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**DISTRICT II**

October 14, 2015

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You are hereby notified that the Court has entered the following opinion and order:

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2014AP2536-FT Democratic Party of Wisconsin v. Wisconsin Department of Justice (L.C. # 2014CV2937)

Before Curley, P.J., Stark and Hruz, JJ.

The Wisconsin Department of Justice and Kevin Potter, administrator of the Division of Legal Services (DOJ), appeal from a circuit court order granting a writ of mandamus compelling the DOJ to disclose video recordings requested by the Democratic Party of Wisconsin and Cory Liebmann, Research Director of the Democratic Party of Wisconsin (DPW), under Wisconsin's open records law. Pursuant to a presubmission conference and this court's order of November 12, 2014, the parties submitted memorandum briefs. Upon review of those memoranda and the record, we affirm the circuit court's order requiring disclosure of the video recordings.

Prior to the 2014 election for Wisconsin Attorney General, the DPW made a WIS. STAT. § 19.35 (2013-14)[1] open records request to the DOJ for materials "made at any training program by [Attorney General candidate] Brad Schimel."[2] In response to the open records request, the DOJ identified, but declined to produce, two video recordings of presentations made by Schimel during State Prosecutors Education and Training (SPET) conferences: a video recording of a 2013 presentation discussing interacting with victims of sensitive crimes and a video recording of a 2009 presentation discussing prosecution of, and common defenses in, internet sexual predator cases.

In response to the DOJ's refusal to disclose the video recordings, the DPW filed a WIS. STAT. § 19.37 petition for a writ of mandamus seeking to compel their production. The circuit court granted the writ of mandamus, but stayed the effect of its order pending this appeal. The DOJ appeals. On appeal, the DOJ argues that releasing the video recordings is not in the public interest.

There is no dispute that the video recordings are records subject to Wisconsin's open records law. WIS. STAT. §§ 19.31-19.37. Wisconsin law presumes "complete public access" to public records. ***John K. MacIver Inst. for Pub. Policy, Inc. v. Erpenbach***, 2014 WI App 49, ¶16, 354 Wis. 2d 61, 848 N.W.2d 862 (quoting WIS. STAT. § 19.31). Upon receipt of an open records request, the records custodian determines "whether any statutory or common law exceptions to disclosure apply." ***Erpenbach***, 354 Wis. 2d 61, ¶13. If no statutory or common

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] Schimel, the former Waukesha County District Attorney, was elected Attorney General in the 2014 election.

law exceptions apply, the custodian undertakes a balancing test to "'weigh the competing interests involved and determine whether permitting inspection would result in harm to the public interest which outweighs the legislative policy recognizing the public interest in allowing inspection.'" ***Id.*** (citation omitted). The custodian must specify reasons for not disclosing the requested records. ***Id.***, ¶14.

In resolving a challenge to the custodian's nondisclosure decision via a writ of mandamus, the circuit court independently undertakes the balancing test and determines whether the custodian's reasons for nondisclosure are sufficient. ***Id.*** The party advocating for nondisclosure has the burden "to show that 'public interests favoring secrecy outweigh those favoring disclosure.'" ***Id.*** (citation omitted). Access to records may be denied only in the "'exceptional case.'" ***Id.*** (citation omitted).

In declining to produce the 2013 video recording and after applying the balancing test, the DOJ determined "that any legitimate public interest in disclosure of this information is outweighed by the public policies requiring that crime victims and their families be treated with 'fairness, dignity and respect for their privacy.'" In addition, because the 2013 video recording discusses litigation strategy, "the strong public interest in the effective investigation and prosecution of crimes outweigh[s] the public's interest" in viewing the video recording. The DOJ declined to produce the 2009 video recording to preserve victim privacy and the ability to effectively investigate and prosecute crimes.

In granting the DPW's petition to compel production of the video recordings, the circuit court considered the strong presumption in favor of disclosing public records. WIS. STAT.

§ 19.31. The court also considered the applicable weighing and balancing test. ***Erpenbach***, 354 Wis. 2d 61, ¶13.

With regard to the 2013 video recording, the circuit court noted the DOJ's claim that victims would be harmed by disclosure. The circuit court made the following findings of fact about the 2013 video recording. The presentation took place in a large conference room with numerous individuals present. In his presentation, Schimel employed the "case study" method, focusing on a high-profile case from several years before. Largely addressing prosecutors, Schimel shared lessons learned in dealing with victims of sensitive crimes, tips for interacting with victims, and changes Schimel intended to make in his own practices. Schimel commented on the reactions of the victims and their families to the crime, how the defendant first came to the attention of law enforcement, and the role of the courts. While Schimel provided a great deal of detail, he did not share any identifying information about the victims.

