STATE OF WISCONSIN
IN THE SUPREME COURT

No. 2015AP001152

VOCES DE LA FRONTERA, INC. and
CHRISTINE NEUMANN-ORTIZ,

Petitioners-Respondents,

v.

DAVID A. CLARKE JR.,

Respondent-Petitioner-
Appellant-Petitioner.

BRIEF AND APPENDIX OF RESPONDENT-PETITIONER-APPELLANT-PETITIONER

ON APPEAL FROM THE JUDGMENT OF THE MILWAUKEE COUNTY CIRCUIT COURT THE HONORABLE DAVID L. BOROWSKI PRESIDING

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STATEMENT OF ISSUE FOR REVIEW

Whether Milwaukee County Circuit Court Judge David L. Borowski and the Wisconsin Court of Appeals, District I, erred in issuing a writ of mandamus ordering Milwaukee County Sheriff David A. Clarke Jr. and the Milwaukee County Sheriff's Office ("MCSO") to produce unredacted immigration detainer forms (I-247s) received from U.S. Immigration and Customs Enforcement ("ICE"), in response to an open records request made pursuant to the Wisconsin's Open Records Law, Wis. Stat. §§ 19.31-19.37.

On June 3, 2015, Circuit Court Judge David L. Borowski determined that the federal immigration documents were not protected from disclosure under Wisconsin's Open Records Law, the federal Freedom of Information Act ("FOIA"), or federal regulation 8 C.F.R. § 236.6, and ordered their production. Appendix A. In a decision dated April 12, 2016, the Wisconsin Court of Appeals, District I, affirmed the circuit court's decision. Appendix B.

STATEMENT OF ORAL ARGUMENT AND PUBLICATION

Respondent-Petitioner-Appellant-Petitioner believes that oral arguments are necessary in this matter to allow the parties the opportunity to fully argue and advance their respective positions.

The Court's opinion will meet the criteria for publication under Wis. Stat. § 809.23(1) in that the opinion of the Supreme Court will provide clarity on an important question of law with substantial and continuing public interest.

STATEMENT OF THE CASE

This case involves an open records request made by Voces de la Frontera, Inc., ("Voces") and its Executive Director Christine Neumann-Ortiz, for unredacted copies of federal immigration detainer forms (I-247s) that were in the possession of Milwaukee County Sheriff David A. Clarke Jr. and the Milwaukee County Sheriff's Office ("MCSO"). The immigration detainer forms being requested originated from U.S. Immigration and Customs Enforcement ("ICE"), a component and the investigative arm of the U.S. Department of Homeland Security ("DHS"). Each I-247[1] form relates to a specific individual in local law enforcement custody. In issuing the form, ICE requests the local agency notify ICE about the proposed release date for a specific individual and maintain custody of said individual for a period of time not to exceed 48 hours (excluding weekends and holidays) after he or she would be released from local custody so that the person can be subsequently taken into custody by ICE for immigration purposes.

Voces is a non-profit organization that seeks to advance the civil rights, electoral participation and economic conditions of Wisconsin's

[1] A sample I-247 form is attached as Appendix C.

Latino community. R.1:1[2]. Christine Neumann-Ortiz is its Executive Director and has held that position since 2005. R.19:6. The organization is involved in a broad immigration rights movement that seeks to decriminalize certain policies and to protect the rights of both legal and illegal immigrants. R.19:6. They advocate against the deportation of illegal immigrants based on the purported disruption it creates for families, the trauma it creates for children, and the fear it instills of law enforcement. R.19:6. To that end, the organization has pushed back against a policy that allows ICE to request that local law enforcement agencies detain undocumented immigrants in local law enforcement custody for a short period of time if ICE believes the individual to be undocumented and/or deportable. R.19:6-7.

On February 5, 2015, Voces and Neumann-Ortiz submitted a written records request to Milwaukee County Sheriff David A. Clarke Jr. requesting, *inter alia,* copies of all immigration detainer forms (Form I-247s) received by MCSO from ICE since November 20, 2014. R.1:2. The I-247 forms were issued by ICE for individuals in local law enforcement custody who ICE/DHS had reason to believe were illegal aliens subject to

[2] Citations containing a number after the colon refer to specific page(s) in the cited document.

removal from the United States. R.3:3-4. The I-247[3] forms requested that the local agency notify ICE about the proposed release date for the individual and then maintain custody of the individual. R.1:2; R.3:3-4; R. 19:7. The local law enforcement agency is permitted to hold the illegal alien in local law enforcement custody for up to an additional 48 hours (excluding weekends and holidays) after the individual can no longer be detained on state-related charges. R.3:9. As explained by Ms. Neumann-Ortiz, an individual subject to the ICE detention hold "could potentially be undocumented or deportable." R.19:7.

