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CIRCUIT COURT
DANE COUNTY, WI
2017CV001737

BY THE COURT:

DATE SIGNED: November 28, 2018

Electronically signed by Judge Valerie Bailey-Rihn
Circuit Court Judge

STATE OF WISCONSIN **CIRCUIT COURT** **DANE COUNTY**
BRANCH 3

LAKELAND PRINTING CO., INC., D/B/A THE LAKELAND TIMES
Plaintiff,

vs. **Case No. 17CV1737**

WISCONSIN DEPARTMENT OF JUSTICE AND PAUL FERGUSON,
Defendant.

DECISION AND ORDER

The facts of this case are not in dispute. In January 2017, Plaintiffs Gregg Walker and The Lakeland Times submitted a written open records request to the Wisconsin Department of Justice (DOJ). The request called for DOJ to produce "all disciplinary records for Department of Justice employees for the years 2013-2016, including the names of the employees disciplined." Affidavit of Gregg Walker ("Walker Aff."), ¶ 3.

Defendant Paul Ferguson is the records custodian for the DOJ, and on July 3, 2017, he sent a letter partially denying Plaintiffs' request. After reviewing the records, Defendants Ferguson and the DOJ decided to partially redact some of the information

contained therein. Presently at issue are twenty (20) records that had information redacted.[1] Relying on the public policy balancing test, Defendants redacted records that fell into three categories. First, eighteen (18) of the records had employee names redacted from disciplinary letters those employees received. Second, one (1) of the records included a redaction of a county name. Finally, Defendants redacted the name of an employee mentioned in a disciplinary report; however, the name of the employee who received the disciplinary letter was not redacted.

In justifying their redactions to Plaintiffs, Defendants provided an extensive list of reasons for withholding information. These reasons are listed below:

- The infractions were work rule violations, not criminal conduct or the type of more serious misconduct involving accountability to the public that concerned the Court of Appeals in *Kroeplin v. Department of Nat. Res.*, 2006 WI App 227, 297 Wis. 2d 254, 725 N.W.2d 286.
- There is a public policy interest in protecting the reputation and privacy interests of public employees.
- The employees at issue are not highly placed DOJ personnel in whom there might be more significant public interest. *Cf. Wisconsin Newspress, Inc. v. School Dist. Of Sheboygan Falls*, 199 Wis. 2d 768, 787, 546 N.W.2d 143 (1996).
- Publicizing the names of employees who are committed to correcting their behavior would embarrass them, be counter-productive and would not serve the public interest in having these employees correct their actions following imposition of discipline.
- Supervisors are more likely to be deterred or inhibited from investigating possible employee misconduct and imposing discipline in appropriate cases if the names of disciplined employees are routinely released to the public.

Walker Aff. Ex. 1, p. 2.

[1] At oral arguments, both parties agreed that the records at issue were listed on pages 3-6 of Plaintiffs' Brief in Support of Motion for Partial Summary and Declaratory Judgment. The brief notes that nineteen employees had names redacted from disciplinary letters and the identification of one county was also redacted. Based on the briefs and description of records at oral arguments, the Court understands that it is ruling on the remaining records.

On July 19, 2017, Plaintiffs filed this action against Defendants DOJ and Paul Ferguson seeking enforcement of Wisconsin's Public Records Law, Wis. Stat. §§ 19.31-19.39. Following discussions between the parties, some of the original claims (including a portion of attorney's fees) were resolved. Based on the November 13, 2018 oral arguments, it appears that the only remaining issues involve the redacted portions of the twenty (20) records described above.

There are now competing motions for summary and declaratory judgment. Based on the briefs, affidavits, and oral arguments, the Court FINDS and ORDERS as follows.

