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MARATHON COUNTY
2022CV000341

BY THE COURT:

DATE SIGNED: March 14, 2023

Electronically signed by Suzanne C. O'Neill
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT MARATHON COUNTY
BRANCH 1

THE BADGER PROJECT, INC.,
Petitioner,
vs. Case No. 22-CV-341

WAUSAU POLICE DEPARTMENT,
Respondent.

DECISION ON SUMMARY JUDGMENT

The petitioner, the Badger Project, filed this mandamus action alleging that the respondent, the Wausau Police Department, failed to sufficiently respond to its open records requests. The Badger Project now seeks summary judgment, arguing that no factual dispute exists and that it is entitled to judgment as a matter of law. The Wausau Police Department likewise argues that it is entitled to judgment as a matter of law because it has already provided the petitioner with all of the records to which it is entitled. While the Court recognizes the validity and significance of the reasons that the Department cited for its limited disclosure, the Court finds that the Department's redactions of information from the released reports were excessive, and the petitioner is entitled to judgment.

BACKGROUND

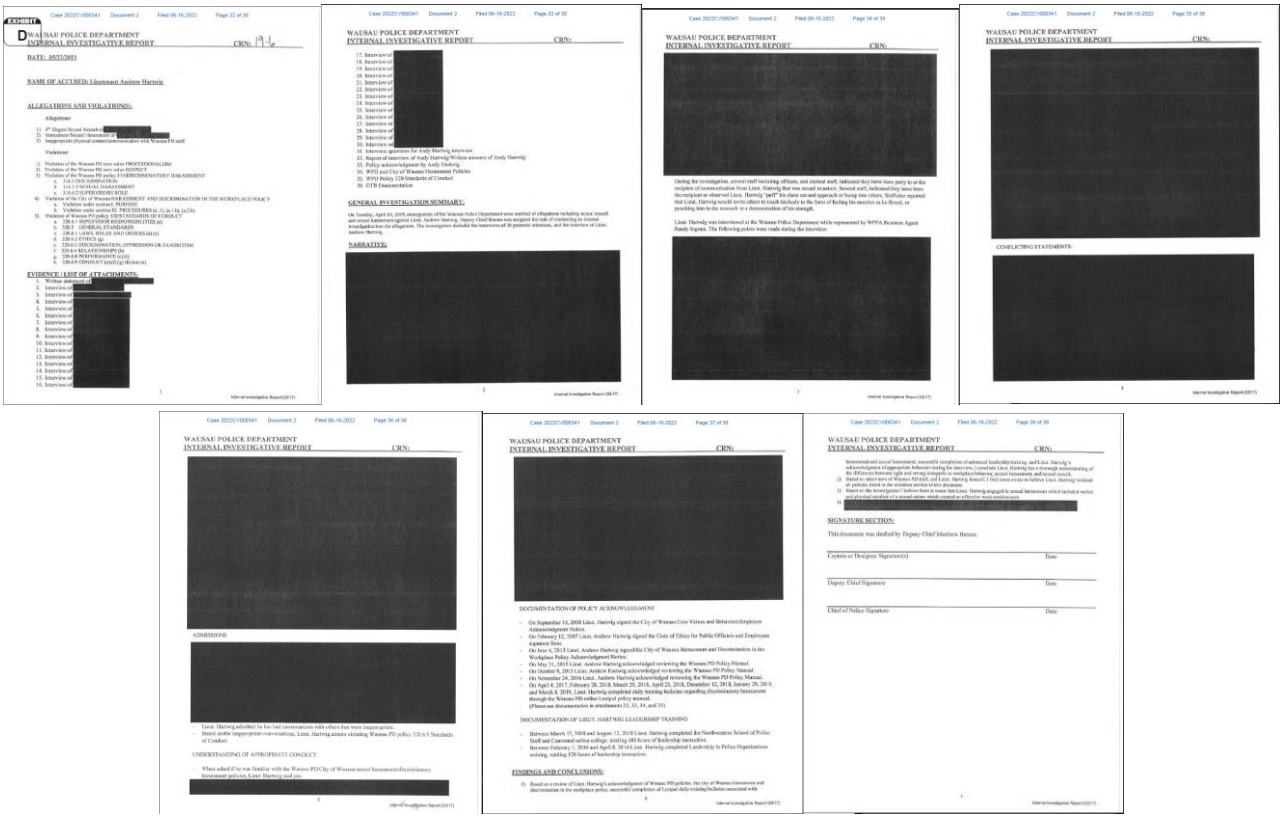
The Badger Project is a journalism nonprofit organization which investigates and reports on matters related to Wisconsin government and politics. As part of a series of stories it was publishing about law enforcement officers who left one law enforcement agency and were later hired at another, the Badger Project requested records from the Wausau Police Department regarding former Wausau Police Officer Andrew Hartwig. The Badger Project made the open records request on September 9, 2021, after it received information that Hartwig had resigned from the Wausau Police Department before the Department had completed an internal investigation.