Captain Catherine Trimboli was designated by Sheriff Clarke as the records custodian for the MCSO and was involved in the production of the records requested. R.19:30-31. Some initial delays occurred in connection with the open records request based on MCSO's requirement that a prepayment be provided by Voces, covering the costs of the open records request, and the withdrawal of other records requests by Voces. R.1:2-3; R.18:5-6. The prepayment amount of $300 was received from Voces on March 11, 2015. R.1:3.

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[3] DHS no longer uses the Form I-247. It was replaced in May 2015 by the I-247N (Request for Voluntary Notification of Release of Suspected Priority Alien) and the I-247D (Immigration Detainer – Request for Voluntary Action). Samples of the revised forms are attached as Appendix G and H.

Based on the nature of the forms being requested, which contained both personally identifiable and law enforcement sensitive information, Cpt. Trimboli contacted ICE to gather additional information about the documents being requested. R.19:32. In response to her request, on March 31, 2015, DHS/ICE notified Cpt. Trimboli that the federal Privacy Act, 5 U.S.C. § 552a, and the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, required the redaction of specific items of sensitive personally identifiable information contained on the I-247 forms. R.3:12-13; R.4:5. Specifically, ICE requested that the following information be redacted from the forms: Subject ID, Event #, FBI number, File No. (A-number), date of birth, nationality, and information relating to immigration history/status. R.3:12-13.

After receiving this information, Cpt. Trimboli notified Voces on March 31, 2015, that the production could not take place until April 8, 2015. R.1:6. The short delay was necessary to allow her time to analyze ICE's request and to balance the interest of the public in disclosure against the interest of the governmental agency in withholding the requested information. R.4:4; R.19:54-55.

On April 1, 2015, before the requested documents could be produced, Voces filed an action in Milwaukee County Circuit Court seeking the issuance of a writ of mandamus compelling the production of the subject documents. R.1. The case was assigned to Milwaukee County Circuit Court Judge David L. Borowski, who, on April 1, 2015, issued an order to show cause why the writ should not be entered, and scheduled the matter for a hearing on April 2, 2015. R.2.

On April 2, 2015, the circuit court judge heard arguments from counsel and following an in-chambers conference, and as a form of compromise, counsel for Sheriff Clarke agreed to produce redacted I-247 forms in Sheriff Clarke's possession. R.18:27-29. The requested I-247 forms, with an initial set of redactions, were thus provided to Voces by Sheriff Clarke on April 2, 2015. R.7:3. The initial document production included the following limited redactions: Subject ID, Event #, File No. (A-number), FBI number, nationality, and information relating to immigration history/status. R.4:6; R.6:3-30; R.19:41-42.

After further consultation with DHS/ICE, the records custodian decided not to redact the nationalities of the subjects on the I-247 forms. R.4:7; R.19:42-43, 61-62. A revised production, which included the

nationalities of the detainees, was thereafter made by MCSO on April 7, 2015. R.7:3; R.15:2. Ultimately, the records custodian provided the requested I-247 forms to Voces with the following limited redactions: Subject ID, Event #, File No. (A-number), FBI number and information relating to immigration history/status.[4]

After the production of the redacted documents, the issue of whether the redactions were appropriately made was submitted to the circuit court on written briefs, and oral arguments were presented to the court on May 6, 2015. R.19. Testimony was presented at this May 6, 2015 hearing from Cpt. Trimboli, during which she provided justification for redacting the sensitive and personally identifiable information from the law enforcement records. R.19:31-38. She explained that she contacted ICE to seek information about the nature of the information being requested and guidance on how to proceed with the production of the requested information. R.19:32. After receiving guidance from ICE, she conducted a balancing test and only withheld the limited information identified by ICE

[4] The limited information actually redacted was less than what was suggested by ICE, as the federal agency also suggested redacting the dates of birth from the I-247 forms. R.3:12; R.19:62. However, the records custodian determined that this information should be provided as it is frequently included in public records available on the Wisconsin Court System Circuit Court Access Program (CCAP) and the Office of the Sheriff Inmate locator website. R.4:6-7; R.19:62.

as containing personally identifiable and/or law enforcement sensitive information. R.3:12; R.14:2-3; R.19:31-33, 40.