LEGAL STANDARD

Under Wis. Stat. § 802.08, summary judgment may be granted when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Home Ins. Co. v. Phillips*, 175 Wis. 2d 104, 110, 499 N.W.2d 193, 196 (Ct. App. 1993). It is only to be granted, however, when it is perfectly plain that there is no substantial issue of fact to be tried. *Sachse v. Mayer*, 1 Wis. 2d 506, 507, 85 N.W.2d 485 (1957). A "material fact" for summary judgment purposes is one that is of consequence to the merits of the litigation. *Schmidt v. N. States Power Co.*, 2007 WI 136, ¶ 24, 305 Wis. 2d 537, 556, 742 N.W.2d 294. If material presented is subject to conflicting interpretations or if reasonable people might differ as to its significance, it is improper to grant summary judgment. *Park Bancorporation, Inc. v. Sletteland*, 182 Wis. 2d 131, 141, 513 N.W.2d 609 (Ct. App. 1994).

DISCUSSION

The issues at the heart of this case are interesting; while Wis. Stat. §§ 19.31-19.39 have been around since 1981, the procedure for determining disclosure has not developed beyond the balancing test of public interests. At the outset, the Court recognizes that there is a "strong presumption of openness and liberal access to public records established by Wis. Stat. § 19.31." *Kroeplin v. Wisconsin Dept. of Natural Resources*, 2006 WI App 227, 297 Wis. 2d 254, 725 N.W.2d 286. The presumption of public access is overruled by statutory exceptions, specified common law exceptions, or if there is a superseding public interest in withholding the information. *Id*. Both parties agree that there is not a statutory or common law exception for denying access to the records here.

In the present case, the DOJ records custodian, Paul Ferguson, determined that there was an overriding public interest in limiting Plaintiffs' access to the records. Under the Public Records Law, a custodian is able to deny access to records using a public policy balancing test. While a custodian may withhold information in the record, denial of access is only intended for exceptional circumstances as the statute explicitly states that "denial of public access generally is contrary to the public interest." Wis. Stat. § 19.31. Further, reviewing courts have held that the test must be applied "to each individual record." *Milwaukee Journal Sentinel v. Wisconsin Department of Administration*, 2009 WI 79, ¶ 56, 319 Wis. 2d 439, 768 N.W.2d 700. This means that the custodian must demonstrate an exceptional reason for refusing access to each individual record that is being denied. Given the list of reasons provided by Defendants, the Court will address each justification in turn.

A. Work Rules Violations vs Criminal Conduct

The first reason for denying access was that there was minimal public interest in the records because the misconduct that is being withheld involves work rules violations as opposed to criminal conduct. Walker Aff. Ex. 1, p. 2.

The Wisconsin Court of Appeals in *Kroeplin* stated that the public records law advocates for disclosure of records "where the conduct involves violations of the law or significant work rules." *Kroeplin* at ¶ 28. This implicitly contradicts the DOJ's argument that the records may be withheld because the misconduct was not criminal by including work rules in the court's analysis. Further, the Court of Appeals appeared to explicitly address the argument in the same case in a footnote, stating,

> "Kroeplin appears to include a third argument. He acknowledges that the public has a strong interest in accessing records relating to employee discipline where the employee is charged with a crime or with a serious work rule violation. However, he asserts, because he was not charged with a crime or because, at least in his view, the DNR did not accuse him of serious misconduct, the public's interest in the disclosure of his documents is slight. We reject this argument. We recognize that Kroeplin has not been charged with a crime, at least at the time this opinion was written. However, it is not up to Kroeplin to determine whether a particular work rule violation is serious." *Id*. ¶ 51, n. 5.

Here, the Court finds that Defendants' reasoning has already been rejected by the Court of Appeals. Defendants attempt to circumvent the binding decision by differentiating the cases. Although, *Kroeplin* involved withholding full documents while the current case only involves specific redactions, the holding regarding the merits of this argument is binding. Public record disclosure is not limited to criminal violations. Further, as detailed more fully below, a rule of this type could create a blanket exception for withholding documents. Wis. Stat. § 19.31 and the relevant caselaw specifically direct the records custodian to review each individual record and determine whether an

exceptional reason exists to deny access. A policy dictating that only criminal records demand full access may create a new blanket exception.