The Department made its initial response to the open records request on September 21, 2021. As part of that response, the Department released 47 pages

of records, which consisted of an April 2019 letter suspending Hartwig pending an investigation, a June 2019 separation agreement between Hartwig and the Department, a copy of Hartwig's 2007 onboarding letter from the time of his hiring, and various documents concerning disciplinary actions for conduct such as tardiness and inadequate preparation for trials. The response did not include any documents from the investigation that had led to or supported Hartwig's suspension.

The Badger Project's managing editor, Peter Cameron, sent another letter the next day, noting the omission of any documents from the investigation and asking that those documents be provided. Cameron was in contact thereafter with the City Attorney, who repeatedly advised that a response was coming.

The Department ultimately responded on January 13, 2022, and released copies of the policies implicated in the investigation, Hartwig's acknowledgment of those policies, and a heavily redacted report. The report is seven pages long; at least three of those pages contain more redactions than text, with significant redactions on two other pages.



The redactions removed the names of each individual interviewed in the investigation, as well as all those who were impacted by Hartwig's conduct. The redactions also removed many of the details of Hartwig's conduct, including the final item in the report's list of findings and conclusions.

The Department's rationale for the redactions, as offered by the City Attorney, cited eight considerations. Five of those considerations involved the Department's ability to receive and investigate complaints of wrongdoing.

1. The Wausau Police Department policy for Sexual Harassment provides that members who make complaints are protected from retaliation and that such matters are kept confidential to the extent possible.

2. The Wausau Police Department policy for Personnel Complaints and Internal Affairs provides that upon conclusion of an Internal Investigation, the department will not release the identity of an employee named in a personnel complaint without cause and the Chief shall ensure confidentiality by maintaining a secure file which has limited controlled access.

3. It is also the policy of the Wausau Police Department to ensure that the community can report misconduct without the corner [sic] for reprisal or retaliation, to the extent allowed by law.

4. Disclosure of the documents you requested would interfere with the ability of a law enforcement agency to conduct thorough, confidential, internal investigations. The Police Department's ability to gather statements from members of the Department or other departments would be seriously hampered by public disclosure of such investigations. Furthermore, disclosure would discourage victims and witnesses from providing information to the Department regarding personnel investigations.

5. Disclosure of the documents you requested would interfere with and hamper the City of Wausau's ability to ensure employees an opportunity for satisfying careers and fair treatment and would impinge upon the City's right and opportunity to retain competent law enforcement personnel.

6. Nondisclosure of the documents you requested protects the privacy rights of individuals who cooperated in the investigation, as well as Andrew Hartwig, and the complainants. Disclosure of these records might subject witnesses, employees, and their families to increased risk of harassment or other jeopardy.

7. Nondisclosure of the documents you requested is further required to avoid a loss of morale within the Police Department.

8 The documents you requested may contain information that is mistaken, unsubstantiated, untrue, or irrelevant, and there

> is a strong public policy in preventing this information from becoming public, thereby causing undue personal and/or economic harm to the individuals involved. Further, disclosure would constitute an unwarranted invasion of personal privacy.

Based on those eight considerations, the Department concluded that "the public interest to be served by the release of such documents does not outweigh the countervailing interests that would be impacted by their release," and therefore, "the public's right to access records must give way to the important public policy of encouraging victims and witnesses of sexual harassment and sexual assault in the workplace to cooperate in internal investigations of such conduct."