Evidence was also presented at the May 6, 2015 hearing as to how the personally identifiable information could be used for fraudulent purposes if the information landed in the wrong hands. R.19:76-77. This included individuals seeking to use someone else's personally identifiable information to obtain illegal entry into the United States, or also potentially committing identity theft or other forms of misrepresentation to obtain benefits. Id.

Notwithstanding this evidence, on June 3, 2015, Judge Borowski ordered Sheriff Clarke to produce the unredacted immigration forms by the end of the day on Friday June 5, 2015. R.20; Appendix A. The trial court stated as follows: "I'm ordering the Sheriff's Department, specifically Sheriff Clarke.... by Friday, to turn over the documents in an unredacted fashion." R.20:25.

On June 4, 2015, counsel for Sheriff Clarke made an emergency motion to the circuit court to stay the enforcement of the writ of mandamus pending an appeal to the Wisconsin Court of Appeals. R.21. In response to the motion, Judge Borowski issued an oral ruling on June 4, 2015, in which

he declined to grant Sheriff Clarke's motion to stay the enforcement of the writ of mandamus during the pendency of the appeal. R.21:11-12. However, upon stipulation of the parties, and in order to provide Sheriff Clarke the opportunity to file the appeal, Judge Borowski stayed the matter until June 12, 2015. R.21:12.

On June 10, 2015, Sheriff Clarke filed a Petition for Leave to Appeal the Circuit Court's Order with the Court of Appeals, along with an emergency motion for a stay of the trial court's order granting the writ of mandamus. R.10; R. 11. On June 11, 2015, the Court of Appeals ordered that the motion for a temporary stay be granted; that the written order reflecting the circuit court's oral ruling be entered within three days; and that Sheriff Clarke file a Notice of Appeal within five days. R.12. The circuit court thereafter entered a written order granting the writ of mandamus on June 15, 2015. R.13.

Sheriff Clarke filed a Notice of Appeal on June 17, 2015. R.16. The Court of Appeals stayed the enforcement of the writ of mandamus pending the appeal. On April 12, 2016, District I of the Wisconsin Court of Appeals, affirmed the trial court's decision and lifted the stay "forthwith"

thereby requiring Sheriff Clarke to produce the unredacted federal immigration documents. Appendix B.

That same day, on April 12, 2016, Voces took the position that the requested unredacted documents needed to be produced by 8:00 a.m. on April 14, 2016, which was approximately 48 hours after the issuance of the Court of Appeals' decision. Later that same day, Voces filed an updated open records request with MCSO, this time seeking all federal immigration-related hold documents that MCSO received from ICE from November 2014 to the present [April 12, 2016]. Appendix D.

On April 13, 2016, Sheriff Clarke moved, on an emergency basis, to again stay the enforcement of the writ of mandamus. Later that same day, the Court of Appeals issued an order granting the stay, "in order to preserve the status quo, we will stay the release of the documents for a period of time to allow the Sheriff to petition for review with the Supreme Court and move that court for relief pending resolution of the Petition." The enforcement of the circuit court's order was thus stayed until May 19, 2016. Appendix E.

Along with the Petition for Review filed with this Court on May 12, 2016, Sheriff Clarke also filed an emergency motion to stay the

enforcement of the writ of mandamus pending the resolution of the petition for Supreme Court review. On May 12, 2016, this Court granted the motion for an emergency stay pending review and stayed the enforcement of the circuit court's mandamus order until further order of this Court. Appendix F.