The circuit court further found the information in Schimel's 2013 presentation would be helpful to families trying to protect children from crime and would encourage cooperation in the prosecution of crime. In particular, the court found that the public should hear Schimel's statements that there were lessons to be learned from the prosecution at issue in the case study. The case study crime was widely reported at the time of the prosecution, the criminal complaint contained virtually everything Schimel mentioned, and Schimel's presentation did not add anything not already in the public sphere. Furthermore, Schimel did not offer anything novel regarding prosecution techniques or approaches, and the presentation did not impact the ability of prosecutors to prosecute crimes successfully or work with law enforcement or the community. The circuit court concluded that the public's right to know outweighed the public's interest in shielding the 2013 video recording from public view.

The circuit court next considered the 2009 video recording, reiterated the strong presumption in favor of disclosure, and made the following findings. The court described the video recording as "investigating child predators 101," a basic and not particularly novel presentation. Schimel discussed various strategies used in investigating and prosecuting sex predators, but most, if not all, of the strategies and techniques were already widely discussed in the public sphere. Noting that law enforcement techniques have evolved significantly since 2009, the court found "not a shred of evidence in this record that releasing that 2009 video is going to impact the ability to prosecute and investigate and" apprehend sex predators. The public had a right to know how to protect children from internet predators and that law enforcement and prosecutors are taking steps to protect children. The public interest in access to the 2009 video recording outweighed the DOJ's reasons for withholding the recording.

Our review of the application of the balancing test is de novo. ***Id.***, ¶14. Nevertheless, we benefit from the circuit court's analysis. ***State ex rel. Bergmann v. Faust***, 226 Wis. 2d 273, 282, 595 N.W.2d 75 (Ct. App. 1999). Having reviewed each of the video recordings, we substantially agree with the circuit court's analysis of the video recordings. The DOJ neither made the exceptional case required to shield public records from public view, ***Erpenbach***, 354 Wis. 2d 61, ¶14, nor overcame the presumption of complete public access to public records, ***id.***, ¶16.

As described in the circuit court's findings, which are not clearly erroneous, WIS. STAT. § 805.17(2), the 2009 and 2013 video recordings did not offer any personally identifiable details about the victims, did not discuss any investigation and prosecution practices not already known or knowable in the public sphere, and did not provide information that would hinder the ability to prosecute the types of crimes discussed in Schimel's presentations. In light of the circuit court's findings about the video recordings, the DOJ's reasons for withholding the recordings were not

sufficient. ***Erpenbach***, 354 Wis. 2d 61, ¶14. The DOJ did not meet its burden to show that the public's interest would be served by keeping the video recordings confidential. ***Id.***

We are unpersuaded by the DOJ's reliance upon ***Linzmeyer v. Forcey***, 2002 WI 84, 254 Wis. 2d 306, 646 N.W.2d 811. The circuit court's findings about the video recordings in the case before us do not implicate the ***Linzmeyer*** court's concerns about disclosing law enforcement records. *See* ***id.***, ¶30. For example, the ***Linzmeyer*** court was concerned about whether disclosing law enforcement records would interfere with an ongoing prosecution or the safety or privacy of persons mentioned in the record. ***Id.***, ¶¶30-31. Such concerns do not apply in this case because the video recordings do not discuss an ongoing prosecution or compromise the privacy of any victim.

"[I]nformation that is already known to the public is germane to the balancing test." ***Id.***, ¶37. The video recordings in the case before us discuss techniques and procedures the circuit court found were known to the public. *See* ***id.***, ¶¶39, 41. ***Linzmeyer*** does not dictate a different outcome on appeal.

We conclude that the 2009 and 2013 video recordings shall be released pursuant to the circuit court's order. Having decided this appeal, we deem dissolved the stay imposed by the circuit court pending this appeal.

The circuit court order did not address the DPW's mandamus petition's request for attorney's fees under WIS. STAT. § 19.37(2)(a). There is no indication in the record before this court that the DPW raised the fee issue in the circuit court after it prevailed on its mandamus petition. The DPW did not cross-appeal from the circuit court's mandamus order to challenge the order's failure to address or award fees. The DPW's respondent's brief does not address the

issue of fees. A party must direct a court's attention to issues being submitted for determination. *See* ***Evjen v. Evjen***, 171 Wis. 2d 677, 688, 492 N.W.2d 361 (Ct. App. 1992). As the respondent, the DPW "seeks to uphold rather than reverse the result reached" in the circuit court. ***State v. Holt***, 128 Wis. 2d 110, 124, 382 N.W.2d 679 (Ct. App. 1985), *superseded by statute on other grounds*. We conclude that the issue of § 19.37(2)(a) attorney's fees is not before this court in this appeal.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is affirmed and the stay is lifted

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*Diane M. Fremgen*
*Clerk of Court of Appeals*