STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

BRAD D. SCHIMEL
ATTORNEY GENERAL

Andrew C. Cook
Deputy Attorney General

17 W. Main Street
P.O. Box 7857
Madison, WI 53707-7857
www .doj.state.wi.us

Paul M. Ferguson
Assistant Attorney General
fergusonpm@doj.state. wi.us
608/266-1221
TTY l-800-947-3529
FAX 608/267-2779

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This is in response to your correspondence, received on March 28, 2016, in which you requested "records and information from the Wisconsin State Crime Lab (Madison) and the Division of Criminal Investigation related to the investigation of the death of Teresa M. Halbach and the subsequent Steven A. Avery homicide investigation and trial."

[redacted]

The Department of Justice (DOJ)construes your correspondence as a public records request pursuant to the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39.

First, your request is insufficient pursuant to Wis. Stat. § 19.35(1)(h), and therefore, it is denied. A public records request is deemed sufficient if it reasonably describes the requested record; a request for a record without a reasonable limitation as to subject matter or length of time does not constitute a sufficient request. Wis. Stat. § 19.35(l)(h). The public records law does not impose such heavy burdens on a record custodian that normal functioning of the office would be severely impaired and does not require expenditure of excessive amounts of time and resources to respond to a public records request. *Schopper v. Gehring,* 210 Wis. 2d 208, 213, 565 N.W.2d 187 (Ct. App. 1997); *State ex rel. Gehl v. Connors,* 2007 WI App 238, ,r 17, 306 Wis. 2d 247, 742 N.W.2d 530.

Second, pursuant to Wis. Stat. § 165.79(1), "[e]vidence, information and analyses of evidence obtained from law enforcement officers by the laboratories is privileged and not available to persons other than law enforcement officers ... prior to trial, except to the extent that the same is used by the state at a preliminary hearing and except as provided in Wis. Stat. § 971.23 [pre-trial criminal discovery]."

Some of the records you requested are not available via a public records request as they constitute records containing information, which are derived from analysis of evidence collected by law enforcement in the investigation of a crime and therefore fall within the purview of Wis. Stat. § 165.79(1).

Upon the termination or cessation of criminal proceedings, the privilege of the findings obtained by a laboratory may be waived in writing by the DOJ and the prosecutor involved in the proceedings. It is the requester's responsibility to request the waivers. DOJ will not consider granting a waiver until it receives a waiver from the prosecutor. It is your responsibility to obtain that waiver and forward it to DOJ.

Next, if your request was sufficient, you requested records pertaining to an investigation into recently provided information and litigation that is continuing at this time. The continued confidentiality of existing records is material to that ongoing investigation into recently provided information and litigation. Therefore, pursuant to the public records balancing test, I am declining to release any records related to that case to you at this time. *Cf. Linzmeyer v. Forcey,* 2002 WI 84, ,r,r 30, 32, 39, 41, 254 Wis. 2d 306, 646 N.W.2d 811; *Journal/Sentinel, Inc. v. Aagerup,* 145 Wis. 2d 818, 824-27, 429 N.W.2d 772 (Ct. App. 1988). In applying the balancing test, pursuant to Wis. Stat. § 19.35(1)(a), I considered specific public policy concerns that would be affected by the release of the requested records at this time, including:

- Current habeas litigation related to the matter may result in new trials, and the disclosure of material that has not been made public could influence the testimony of trial witnesses.
- The release of the requested records will impact the defendants' ability to have a fair trial.
- The DOJ Division of Criminal Investigation (DCI) records contain information that is irrelevant, inadmissible, and/or speculative. Such information could influence the jury pool and hurt both the prosecution and the defense. For example, the DCI record likely contains reports of "other acts" evidence that was excluded in the first trials. It would be improper and irresponsible to disclose that information.
- DOJ has received reports of false information since the release of the Netflix series, *Making a Murderer*. Prosecutors are concerned that people, influenced by new information, will come forward as witnesses while presenting false or fabricated information.
- Potential witnesses having access to previously undisclosed evidence undermines the ability to determine when a potential witness is telling the truth. For example, in one of the cases, a witness stated he had access to certain information through the media, but, in fact, the information had never been disclosed.
- Releasing previously undisclosed evidence will hurt the prosecutor's ability to corroborate the veracity of new witnesses who come forward with evidence.
- The information contained in the requested records could influence the judges hearing the current habeas cases and judges for the court of appeals, and such influence could adversely affect judicial decisions.
- Jurors in the Avery and Dassey cases have been subject to badgering and harassment from some members of the public and feel fearful, anxious, and nervous as a result. Release of information not already in the public record, or in the trial record, could likely perpetuate the harassment.
- Several individuals involved in the Avery and Dassey cases have received threats, particularly following the release of the Netflix series. Former District Attorney Ken Kratz, the judge, key investigators, and sheriffs have received threats. Release of information not already in the public record, or in the trial record, could likely perpetuate the threats.
- Prosecutors do not know the extent of future litigation or what to expect from future litigation, so determining what information can be released is impossible.
- Disclosure of the requested records at this time would require the excessively burdensome expenditure of government time, resources, and personnel. For example, the three prosecutors involved in the case as well as the DCI special agents involved would be required to meet and review the entire DCI case file in order determine what could be disclosed to the public at this time. The estimated time for such a review is at least 40 hours per person with no guarantee that the records could be released.

Therefore, in performing the public records balancing test, I concluded that the strong public interest in not disclosing the requested records outweighs any public interest in disclosing the requested records at this time.

Certain requested records have been released to the public by individuals other than DOJ and without DOJ's knowledge or consent. DCI's investigative records are voluminous and it would be overly burdensome for DOJ to research what records are already public and sort through all DOJ records for the sole purpose of releasing duplicate copies of the same records. As stated previously, the public records law does not impose such heavy burdens on a record custodian that normal functioning of the office would be severely impaired, and does not require expenditure of excessive amounts of time and resources to respond to a public records request. *Schopper v. Gehring,* 210 Wis. 2d 208, 213, 565 N.W.2d 187 (Ct. App. 1997); *State ex rel. Gehl v. Connors,* 2007 WI App 238, ,r 17, 306 Wis. 2d 247, 742 N.W.2d 530.

Additionally, your request encompasses the prosecutor's file or documents contained therein. We are denying your request as there is a common law limitation on the right to inspect a prosecutor's files. *See* Wis. Stat. § 19.35(1)(a). A prosecutor's files are not subject to disclosure under the public records law. *State ex rel. Richards v. Foust,* 165 Wis. 2d 429, 436, 477 N.W.2d 608 (1991) ("the common law provides an exception which protects the district attorney's files from being open to public inspection"; "a common law limitation does exist against access to prosecutor's files under the public records law").

Pursuant to Wis. Stat. § 19.35(4)(b), this determination is subject to review by mandamus under Wis. Stat. § 19.37(1) or upon application to a district attorney or the Attorney General.

Sincerely,

Paul M. Ferguson
Assistant Attorney General
Office of Open Government

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