ARGUMENT

I. STANDARD OF REVIEW

This case involves the application of Wisconsin Open Records Law, Wis. Stat. §§ 19.35 and 19.36, to an undisputed set of facts. The application of a statute to a particular set of facts presents a pure question of law. *Oshkosh Northwestern Co. v. Oshkosh Library Bd.,* 125 Wis. 2d 480, 485, 373 N.W.2d 459, 462 (Ct. App.1985). This Court's review should therefore be pursuant to a *de novo* standard. *First Nat'l Leasing Corp. v. City of Madison,* 81 Wis. 2d 205, 208, 260 N.W.2d 251, 253 (1977); *see also Seifert v. School District of Sheboygan Falls*, 2007 WI App 20, ¶ 16, 305 Wis. 2d 582, 740 N.W.2d 177 (where a circuit court determines a petition for writ of mandamus by inteprepeting Wisconsin's Open Records Law and has applied that law to undisputed facts, the review is *de novo*);

ECO, Inc. v. City of Elkhorn, 2002 WI App 302, ¶ 15, 259 Wis. 2d 276, 655 N.W.2d 510 (same).

II. THE I-247 FORMS REQUESTED BY VOCES ARE NOT SUBJECT TO DISCLOSURE UNDER THE WISCONSIN OPEN RECORDS LAW.

A. Federal regulation specifically protects the disclosure of the requested federal immigration documents.

Voces seeks to circumvent federal law by requesting the I-247 forms from MCSO rather than directly from the federal government. However, even though the request was made to MCSO under Wisconsin law, because the documents originated from the federal government, it was appropriate to apply federal laws and regulations in determining whether the records should be produced. As will be discussed below, federal law, and in particular federal regulation 8 C.F.R. § 236.6 and exemptions under the Freedom of Information Act ("FOIA") protect the disclosure of the I-247 forms in MCSO's possession.

In determining whether a particular record should be disclosed under Wisconsin's Open Records Law, a two-step approach is used. First, the records custodian must determine whether the Open Records Law applies to the record. *Linzmeyer v. Forcey*, 2002 WI 84, ¶ 10, 254 Wis. 2d 306,

646 N.W.2d 811. If it does, the second step is determining whether there is a statutory or common law exception that would exempt the production of the specific record. *Id.*

There is no dispute that the immigration documents at issue are "records" under the law, so the only question presented to the Court is whether there is a statutory or common law exception that would protect or prohibit their disclosure.

While there is a strong presumption favoring the production of governmental records under Wisconsin law, the presumption is not absolute. The presumption gives way to statutory or specified common law exceptions, or where there is an overriding public interest in keeping the records confidential. *Kroeplin v. Wisconsin Dep't of Natural Res.,* 2006 WI App. 227, ¶ 13, 297 Wis. 2d 254, 267, 725 N.W.2d 186 (*citing Hathaway v. Joint School Dist.*, 116 Wis. 2d 388, 396-397, 342 N.W.2d 682 (1984). Several specific statutory exceptions to the Wisconsin Open Records Law are applicable here.

Wis. Stat. § 19.36(1) provides that "[a]ny record which is specifically exempted from disclosure by state or federal law or authorized to be exempted from disclosure by state law is exempt from disclosure

under s. 19.35 (1), except that any portion of that record which contains public information is open to public inspection as provided in sub. (6)." This means that if a record contains information that is both subject to disclosure and other information that is not subject to such disclosure, the authority having custody of the record shall provide the information that is subject to disclosure and delete (or redact) the information that is not subject to disclosure from the record before its release.

Additionally, Wis. Stat. § 19.36(2) provides that, whenever federal law or regulations require, all record relating to investigative information obtained for law enforcement purposes shall be exempt from public disclosure. In this regard, 8 C.F.R. § 236.6 expressly protects the confidentiality of information concerning immigration detainees in local law enforcement custody and supersedes any state law to the contrary. The regulation provides that information obtained by a local law enforcement agency concerning an immigration detainee remains in the control of the federal agency and is only subject to public disclosure pursuant to the provisions of applicable federal laws, regulations and executive orders. Specifically, 8 C.F.R. § 236.6 provides as follows:

> No person, including any state or local government entity or any privately operated detention facility, that houses,

> maintains, provides services to, or otherwise holds any detainee on behalf of the Service (whether by contract or otherwise), and no other person who by virtue of any official or contractual relationship with such person obtains information relating to any detainee, shall disclose or otherwise permit to be made public the name of, or other information relating to, such detainee. Such information shall be under the control of the Service and shall be subject to public disclosure only pursuant to the provisions of applicable federal laws, regulations and executive orders. Insofar as any documents or other records contain such information, such documents shall not be public records. This section applies to all persons and information identified or described in it, regardless of when such persons obtained such information, and applies to all requests for public disclosure of such information, including requests that are the subject of proceedings pending as of April 17, 2002.