The Badger Project filed this action to seek review of the Department's decision.

ANALYSIS

Wisconsin's open records law creates a "strong presumption of openness and liberal access to public records." *Kroeplin v. Wisconsin DNR*, 2006 WI App 227, ¶12, 297 Wis. 2d 254, 725 N.W.2d 286. The law recognizes "that a representative government is dependent upon an informed electorate," and for that reason, it declares "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." Wis. Stat. §19.31. "To that end," the provisions of the open records law "shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business." *Id.* To deny that access requires "statutory or specified common law exceptions" or the existence of "an overriding public interest in keeping the public record confidential." *Kroeplin*, 297 Wis. 2d 254, ¶13.

Here, the Department did not rely on any statutory or common-law exceptions, so the only question is whether it appropriately determined that an overriding public interest overcame the presumption of openness with respect to its redactions and the materials it withheld.

The first step in that process is to examine whether the records custodian made its denial of access with sufficient specificity. *Wisconsin Newspress, Inc. v. School Dist. of Sheboygan Falls*, 199 Wis. 2d 768, 784, 546 N.W.2d 143 (1996). The Badger Project does not dispute that the Department's explanation was sufficiently specific.

The second step is for the Court to assess whether the Department properly weighed the considerations it cited. In making that assessment, the Court must consider "'whether the documents implicate the public interests in secrecy asserted by the custodian [ ] and, if so . . . [whether] the countervailing interests

outweigh the public interest in release.'" *Id.* (quoting *Milwaukee Journal v. Call*, 153 Wis. 2d 313, 317, 450 N.W.2d 515 (Ct. App. 1989); alterations added).

Although the Department disclaimed reliance on any common-law exception and recognized that there is no blanket rule against disclosure of public employees' personnel files,[1] it nevertheless seemed to argue in favor of a blanket rule specific to police officers. It argued, "It is the law of Wisconsin that, except for monitoring the use of deadly force by police officers, the personnel records of rank-and-file police officers[2] are not subject to public disclosure." (Respondent's Brief, p. 7.) For that rule, it relied on three cases: *Pangman v. Stigler*, 161 Wis. 2d 828, 468 N.W.2d 784 (Ct. App. 1991); *Village of Butler v. Cohen*, 163 Wis. 2d 819, 472 N.W.2d 579 (Ct. App. 1991); and *Pangman v. Zellmer*, 163 Wis. 2d 1070, 473 N.W.2d 538 (Ct. App. 1991).

The Department's apparent confusion is understandable given the language used in those three cases. Although the *Stigler* court noted that the balancing test must be "performed on a case-by-case basis," *Stigler*, 161 Wis. 2d at 840, the other two cases seemed to use categorical language. The *Cohen* court, for example, had stated that "[t]he issue here is not the contents of these particular officers' personnel files, but the personnel files of officers in general," and it found that the statutory provisions that the Village had relied on "indicate a legislative recognition of a public policy interest in generally denying access to the personnel files of police officers." *Cohen*, 163 Wis. 2d at 827, 831. Similarly, the *Zellmer* court was addressing multiple requests affecting more than a dozen officers, and it spoke in broad terms that would apply to any law enforcement officer. *Zellmer*, 163 Wis. 2d at 1083, 1086–87, 1089–90.

But those categorical statements do not accurately reflect the current state of the law in Wisconsin. Subsequent cases have made clear that there is no blanket

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[1] The Department's brief includes at least three references to the principle that there is no blanket exception for the disciplinary or personnel records of public employees, and that such records are subject to a balancing test. (Respondent's Brief, pp. 11–12; *see also id.* at p. 5.)

