pending this petition for review. (P-A App. 019-027.)

**ARGUMENT AMPLIFYING THE REASONS RELIED
ON TO SUPPORT THE PETITION**

I. This Court should accept review to confirm the public interest in nondisclosure to protect the integrity of law enforcement trainings and crime victims' privacy.

The public records law contemplates the default of disclosure, but that default comes with limits. DOJ believes this case presents one such exception: to preserve the integrity of prosecutorial trainings, and the strategies and commentary discussed therein, especially when those trainings address sex crimes. This view is grounded in Wisconsin policy and case law that recognize the unique importance of law enforcement records that contain techniques and strategies, and the importance of protecting victims from unnecessarily being re-traumatized. This Court's guidance is needed to clarify how these principles apply to the materials at issue here.

In *State ex rel. Richards v. Foust*, 165 Wis. 2d 429, 433–37, 477 N.W.2d 608 (1991), this Court discussed a line of cases stretching back to at least 1929, supporting the general assertion that investigative files often are not

subject to disclosure. The *Richards* Court relied on common law exceptions to disclosure, and principles of public policy, to conclude that even closed prosecutorial files should be exempt from public disclosure. *See State ex rel. Richards*, 165 Wis. 2d at 431–32. The Court emphasized that a significant consideration in limiting disclosure of prosecutorial files is that they “may contain historical data leading up to the prosecution,” including investigatory information which should “be protected if continuing cooperation of the populace in criminal investigations is to be expected.” *Id.* at 435.

Similarly, in *Linzmeier v. Forcey*, 2002 WI 84, ¶ 30, 254 Wis. 2d 306, 646 N.W.2d 811, this Court discussed the “strong public interest in investigating and prosecuting criminal activity.” That case involved a request for records relating to a pending police investigation of a school teacher. Although those facts are not on point here, this Court’s discussion of potential law enforcement concerns is. *See id.* ¶¶ 1–3, 34–36.

In particular, this Court noted that “[b]ecause of the sensitivity of law enforcement records,” several public policy considerations are implicated in determining whether such records should be disclosed. *Id.* ¶ 26. This Court properly recognized that “[l]aw enforcement records are generally more likely than most types of public records to have an adverse effect on other public interests if they are released.”

Id. ¶ 30. Important here, this Court adopted as a framework certain considerations listed in the federal Freedom of Information Act (FOIA), 5 U.S.C. § 552, pertaining to law enforcement records. *Id.* ¶ 32. Notably, the FOIA exempts disclosure where production of the law enforcement records would “disclose techniques and procedures for law enforcement investigations or prosecution”:

[Nondisclosure is proper where it] could reasonably be expected to constitute an unwarranted invasion of personal privacy[;] . . . *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] could reasonably be expected to endanger the life or physical safety of any individual.

See id. ¶ 32 (quoting 5 U.S.C. § 552(b)(7) (2000) (emphasis added)).

That is the same reasoning proffered by DOJ here. The court of appeals nonetheless believed that DOJ’s reasons were inadequate in part because the prosecutor training videos “do not discuss an ongoing prosecution.” (Oct. 14, 2015, Order at 6; P-A App. 24.) But that is not what the framework in *Linzmeier* required, and that plainly is not what this Court had in mind in *Richards*. Rather, *Richards* addressed *closed* files—*i.e.*, files for cases that were *not* ongoing—and this Court recognized the importance of protecting the contents of those files against disclosure. *State ex rel. Richards*, 165 Wis. 2d at 431, 434.

Thus, the court of appeals' decision is in tension with *Linzmeyer* and *Richards*. Contrary to the court of appeals' decision in this case, there is no ongoing-investigation requirement when it comes to prosecutors' investigatory techniques and strategies. Strategies and techniques discussed in the context of a closed case may be applied to different ongoing cases or future cases. In this realm, the public's interest does not turn on whether a particular case file is active.

Further, there is another area of public concern here: avoiding re-traumatizing victims of sex crimes, and preventing chilling effects on reporting by other victims. The videos, and especially the 2013 one, detail sex crimes affecting minors and provide insider commentary on the events for the sole purpose of training other prosecutors and those that assist them. It is not in the public's interest for that kind of sensitive training material to become public.

This Court has recognized Wisconsin's important public policy of "minimiz[ing] further suffering by crime victims." *Schilling v. State Crime Victims Rights Bd.*, 2005 WI 17, ¶ 26, 278 Wis. 2d 216, 692 N.W.2d 623. And such values also are enshrined in the state constitution and statutes. The Wisconsin Constitution, art. I, § 9m, requires that crime victims be treated with "fairness, dignity and respect for their privacy." The importance of protecting crime victims is reflected in the Wisconsin statutes,

including chapters 949 (victim compensation) and 950 (rights of victims) and, in turn, through the services provided by DOJ's Office of Crime Victim Services. Indeed, this Court recently recognized that it is the policy of the courts of this state to "protect the privacy and dignity interests of crime victims" by prohibiting reference to victims by name in appellate court filings without a showing of good cause. *See* Wis. Stat. § (Rule) 809.86(1) & (4).