8 C.F.R. § 236.6.

The circuit court and the Court of Appeals erred in its analysis of this federal regulation by failing to interpret the regulation to encompass and protect information about federal immigration detainees held on behalf of ICE, regardless of whether the detainee is in custody of the local law enforcement agency or the federal government. *See, Belbachir v. U.S.,* 2012 WL 5471938 (N.D. Ill. 2012) (Appendix I) (noting that the redaction of names and other information related to immigration detainees was proper under 8 C.F.R. § 236.6); *American Civil Liberties Union of New Jersey, Inc. v. County of Hudson,* 352 N.J. Super. 44, 86, 89-90, 799 A.2d 629

(2002) (holding that 8 C.F.R. § 236.6 controls the type of information a state can release to the public relating to immigration detainees in response to an open records request). The prohibition against state and local disclosure of federal records includes the information on the I-247 forms, as the regulation covers all information relating to the immigration detainees received by a local law enforcement agency. *Ricketts v. Palm Beach County Sheriff*, 985 So. 2d 591, 592 (Fla. Dist. Ct. App. 2008) (noting that requested federal immigration documents including I-247s were not disclosed based on 8 C.F.R. § 236.6).

The analysis of this federal regulation in *County of Hudson,* supra, is instructive. The case involved a civil liberties group that sued two counties, who held detainees for the Immigration and Naturalization Service (INS)[5] in their jails, to disclose copies of records and information pertaining to each person detained pursuant to New Jersey's Public Records Law. 352 N.J. Super. at 59-61. After the trial court initially ordered the production of the requested information, 8 C.F.R. § 236.6 was enacted – an emergency regulation promulgated by Attorney General John Ashcroft in direct

[5] INS ceased to exist under that name on March 1, 2003, when most of its functions were transferred to three new entities – U.S. Citizenship and Immigration Services (USCIS), U.S. Immigration and Customs Enforcement (ICE), and U.S. Customs and Border Protection (CBP) – within the newly created Department of Homeland Security, as part of a major government reorganization following the September 11, 2001 attacks.

response to the lower court's ruling in *County of Hudson.* The regulation superseded the court's ruling and required that counties holding immigration detainees for the federal government were prohibited from disclosing immigration detainee information, regardless of what state law provided.

On appeal in *County of Hudson*, it was argued that the newly promulgated federal regulation pre-empted state law and specifically prohibited the production of the requested information. In analyzing 8 C.F.R. § 236.6, the Superior Court of New Jersey first found the regulation was duly promulgated within the scope of authority delegated to the Commissioner by Congress. *Id.* at 86. It was noted the right to regulate matters relating to immigration and naturalization resided exclusively within the purview of the federal government, and that the State has no constitutionally recognized role in the area. *Id.* at 87-88. The court thus concluded that 8 C.F.R. § 236.6 preempted state law and controlled the type of information the counties could release concerning immigration detainees. *Id.* at 78, 89. The superior court found that the requested information relating to the immigration detainees was not subject to

production under 8 C.F.R. § 236.6 and reversed the trial court's decision that had ordered the production of the immigration information. *Id.* at 89.

The Court of Appeals sought to distinguish this case on the basis that the INS detainees in *Hudson* were purportedly in federal government custody. Appendix B, p. 19. That finding was factually flawed in that the immigration detainees in *Hudson* were committed to the Passaic County Jail and in county custody. *Id.* at 58-59. Indeed, the *Hudson* court noted that the inmates were housed in the county jail pursuant to an agreement in which the County "agree[d] to accept and provide for the secure custody, care and safekeeping" of the detainees. *Id.* at 58. The inmates were not in federal custody.

A decision not to produce information relating to immigration detainees was also upheld by the Connecticut Supreme Court in *Commissioner of Correction v. Freedom of Information Comm'n*, 307 Conn 53, 52 A.3d 636 (2012), where the Freedom of Information Commission sought the copy of a printout from the state of a database maintained by the Federal Bureau of Investigation (FBI) relating to a detainee in state custody on alleged immigration violations. The Connecticut State Department of Corrections refused to provide the requested information on the basis that

the production was barred by the operation of 8 C.F.R. § 236.6. After a lengthy series of appeals, the matter landed with the Connecticut Supreme Court, which specifically addressed the question of whether the regulation only protected the disclosure of federal information on detainees *currently* in custody, or whether it applied to both *current* and *former* detainees. The court noted the importance of uniform public policies concerning immigration detainees and the importance of preventing adverse impact on ongoing investigations and investigative methods. *Id.* at 70-71. Based on its reading of the regulation, Connecticut's highest court concluded that the regulation precluded the disclosure of information relating to immigration detainees, regardless of whether the detainee was currently detained, had been transferred to the custody of another governmental entity, or had been released altogether. *Id.* at 73-74.