B. Reputational Interest of Public Employees

Next, Defendants assert that the reputational interests of public employees are an important factor and consideration in denying access to the records. At the November 13 hearing, Defendants noted that employees whose names are released may be embarrassed, or in more severe cases, struggle getting hired based on the release of their names. Defendants contend that the popularity and permanence of social media and the internet favor denying access so as to protect public employees from embarrassment.

The DOJ's reasoning was considered in *Kroeplin, Linzmeyer v. Forcey*, 2002 WI 84 ¶ 11, 254 Wis. 2d 306, 646 N.W.2d 811, and briefly in *Milwaukee Journal Sentinel v. Wisconsin Dept. of Admin.*, 2009 WI 79, ¶ 62, 319 Wis. 2d 439, 768 N.W.2d 700. For example, the Wisconsin Supreme Court in *Linzmeyer* noted that the "public interest is *not* equivalent to an individual's personal interest in protecting his or her own character and reputation." *Linzmeyer*, 2002 WI 84 ¶ 11. The *Linzmeyer* Court explained that personal interest was a salient point only when the individual's privacy interest directly related to the "public effects of the failure to honor the individual's privacy interest." *Id* (emphasis added). The Court stated that an example of a public detriment based on reputational interests would be that a party may be less willing to testify in court when faced with the potential that they would be cross-examined on the contents of their personnel file. The record custodian must therefore indicate a public effect beyond simply personal strife.

In advocating for the protection of the reputational interests of public employees, Defendants assert that there is a public interest in ensuring that all willing and capable people are able to find employment. Defendants cite *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 544, 105 S.Ct. 1487 (1985), to demonstrate that there is a public interest in making sure that qualified employees continue working. *Loudermill* held that public employees had a property right in their continued employment. The Supreme Court stated early in the decision that the government is not served by having willing and able employees on welfare. *Id*. However, this public interest is not absolute and it is distinct from the issue in the present case. A public interest in continued employment, especially for employees who may have serious work misconduct, would certainly give way to the public interest in transparency. Additionally, the holding in *Loudermill* is not applicable to personal issues resulting from the disclosure of identifying information. The case focuses solely on public employee rights when employment is terminated.

In *Kroeplin*, the Court of Appeals stated that personal privacy interests may favor withholding records in two specific scenarios: "disclosure would threaten both personal privacy and safety of employees…or if other privacy protections are already established by law." *Kroeplin* at ¶ 46 (internal citations omitted). The *Milwaukee Journal Sentinel* court stated: "potential for embarrassment is not a basis for precluding disclosure." 2009 WI 79, ¶ 63 (internal citations omitted). Here, the records custodian did not offer a reasoning that fit into either of these categories. Releasing names due to potential

embarrassment does not relate to the safety of employees nor is there a protection established by law in withholding the information.

Finally, the records at issue are characterized both as "garden variety" and severe. Defendants assert both that the misconduct is minimal and therefore the public does not need the information while simultaneously stating that release of names could cause challenges in future employment. Having reviewed the facts, it seems that the records likely land somewhere in between the two opposing characterizations. While it is not entirely clear where each individual record falls on the scale, the Court finds that neither justification is adequate to rebut the presumption of openness. Defendants have not shown how personal reputation concerns relate to the larger public interest.

C. Not Highly Placed Personnel Favors Nondisclosure

Next, DOJ avers that higher profile public employees are subject to additional disclosure and they are therefore justified in limiting access to lower-level public employees. There does not appear to be case directly addressing potential differences in the level of scrutiny between high- and low-level public employees. However, Court's in the past have held that generalized concerns that apply to all "public employees" fail the "exceptional reason" requirement (*Milwaukee Journal Sentinel v. Wisconsin Dept. of Admin*, 2009 WI 79, ¶ 63, 319 Wis. 2d 439, 768 N.W.2d 700). *Milwaukee Journal Sentinel*, which appears to be the case that most closely addresses the issue, does contain a passage which the Court finds persuasive.