[2] Even if this were the rule, it is not clear that it would apply in this case. The term "rank and file" refers to "[t]hose who form the major portion of any group or organization, excluding the leaders and officers," or "[t]he common soldiers of an army." *American Heritage Dict. of the English Lang.* 1080 (1980). *See also Black's Law Dict.* 1450 (10th ed. 2014) (defining "rank and file" as "[t]he enlisted soldiers of an armed force, as distinguished from the officers" or "[t]he general membership of a union"). Hartwig was a lieutenant in the Department and held supervisory authority. Thus, Hartwig would not be considered a rank-and-file officer. He was in a position of greater authority and should have expected greater public scrutiny of his conduct.

rule, and that to read *Stigler, Cohen,* and *Zellmer* as creating one would be a mistake. In describing the import of those three cases, the supreme court said, "in each case the court of appeals clearly applied the balancing test in making its determination. The cases do not stand for the proposition that there is a blanket exception for personnel records under the open records law." *Wis. Newspress*, 199 Wis. 2d at 780. *See also Hempel v. City of Baraboo*, 2005 WI 120, ¶62, 284 Wis. 2d 162, 699 N.W.2d 551 ("*Zellmer* and *Cohen* do not impose a blanket rule excepting the disclosure of any 'rank-and-file police officer's' personnel records.").

Rather, the current state of the law is that "[e]ach request will lead to a fact-intensive inquiry" and that the records custodian, being "mindful of the strong presumption of openness, must perform the open records disclosure analysis on a case-by-case basis." *Hempel*, 284 Wis. 2d 162, ¶62.

In this case, the Department's concerns about encouraging victims and witnesses to report inappropriate conduct and to cooperate with investigations into such conduct are valid and worthy of some degree of nondisclosure. Those concerns have been recognized in previous cases. *See, e.g., Hempel*, 284 Wis. 2d 162, ¶¶70–73; *Linzmeyer v. Forcey*, 2002 WI 84, ¶¶30–31, 254 Wis. 2d 306, 646 N.W.2d 811. However, protecting the privacy and confidentiality of witnesses is not a reason to hide the alleged conduct itself. *See Hempel*, 284 Wis. 2d 162, ¶70.

Potential loss of morale and inability to attract or retain competent personnel have also been recognized as valid considerations. In *Hempel*, the supreme court recognized that, for a law enforcement agency, a potential loss of morale was a "plausible" concern, and the potential difficulty in attracting qualified candidates "weighs slightly" in favor of nondisclosure. *Id.* at ¶¶74–75. But in other cases, those concerns have been rejected. *See, e.g., Hagen v. Board of Regents*, 2018 WI App 43, ¶9, 383 Wis. 2d 567, 916 N.W.2d 198. Those concerns have even been rejected in cases involving law enforcement. *Kroeplin*, 297 Wis. 2d 254, ¶44; *State ex rel. Journal/Sentinel, Inc. v. Arreola*, 207 Wis. 2d 496, 517, 558 N.W.2d 670 (Ct. App. 1996). In a case like this, where a police officer holding a supervisory position was accused of sexual harassment and sexual assault, it is difficult to see how the release of details about the investigation of those complaints, while redacting the names of the victims and witnesses, would impair morale or hinder the recruitment of qualified personnel.

The Department's concern about the release of mistaken, unsubstantiated, untrue, or irrelevant information carries some weight, but not enough to justify the substantial redactions in the report it released. To the extent the Department found that the allegations were substantiated, that information should be released.

Given that the Department did release a redacted version of its internal investigative report, it apparently recognized that some degree of disclosure was warranted. But the report was so heavily redacted that some of Hartwig's conduct has been entirely hidden. In that respect, the redacted report in this case differs significantly from the one at issue in *Hempel*. The *Hempel* court noted that the redacted report available in that case "provide[s] a substantial degree of understanding about the alleged problem within the Department." *Hempel*, 284 Wis. 2d 162, ¶69. The court then provided examples from the report, in which names had been redacted but the conduct at issue was still visible.[3] The court found that the redaction "protected the privacy and confidentiality of certain witnesses without hiding alleged conduct," and that the release of the redacted report "weighs heavily in the balancing test" when considering whether any additional disclosure should be ordered. *Id.* at ¶70.

The Department's redactions in this case were too extensive. They went beyond protecting the privacy and confidentiality of victims and witnesses and hid the conduct for which Hartwig was being investigated. Paragraphs like the passages quoted in *Hempel* were removed in their entirety. That level of redaction is contrary to the openness required of public records. Significantly, although the redacted report revealed that Hartwig had been accused of fourth-degree sexual assault, it entirely deleted the Department's findings and conclusions about that allegation.