The application and scope of 8 C.F.R. § 236.6 was also addressed by an Illinois district court in *Belbachir*, supra. The case involved a request to submit certain information concerning immigration detainees to the court under seal in connection with several court motions. 2012 WL 5471938, at 1-2. The district court noted that the names of the immigration detainees and other information was properly received by the court under seal

pursuant to 8 C.F.R. § 236.6. *Id.* at 3. In finding that the magistrate judge properly received the records under seal, the district court noted the privacy concerns that 8 C.F.R. § 236.6 sought to protect were significant. *Id.* The court affirmed the magistrate judge's decision to retain the documents under seal. *Id.*

By its express terms, 8 C.F.R. § 236.6 trumps any state open records laws, as the regulation pertaining to immigration and naturalization is within the exclusive jurisdiction of the federal government. As noted by the court in *Commissioner of Correction*, supra, 8 C.F.R. § 236.6 effects matters involving immigration and national security, which are matters that are exclusively within the purview of the federal government. 307 Conn at 80 (*citing Hudson,* 352 N.J. Super. at 76). 8 C.F.R. § 236.6 thus exempts from disclosure, pursuant to state law, federal immigration related documents and information on detainees maintained or received by local law enforcement agencies.

In its decision, the Court of Appeals erroneously concluded that 8 C.F.R. § 236.6 did not apply to these facts because the detainees were not technically in "federal custody," but rather remained in the custody of the MCSO. There are no prior judicial decisions limiting the scope of the

federal regulation to inmates in the physical custody of the federal government. Indeed, in both *Hudson* and *Commissioner of Corrections*, the immigration detainees were housed at a county or state detention facility and were not in the custody of the federal government. The Court of Appeals' interpretation cannot stand.

By its clear and unambiguous language, 8 C.F.R. § 236.6 applies to inmates being detained in state, local or private facilities *on behalf of* the federal government. (emphasis added). There is no language in 8 C.F.R. § 236.6 that requires the individual to be in federal custody; only that the individual be "house[d], maintain[ed]... or otherwise h[eld].... on behalf of the Service."

The case of *Ricketts,* supra is instructive. The case involved an individual who was held in the custody of a county sheriff following the filing of state charges pursuant to an immigration detainer I-247 form. It does not appear from the decision that the individual was ever in federal custody. The court noted that after being detained for 48 hours pursuant to an I-247 form, an I-203 form *may* be filed, at which time the individual is considered to be in federal custody. *Id.* at 592. The court noted that "*if* he had posted the $1,000 bond on the state charges, then he *would* have been

booked on the federal I-203." *Id.* However, because the sheriff refused to accept the $1,000 bond, Ricketts was never booked on the federal I-203 and therefore never in federal custody. The district court nevertheless noted that the sheriff withheld copies of the immigration documents under state law on the basis of 8 C.F.R. § 236.6. There was no requirement that the individual be in federal custody for the federal regulation to apply.

The Court of Appeals also cited with approval Voces' argument that the regulation did not apply because the inmates were not being held on behalf of the federal government "at the time of the open records request." Appendix B, p. 13. Without any support in the record, the Court of Appeals concluded that "the twelve detainees were still in custody on their state charges." *Id.* at p. 18. There is no factual support in the record for that finding.

Additionally, such a narrow reading of the regulation would mean that the only period of time that a local law enforcement agency could withhold the production of the immigration information would be during the 48 hour period in which the subject was being detained pursuant to the I-247. Such an interpretation is illogical and contrary to prior legal precedent. *See, e.g., Commissioner of Correction,* 307 Conn at 73 (holding

that nothing in the language of 8 C.F.R. § 236.6 differentiates between information about detainees who are currently detained, have been transferred to the custody of another governmental entity, or who have been released).

