

All Requestors of Records related to the arrest of Ms. Genele Laird at East Towne Mall on June 21, 2016

To Whom It May Concern:

The Madison Police Department has received many requests for public records related to the June 21, 2016, arrest of Genele Laird at East Towne Mall. We respect the public's right to have access to the requested records "as soon as practicable and without delay". However, responding to the unique nature of each request would significantly delay our ability to respond to all of these requests in a timely manner. Therefore, the Madison Police Department has decided to expedite our response by consolidating all of the requests we have received and provide each requestor with the same responsive records. Records prepared for release have been posted to the **Madison Police Department** website, located at: <http://www.cityofmadison.com/police/newsroom/recordsrelease-2016-06-21.cfm>, effective September 1, 2016.

The records posted online are composed of printed records only, no video files have been posted. There will be no fee associated with online access to these printed records. Those requestors seeking a personal copy of these records can obtain them from the Madison Police Department Records Bureau on CD for a fee of \$15/CD. The Madison Police Department will provide related audio/video records to those requestors seeking them for the cost of \$15/CD.

Under the Wisconsin Public Records Laws, records custodians must carefully weigh the competing public interests involved when deciding to release any record in their possession. Custodians begin with a presumption of complete public access to such records. However, custodians must consider whether any statute or any case law (common law) prohibits public access to the requested records. If neither the statutes nor the common law prohibits inspection of the records, the custodian must consider whether inspection of the record could result in harm to the public interest that would outweigh the benefits of such inspection. When such harm outweighs the benefits of public inspection, such records or portions thereof, must remain confidential. After reviewing the statutes and common law and after balancing these societal interests, I am releasing the vast majority of the requested records. However, for the following reasons, I am withholding all or part of some of the requested records.

I have determined that the public interests require me to keep some personally identifying information redacted from these records. This information is composed of the proper addresses, dates of birth, personal telephone numbers and email addresses of the cooperating witnesses. Release of this information would facilitate identity theft crimes and thus, would be contrary to the well-established public interests in crime prevention and reduction. Furthermore, victims, witnesses, and contacts may be reluctant to report what they know to the police if they have to fear that this personal and sensitive information is subject to release upon a public records request. These persons should not have to fear that they will have their contact information disseminated across the internet nor should they have to fear the unwanted attempts to contact, influence or perhaps harass, these witnesses. Additionally, this type of information is critical for follow-up of investigative matters, for crime detection and prevention purposes, and the public disclosure would hamper investigations if parties should refuse to provide personally identifiable information to police. There is marginal, if any, public interest in the disclosure of this information when balanced against the greater public interest in police effectively addressing crime and disorder issues. Therefore, in balancing the public interests associated with the release of these records, I conclude that these redactions are necessary to promote public interests that outweigh the presumed public interests associated with the disclosure of this information.

I have redacted the identity of a witness who provided information to MPD and requested anonymity. Law enforcement relies on the information provided by witnesses to investigate crime. This witness had no legal obligation to provide this information to the police. They provided this information while requesting confidentiality. Release of the requested records could place this witness' personal safety in jeopardy, and could seriously impact the willingness of this witness, and others, to participate in similar investigations. The Wisconsin Public Records laws prohibit the release of any records that if disclosed, would place any person in danger, disclose the identity of a confidential informant or that would compromise the rehabilitation of a prisoner. Wis. Stats. §§19.35(1)(am)2.; 19.36(8).

Further, Wis. Stats. § 19.36(8), prohibits custodians from disclosing the identities of law enforcement informants unless the custodian determines that "the public interest in allowing a person to inspect, copy, or receive a copy of such identifying information outweighs the harm done to the public interest by providing such access." Thus, this section of law reverses the burdens applied in the traditional "balancing test" applied to public records requests. No public interests have been identified to me with regards to requests for these records which outweigh the statutorily declared public policy in protecting the identities of confidential law enforcement informants. Indeed, releasing these reports to someone under the circumstances of your request would undermine the police department's ability to recruit additional informants. Those potential informants would rightfully conclude that any such release of records was irresponsible (given the factors set forth above), that records naming them as an informant would be released under similarly irresponsible circumstances and that therefore, they are not going to place their safety in such grave danger by acting as a confidential informant. This result would be directly contrary to the well accepted public policy of crime detection and successful prosecution of criminal behavior. Therefore, under these circumstances, Wis. Stats. § 19.36(8), prohibits the disclosure of this witness's identifying information.