Not only is protecting crime victims important in its own right, but doing so also makes it more likely that future victims will come forward. As a society, we want crime victims to trust the system. But if re-victimization is the rule, they are less likely to come forward in the first place.

Many of these same considerations—regarding both law enforcement and victims—are also found in this Court's decision in *Hempel v. City of Baraboo*, 2005 WI 120, 284 Wis. 2d 162, 699 N.W.2d 551. In *Hempel*, the Court reiterated the unique considerations facing law enforcement officials evaluating whether nondisclosure best serves the public interest. This Court upheld a custodian's decision not to disclose records of an internal law enforcement investigation, reasoning that "the public interest in nondisclosure of police investigative records outweighs the public interest in releasing the records." *Id.* ¶ 5. Factors that the Court found relevant were (1) that disclosure would have a chilling effect on victim and witness cooperation with law

enforcement; and (2) that disclosure of the investigative records might have a chilling effect on legitimate law enforcement activity, out of fear that everything said and done would be subject to public disclosure. *See id.* ¶¶ 73–76.

As noted in the background, there are two videos at issue in this case. DOJ believes that both should be withheld for the reasons discussed in these cases, as both contain discussions about law enforcement techniques and crimes. However, the videos are not identical. It is possible that this Court might analyze differently the 2013 video’s detailed discussion of one complex sex-crime prosecution and its impact on victims, as opposed to the 2009 video that surveys a variety of techniques related to sex crimes. For purposes of this petition, what matters is that these issues arise in the videos and merit attention by this Court. DOJ will address any differences between the videos if necessary in its merits brief, if this petition is granted.

In sum, the cases present strong support for the principle that protecting victims’ privacy, as well as protecting law enforcement’s investigatory and prosecutorial methods, are valid considerations that law enforcement officials may invoke in support of nondisclosure. The decision from the court of appeals ignores this tradition, creates uncertainty, and undermines efforts by law enforcement to better train itself and insulate victims from unnecessary exposure. This Court should grant review to

address these inconsistencies and provide clarity in this important area of the law.

II. This Court should grant review to reaffirm that weight should be given to the reasoning relied on by records custodians for not disclosing sensitive law-enforcement matters.

A related issue arises in this case involving what showing a law enforcement custodian must make for a nondisclosure determination to be upheld by a reviewing court. In the law enforcement context, this Court has recognized that records custodians may employ “substantial discretion” when dealing with the factual issues that arise. *Hempel*, 284 Wis. 2d 162, ¶ 62. But the court of appeals did not give any weight to DOJ’s proffered reasons here.

In putting aside DOJ’s reasoning, the court of appeals cited its own published decision, *John K. MacIver Inst. for Public Policy, Inc. v. Erpenbach*, 2014 WI App 49, 354 Wis. 2d 61, 848 N.W.2d 862. (P-A App. 020-024.) Although the court of appeals was not empowered to overrule its own decision, this Court is so empowered, and should do so to the extent the court of appeals believes it is bound by *Erpenbach* to cast aside a law enforcement custodian’s on-the-ground perspective. At least when it comes to law enforcement techniques and crime victims, that perspective should matter.

This issue arises here because the court of appeals emphasized that DOJ had not proven that the techniques

and commentary in the videos were, in some sense, “novel.” (P-A App. 22.) However, that is the wrong question under this Court’s precedent, and it places an untenable burden on law enforcement. And it is far from clear where this reasoning stops. For example, the same line of reasoning might require disclosure of law enforcement training manuals, internal operating procedures, and the like, if a court were to determine that those techniques were already in use somewhere.

This Court’s precedent does not require that law enforcement records containing techniques and strategies be proven “novel” or cutting edge to be subject to nondisclosure. *Richards* did not require a showing of novel techniques. *See State ex rel. Richards*, 165 Wis. 2d at 433–37 (discussing, among other things, historical data and other past investigatory information). And neither did *Linzmeier* when discussing the FOIA factors. *See Linzmeier*, 254 Wis. 2d 306, ¶ 32 (adopting factors regarding, among other things, “techniques and procedures for law enforcement investigations or prosecutions”).

Likewise, requiring that kind of showing is not practical. Although both the lower courts appeared to believe that novelty is important, neither clearly explained how a law enforcement custodian is to make that showing. For example, the court of appeals adopted the trial court’s reasoning, which included vague assertions that some

similar techniques may be found by searching the Internet or by watching certain television shows. (P-A App. 014, 023.) But it would be essentially impossible for a custodian to prove that a law enforcement training record is unique in the world of information.