As a practical matter, it should not matter whether an immigration detainee is in federal custody or not. The critical point is that the individual is being detained at the request of the federal government for an immigration related purpose. The individual can no longer be held on state charges, but is continuing to be held for a 48 hour period because the federal government both authorized and requested that the individual be held on a federal immigration-related matter. At that point in time, the same rationale that supports the confidentiality of records relating to the immigration detainees in federal custody would apply with equal force to immigration detainees in local custody held on behalf of ICE.[6] Sheriff Clarke thus requests the protection of this Court to prevent the improper disclosure of information relating to these detainees.

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[6] If this Court believes that the status of the individual detainees is dispositive in this matter, Respondent-Petitioner-Appellant-Petitioner would respectfully request that this Petition be granted and the case remanded to the circuit court for a determination of whether the individual detainees identified on the I-247 forms were in the custody of the local law enforcement agency, in the custody of ICE, or no longer in custody, when the open records request was made.

B. The balancing test also supports non-disclosure of redacted information on I-247 forms.

Assuming *arguendo* that this Court finds that 8 C.F.R. § 236.6, as applied through the Wisconsin Open Records Law, does not protect the disclosure of the redacted immigration detainee information, the decision of the Court of Appeals must nevertheless be reversed. The Court of Appeals erred in finding that the MCSO records custodian failed to conduct an appropriate balancing test, and that the balancing test under Wisconsin's Open Records Law did not support the redactions on the I-247 forms.

Where neither a statute nor a common law creates a blanket exception to the production of requested records, the records custodian must decide whether the strong presumption favoring access and disclosure is overcome by some even stronger public policy favoring limited access or nondisclosure. *Linzmeyer,* 2002 WI 84 at ¶ 11 (*citing Woznicki v. Erickson,* 202 Wis. 2d 178, 192-93, 549 N.W.2d 699 (1996)). To determine whether the presumption of openness is overcome by another public policy concern, the balancing test articulated by the court in *Woznicki* and *Wisconsin Newspress, Inc. v. Sch. Dist. of Sheboygan Falls,* 199 Wis. 2d 768, 776, 546 N.W.2d 143 (1996) must be employed.

It is up to the records custodian – and ultimately the court – to balance the competing public interest in disclosure versus non-disclosure. *Milwaukee Journal Sentinel v. Wisconsin Dep't of Admin.,* 2009 WI 79, ¶ 56, 319 Wis. 2d 439, 476, 768 N.W.2d 700 (balancing a question of law for the court). "Accordingly the balancing test must be applied with respect to each individual record" and "on a case-by-case basis… to determine whether a particular record should be released." *Id.* (internal citations omitted).

There is a strong presumption under Wisconsin law to protect the confidentiality and privacy of law enforcement records that could hurt the public interest or the individual subject to the release. This is codified in the Wisconsin Open Records Law, and has specifically been recognized by the courts. For instance, in *Linzmeyer*, 2002 WI 84, at ¶¶ 30-31, this Court noted that there is a strong public interest in investigating and prosecuting criminal activity, and when the release of records would interfere with an ongoing prosecution or investigation, the general presumption of openness would likely be overcome. *Id.* at ¶ 30. There also exists a strong public interest in protecting an individual's privacy and reputation. *Id.* at ¶ 31. This public interest, the court noted, arises from the public effects of the

failure to honor the individual's privacy interests, and not the individual's concern about embarrassment. *Id.*; *see also Woznicki*, 202 Wis. 2d at 187; *Newspapers, Inc. v. Breier,* 89 Wis. 2d 417, 430, 279 N.W.2d 179 (1979).

The balancing test requires consideration of Wisconsin's presumption of privacy with respect to law enforcement records and personally identifiable information, as well as the FOIA factors found at 5 U.S.C. § 552(b)(6) and (b)(7). The I-247 immigration detainer form includes sensitive law enforcement information (Subject ID, Event #, FBI number and File No.), and confidential personally identifiable information (File No. and immigration enforcement history/status). FOIA mandates that law enforcement records or information compiled for law enforcement purposes are exempt from production (either in whole or in part) to the extent that the production of such law enforcement records or information:

> (A) could reasonably be expected to interfere with enforcement proceedings,
>
> (B) would deprive a person of a right to a fair trial or an impartial adjudication,
>
> (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy,
>
> (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which

> furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source,
>
> (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or
>
> (F) could reasonably be expected to endanger the life or physical safety of any individual.