The Court finds that the Department withheld too much, and the Badger Project is entitled to the release of additional material. The Court is willing to take on the role of redactor, but would prefer to give the Department an opportunity to do so itself, with an eye toward the principles enunciated in this decision. If that attempt does not successfully resolve the parties' dispute, then the Court will step in.

In its renewed analysis of the materials at issue, the Department should bear in mind that courts have repeatedly recognized "the great importance of disclosing disciplinary records of public employees and officials where the conduct involves violations of the law or significant work rules." *Kroeplin*, 297 Wis. 2d 254, ¶28. "The public has a particularly strong interest in being informed about public

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[3] "As we have noted, one of the documents contained the following text: 'After (redacted) asked if (redacted) was in trouble I explained to (redacted) that I received information within the last twenty-four hours or so that (redacted) may have suffered some harassment by one of the Baraboo Police Department officers.' The document continues: '(Redacted) said that (redacted) was talking to (redacted) and made the following statements, "Women are brainless"; "Women should not be working in police work"; and "Women should not be working at all."'" *Hempel*, 284 Wis. 2d 162, ¶69.

officials who have been 'derelict in [their] duty.'" *Wis. Newspress*, 199 Wis. 2d at 786 (quoting *State ex rel. Youmans v. Owens*, 28 Wis. 2d 672, 685, 137 N.W.2d 470 (1965); alteration in original). "The public interest in being informed both of the potential misconduct by law enforcement officers and of the extent to which such misconduct was properly investigated is particularly compelling [.]" *Kroeplin*, 297 Wis. 2d 254, ¶46. "'All officers and employees of government are, ultimately, responsible to the citizens, and those citizens have a right to hold their employees accountable for the job they do.'" *Zellner v. Cedarburg School Dist.*, 2007 WI 53, ¶53, 300 Wis. 2d 290, 731 N.W.2d 240 (quoting *Linzmeyer*, 254 Wis. 2d 306, ¶28).

CONCLUSION

In weighing the public interest in disclosure of the Department's disciplinary records concerning Lt. Andrew Hartwig against the public interest in nondisclosure, the Court finds that the Department erred on the side of nondisclosure and withheld too much. While there are valid reasons for withholding certain information, such as the confidentiality of victims and witnesses and the Department's ability to conduct thorough and candid investigations, those reasons do not extend to completely obscuring the conduct at issue in the complaints. Law enforcement officers, like all public employees, should expect some level of public scrutiny, as "[t]hat is the nature of the job." *Kroeplin*, 297 Wis. 2d 254, ¶44; *see also Local 2489, AFSCME, AFL-CIO v. Rock County*, 2004 WI App 210, ¶26, 277 Wis. 2d 208, 689 N.W.2d 644.

THEREFORE, IT IS HEREBY ORDERED that the petitioner's motion for summary judgment is granted. The respondent shall re-examine the materials it previously withheld and release additional information consistent with this decision. If that does not resolve the parties' dispute, they may advise the Court, and the Court will perform the necessary re-examination and release of information itself.

Although this decision grants summary judgment, and thereby essentially settles the rights of the respective parties, it does contemplate further proceedings in the future. For that reason, this order it is not final for purposes of appeal.[4]

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[4] A judgment or order is final for purposes of appeal if it "disposes of the entire matter in litigation as to one or more parties [.]" Wis. Stat. §808.03(1). "[I]n order to 'dispose' of the matter under §808.03(1), a memorandum decision must contain an explicit statement either dismissing the entire matter in litigation or adjudging the entire matter as to one or more parties." *Wambolt v. West Bend Mut. Ins. Co.*, 2007 WI 35, ¶39, 299 Wis. 2d 723, 728 N.W.2d 670. The recommended practice is for the Court to explicitly state when a judgment is final for purposes of appeal. *Id.* at ¶¶44–45; *Tyler v. The RiverBank*, 2007 WI 33, ¶¶25–26, 299 Wis. 2d 751, 728 N.W.2d 686.