> "[W]e note that the safety concerns set forth by WSEU with respect to correctional employees, parole agents and DNR wardens in general, when examined as a group, are not concerns different from those faced by other groups of employees of the State of

> Wisconsin. Nearly all public officials, due to their profiles as agents of the State, have the potential to incur the wrath of disgruntled members of the public, and may be expected to face heightened public scrutiny; that is simply the nature of public employment." *Id*.

First, the Court notes that the grouping includes higher up officials (wardens) as well as lower level state employees (correctional employees and parole agents). The cited portion also advises that all public officials are subject to heightened scrutiny. Further, as previously stated the Wisconsin Supreme Court requires that there be particular concerns for withholding information, not issues that could be generalized to all public employees. Based on these tenets, a generalized argument limiting access to lower level employees is not an exceptional circumstance that would favor nondisclosure.

The Court is also aware that if this distinction were to be used, it could easily qualify as a blanket exception. A record custodian could deny access to any employee not in a supervisory role. Due to concerns over blanket exceptions and the case law favoring full and open access, the Court finds the distinction between the authority levels unpersuasive.

D. Deter Supervisors from Investigating Misconduct

Defendants' final reason for denying access was that complete open records, including names of employees, would deter supervisors from fully and adequately investigating misconduct. However, the Court of Appeals in *Kroeplin* rejected the argument that investigators of employee misconduct "would be less than candid if they feared that their appraisals might be available for public inspection." *Kroeplin* at ¶ 50.

The court rejected the argument stating that there was no indication that disclosing the records would have the purported effects. *Id.* at 51.

Here, there does not seem to be a practical difference between DOJ's argument and the rejected argument in *Kroeplin*. As in *Kroeplin*, DOJ fails to point to any evidence indicating that disclosing misconduct records would inhibit supervisors from investigating claims or imposing discipline. There is a statutory presumption of openness; without evidence of an actual chilling effect on investigations, the Court is not going to deny full access.

E. Blanket Exception

Finally, there are competing claims as to whether DOJ's reliance on low-level employees and minor infractions constitutes a "blanket exception." The Wisconsin Supreme Court explained that a record custodian must use the balancing test on a "case-by-case basis," meaning that the custodian may not create a category and deny public access to that entire category. *Milwaukee Journal Sentinel v. Disconsin Dept. of Admin.*, 2009 WI 79, ¶ 56, 319 Wis. 2d 439, 768 N.W.2d 700 (internal citations omitted). Courts have consistently found that records custodians may not "catalog the situations in which harm to the public interest would justify refusal" to release records. *State ex rel. Youmans v. Owens*, 28 Wis. 2d 672, 682, 137 N.W.2d 470. Plaintiffs contend that the enumerated reasons for denying access create new blanket exceptions. Conversely, Defendants contend that each file was individually reviewed, and the justifications provided were not blanket exceptions. Defendant claims that although the reasons

happened to be similar for various records, Defendants performed their statutory duty and reviewed each record individually.

After reviewing the record and briefs as well as listening to oral arguments, the Court is unable to determine whether a blanket exception was applied to the records in the case. However, given that the Court has ruled that the various justifications do not rebut the presumption of access to the records, there is no reason to determine whether Defendants' articulated reasons constituted a blanket exception.

CONCLUSION

The Court appreciates the concerns regarding the openness and longevity of internet search results, but as of yet, there is not a statutory or common law justification for denying full access to records on that basis. Additionally, many of Defendants' listed reasons for redacting information have already been addressed by higher courts. The purpose of the open records law is to allow for transparent and accountable government and public employees.

The reasons for redacting certain information from the twenty (20) records at issue are insufficient as there does not seem to be an "exceptional" circumstance justifying denial of access. Therefore, the Court GRANTS Plaintiff's motion for partial summary and declaratory judgment. Defendants shall release the records at issue without redactions of the disciplined employee names and remove the substantive redactions from disciplinary letters issued to Lori Phillips (dated 3/25/14) and Bradley Kust (dated 4/8/14).