I have redacted the names of the juvenile cooperating witnesses as well as other information that would positively identify these witnesses. In redacting the names of these juveniles and any information that would enable these juveniles to be identified, I note that Wis. Stats. §19.35(1), exempts from disclosure any record that another state statute authorizes to remain confidential. Wis. Stats. §§ 48.396 and 938.396 declare that law enforcement records of children shall be treated as confidential records. These statutes reflect a societal policy of keeping confidential the identities of juveniles who are involved in sensitive situations and with the justice system. Although the juveniles contained in these records were not referred to the court system, the same societal concerns are at issue with this matter. It would be contrary to the policies that underlie those statutes to release the identities of the juvenile witnesses identified in these records.

I have also redacted the identity and identifying information of an individual against whom potentially criminal allegations were directed, but that have not been investigated further at this time. Given the lack of any information to corroborate these allegations there is little or no public interest in knowing the identity of the subject of these allegations. However, there is a very strong public interest in avoiding unwarranted intrusions into the legitimate privacy interests and expectations of private citizens. In addition, disclosing such information could inhibit the cooperativeness of witnesses who may be reluctant to speak with the police if such unproven accusations can later be the subject of public records or news media disclosures. There is no doubt that some persons would even use such opportunities to harm other individuals by filing police reports and then publish these accounts either in print media or the internet. I am also concerned about the reputational interests of the subject identified in this investigation who may have their reputation unduly tarnished if evidence is released piecemeal to the public after it has been disclosed to a public records requestor. Thus, I find the presumed benefits of public disclosure clearly outweighed by these very real harms to the public interests that would occasion the release of this information. Consistent with Wis. Stats. § 19.35(1)(am)2. I am withholding photographic images of individuals for whom such disclosures would endanger their lives or safety and the lives and safety of

their friends and/or family.

I have withheld or redacted portions of these records that relate to a medical information/diagnosis and prescription/drug information. Wis. Stats. § 19.36(1) states that any records specifically exempted from disclosure by state or federal law are exempt from disclosure under the Wisconsin Public Records Laws. Multiple state and federal statutes, such as HIPAA, protect the sensitive nature of medical information by declaring such records to be confidential. Furthermore, it is unlikely that people would voluntarily disclose relevant medical and mental health conditions to the police if they knew that such information would be disclosed to any person making a public records request. In certain situations, the failure to disclose those relevant conditions could place the person, the police and the public in danger.

Likewise, state and federal statutes protect the confidential nature of mental health records. Under Wis. Stats. §§19.36(1) Wis. Stats; 51.30(4); and Wis. Admin. Code § DHS Chapter 92, mental health treatment records are confidential and may only be released to third parties with the informed consent of the records subject. Furthermore, these confidentiality requirements apply to police records that contain or reflect the substance mental health treatment records. *Watton v. Heggerty*, 2008 WI 74. As the Watton Court noted, Wisconsin has a “strong [legislative] interest in keeping private the details of an individual’s mental and emotional condition.” *Id* (citations omitted). In fact, a law enforcement agency cannot lawfully share such records with other law enforcement agencies even when such records reflect upon the fitness for duty of an officer of the second agency. *Milwaukee Deputy Sheriff’s Assoc., et al. v. City of Wauwatosa*, 2010 WI App 95.

Although these laws provide explicit authority for withholding these records, I have also applied the public records “balancing test” in deciding whether to disclose these records. Under that test, I must carefully weigh the competing public interests involved when deciding to release any record in our possession and determine whether inspection of the record could result in any harm to public interests and whether such harm outweighs the presumed benefits of public disclosure. Unfortunately, mental illness still carries a certain amount of social stigma. Wisconsin’s mental health treatment laws recognize this fact and seek to promote treatment by ensuring that the records of such treatment are confidential. This confidentiality promotes people seeking out treatment to avoid any stigmatization that would accompany the public disclosure of such needs. These provisions also promote relatives, friends and close associates, to report those persons in crisis or in need of treatment to the appropriate authorities and health care providers. After reviewing the materials involved and after giving due consideration to this matter, I have determined that mental health related information be redacted from these records.

Requests have been received for the disciplinary files of the two officers who made the arrest at issue. Neither of the officers involved has received any discipline, therefore, there are no disciplinary records to release. However, in recognition of the scope of, and the heightened public interest in this incident, the Professional Standards and Internal Affairs unit has prepared a summary of complaints received regarding the involved officers which concern allegations of excessive use of force. Please note that complaints are just that, complaints. These complaints were investigated and the disposition of those complaints is noted in these records being released today. The officers have reviewed these summaries, and have waived their right to challenge release of these records. A brief biography and summary of awards and commendations received by the officers has also been included.