Perhaps more to the point, that inquiry leaves aside important considerations. Knowing what happens somewhere else in the world, or on television, likely makes little difference to a Wisconsin child sex offender. What would matter most to a Wisconsin criminal or would-be criminal is what techniques are used locally in actual cases—because that is the information that can be used locally to avoid detection or thwart prosecution. The court of appeals' decision does not address that important nuance, even though DOJ raised it in its briefing.

All said, the court of appeals' order gives no deference to law enforcements' balancing of the concerns central to it. And, going a step further, the court effectively puts a burden on law enforcement custodians to prove novelty where such a showing is not necessary or realistic. That puts law enforcement in an untenable situation.

It is also in tension with this Court's precedent. For example, in *Hempel*, this Court examined a law enforcement custodian's reasoning in a much different manner than did the court of appeals here. In upholding the police department's decision not to disclose the records, the

Hempel Court noted that, although the department did not provide “hard evidence” to support its nondisclosure decision, the open records statute “does not require the records custodian to give facts supporting the reasons for its denial.” *Hempel*, 284 Wis. 2d 162, ¶ 79 (citing Wis. Stat. § 19.35(4)(b)). Instead, the statute “merely requires the custodian to provide specific reasons for the denial,” and a court conducting mandamus review of the nondisclosure decision “is free to evaluate the strength of the custodian’s reasoning in the absence of facts.” *Id.* That is a much different proposition than requiring proof of novelty.

Similarly, in *Hempel*, this Court recognized that the fact intensiveness of records inquiries may vest “substantial discretion” in the records custodian. *Hempel*, 284 Wis. 2d 162, ¶ 62. But that understanding by this Court appears to have been disregarded by the court of appeals. The court of appeals here cited *Erpenbach*, 354 Wis. 2d 61, ¶ 14, for the proposition that “[i]f the custodian’s decision is challenged, however, a court must make its own independent decisions regarding these matters.” In the present case, the court of appeals seemingly interprets that to mean that a law enforcement custodian’s stated reasons not only are given no deference, but also must come with hard evidence to be seriously considered. DOJ believes that this goes too far when it comes to sensitive law enforcement materials.

Thus, in addition to the other reasons stated, this Court should grant review to clarify what weight should be given to law enforcement rationales. The tension between levels of scrutiny is evident from the result reached below in this case.

III. This Court should grant review to clarify that custodians have a continuing obligation under Wis. Stat. § 19.36(6) to redact.

DOJ denied disclosure of two videos outright, and still believes that neither should be disclosed at all because the law-enforcement-technique and crime-victim information is pervasive. However, if there were a final decision in this case requiring disclosure, a secondary issue would arise. Because DOJ believed none of the videos should be disclosed, it never attempted redaction of a subset of the videos. If the lower courts' decisions stand, DOJ now faces the prospect of disclosing all of that material, without any opportunity to redact.

Such an outcome is in tension with the record custodian's obligation, under Wis. Stat. § 19.36(6), to "delete the information that is not subject to disclosure from the record before release." As this Court recognized in *Osborn v. Board of Regents of University of Wisconsin System*, 2002 WI 83, ¶ 45, 254 Wis. 2d 266, 647 N.W.2d 158, redaction is a mandatory duty, as demonstrated by the legislature's use of the term "shall" in the redaction provision:

The unambiguous and instructive word “shall” does not give a custodian, under these circumstances, the option of separating the information or simply denying the open records request. Rather, we conclude that the statute requires the custodian to provide the information subject to disclosure and delete or redact the information that is not.

Thus, even if this Court were to otherwise affirm the lower courts, this Court’s guidance is needed to clarify whether a custodian may still consider partial redaction after losing in court as to complete nondisclosure. For this additional reason, DOJ asks this Court to accept review to provide further guidance.

CONCLUSION

For the reasons stated, DOJ requests that this Court grant its petition for review.

Dated this 21st day of October, 2015.

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CERTIFICATION

I hereby certify that this Petition for Review conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and (d) and 809.62(4) for a petition for review brief and appendix produced with a proportional serif font. The length of this brief is 4,175 words.

Date this 21st day of October, 2015.



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Assistant Attorney General

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

I hereby certify that:

I have submitted an electronic copy of this petition for review, excluding the appendix, which complies with the requirements of Wis. Stat. §§ (Rule) 809.19(12) and 809.62(4)(b).

I further certify that:

This electronic petition for review is identical in content and format to the printed form of the petition for review filed as of this date.

A copy of this certificate has been served with the paper copies of this petition for review filed with the court and served on all opposing parties.

Dated this 21st day of October, 2015.



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APPENDIX CERTIFICATION

I hereby certify that filed with this petition for review, either as a separate document or as a part of this petition, is an appendix that complies with Wis. Stat. § 809.62(2)(f) and that contains, at a minimum: (1) a table of contents; (2) the decision and opinion of the court of appeals; (3) the finding or opinion of the circuit court necessary for an understanding of the petition; and (4) portions of the record for an understanding of the petition.

I further certify that if this petition for review is taken from appeal of a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 21st day of October, 2015.



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