The Wisconsin Supreme Court has recognized that the conduct of public employment non-criminal personnel investigations requires a level of confidentiality that must be accorded to employee witnesses which outweighs the public's right of access to such employee's identities, *Hempel v. City of Baraboo*, 2005 WI 120. In considering whether to release the investigative records of the PSIA files, I have carefully considered the facts and holding in the *Hempel* case. The *Hempel* case involved a request for the release of records relating to an internal investigation of alleged sexual harassment by a law enforcement

officer. Just as we are doing today, the records custodian in Hempel released the complaint with personal names of officers and other witnesses redacted, but did not release any of the other investigative materials/records. The Wisconsin Supreme Court explicitly agreed with this approach to processing of requests related to such non-criminal internal investigations.

The most compelling argument, however, to deny this information is found in the ruling by former Dane County Circuit Court Judge Mark Frankel, in a decision directly on release of records of the Madison Police Department. In *Wisconsin State Journal, et al. v. City of Madison Police Department, Case No 96-CV-1137*, Judge Frankel wrote (Memorandum Decision and Order dated February 3, 1998, pages 46-47):

“When dealing with unsubstantiated allegations and minor rule infractions of a personal nature, such information can be very damaging to the privacy and reputational concerns of the police officers as members of the public, yet is largely of de minimis value to the public as a whole. To the extent that release of this information is useful to the public, its primary utility stems from the fact that the public has an interest in the nature of the allegation of misconduct and the disposition of the incidents—whether proper attention was paid to the matter and whether an appropriate disposition ensued. Both lawyer and judicial disciplinary boards in Wisconsin routinely release to the public summaries of minor professional misconduct together with sanctions imposed while withholding the identities of the parties involved. Release of these summaries of professional misconduct is both a valuable educational tool and a means to assure the public of the integrity of the professional disciplinary process.

In the interest of striking the appropriate balance between the competing policy interests of the Department’s interests in an effective disciplinary system, the officers’ right to privacy and protection of reputation, versus the public’s right to know, I conclude that the Department has a duty under s 19.36, Wis.Stats., to redact information not subject to disclosure under the Open Records Law and to provide information which is” It continues by stating “However, based on Arreola and the public policy in favor of privacy as expressed in Woznicki and other case law, and the public interest in promoting the continued flow of this sensitive information, it is appropriate for the Department to redact the names and addresses of the officers and complainants involved, as well as any other information likely to reveal their identity”.

Some of the records requests are so broadly stated that their terms encompass exchanges between Madison Police Department employees and the legal staff of the Office of the City Attorney. These records reflect communications regarding the seeking of, and the provision of, legal advice. These records reflect the research, analysis, and recommendations of the City’s attorneys. Thus, these records are confidential work product of the Office of the City Attorney and are confidential communications under attorney client privilege. Therefore, access to these records is denied. These privileges exist to “encourage full and frank communication between attorneys and their clients and thereby promote broader public interest in the observation of law and administration of justice.” *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

Some of the records that have been requested contain sensitive criminal intelligence information and other records depict methodology used by law enforcement to successfully investigate criminal activity. Disclosure of this information and these techniques would undermine their effectiveness. I have therefore withheld this information from the requested records. In my decision not to release this information to you, I am also persuaded by the public policy reflected in Wis. Stats. § 19.85(1)(e), that permits public bodies to meet in closed session to consider strategies for crime prevention and/or crime detection. This statute reflects the public policy that dissemination of the details of such crime prevention/detection strategies would be clearly contrary to the public's interests. Therefore, access to these records or portions thereof is denied.

Lastly, I have removed the computed generated Transaction Information for the Management of Enforcement (TIME) printouts that were included in these documents. TIME system responses are protected by both state and federal laws that prohibit their disclosure by a user agency, such as, the City of Madison Police Department. Requestors seeking such information should contact the Wisconsin Department of Justice.

In closing you are advised that, pursuant to Wis. Stats. § 19.35 (4)(b), this determination not to disclose certain portions of these records is subject to review by Mandamus under Sec. 19.37 Wis. Stats., or upon application to the Wisconsin Attorney General or Dane County District Attorney. I have consulted with the City Attorney regarding the denial of access for a portion of this record per § 3.70(6) MGO.

Sincerely,

A handwritten signature in black ink, appearing to read "Lt. Anthony Bitterman". The signature is written in a cursive, somewhat stylized font.

Anthony Bitterman, Lieutenant of Police- Records Custodian
Cc Roger Allen, OCA