5 U.S.C. § 552(b)(7).

The use of federal law to provide guidance to a records custodian employing the balancing test is consistent with Wisconsin law, which exempts from disclosure "[a]ny record which is specifically exempt from disclosure … by federal law," and any law enforcement records, whenever federal law or regulation require, "relating to investigative information obtained for law enforcement purposes." Wis. Stat. § 19.36(1) and (2). Moreover, this Court has held that the policies and exemptions of FOIA are among the specific factors that "provide a framework that records custodians can use to determine whether the presumption of openness in law enforcement records is overcome by another factor." *Linzmeyer*, 2002

WI 84, at ¶¶ 32-33. This Court touted these FOIA exemptions for law enforcement records as "concisely list[ing] the factors that support . . . public policies" that weigh against disclosure of police records. *Id. at* ¶ 32. Reliance on these federal FOIA exemptions is particularly appropriate here, as the documents at issue are federal immigration documents, which happen to be in the custody of a local law enforcement agency.

There are three specific FOIA exemptions set forth in 5 U.S.C. § 552(b)(7) that are particularly applicable to the federal I-247 detainer forms. As indicated above, Exemption (b)(7)(A) provides that records or information that could reasonably be expected to interfere with ongoing enforcement proceedings may not be subject to disclosure, in whole or in part; Exemption (b)(7)(C) exempts from disclosure records that could reasonably be expected to constitute an unwarranted invasion of personal privacy; and Exemption (b)(7)(E) protects records compiled for law enforcement purposes, the release of which would disclose techniques and/or procedures for law enforcement investigative purposes that are not commonly known.

Also to be considered is FOIA Exemption (b)(6) which allows the withholding of information about individuals located in personnel and

medical files and similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy. Records that apply to or contain information describing a particular individual, including investigative records, qualify under this exemption.

Consistent with these exceptions, ICE notified MCSO that when responding to a FOIA request for immigration detainer forms (I-247), the agency would redact certain sensitive and personally identifiable information. R.3:12; R.14:2-3. This request specifically included the subjects at issue in this litigation: Subject ID, Event ID #, File No. (A-number), FBI number and information regarding immigration enforcement history/status. R.14:2-3.

In order to fall within the scope of the 5 U.S.C. § 552(b)(7) exemptions, the information withheld must have been compiled for law enforcement purposes. The immigration detainer forms satisfy this threshold requirement. Pursuant to the Immigration and Nationality Act codified under Title 8 of the U.S. Code, the Secretary of Homeland Security is charged with the administration and enforcement of laws relating to the immigration and naturalization of aliens, subject to certain exceptions. *See* 8 U.S.C. § 1103. ICE is the largest investigative arm of

DHS, and is responsible for identifying and eliminating vulnerabilities within the nation's borders. ICE is tasked with preventing any activities that threaten national security and public safety by investigating the people, money, and materials that support illegal enterprises. To that end, ICE works with local law enforcement entities to apprehend individuals who may be subject to removal from the United States for a variety of reasons. As the records in question allow ICE to perform its statutorily mandated functions, the detainer forms are clearly law enforcement records.

FOIA Exemption (b)(7)(E) supports withholding internal identifying numbers on the immigration detainer forms (such as the Subject ID, Event #, FBI number and File No.). These numbers are used for internal tracking purposes by ICE. R.14:2. If this information was released, an individual who gains unauthorized access to an ICE system could illicitly modify data and circumvent law enforcement. Id. There is also significant risk of identity theft and fraud if such internal and sensitive personally identifiable information is shared; the public has an interest in reducing identity theft/fraud and protecting the national security, interests not served by allowing access to this information. *See e.g., Flores-Figueroa v. U.S.*, 556 U.S. 646, 129 S. Ct 1886, 173 L. Ed. 2d 85 (2009).

Additionally, the disclosure of this information serves no public benefit and would not assist the public in understanding how the agency is carrying out its statutory responsibilities. There is no compelling reason for Voces to have this information, as it is purely used for internal law enforcement record keeping purposes. The information should therefore be withheld from production under Wisconsin law, as supported by the rationale set forth under (b)(7)(E).

Exemption (b)(7)(A) also supports the non-disclosure of the redacted information. Concerns relating to the impact on enforcement proceedings from the disclosure of information concerning immigration detainees was aptly articulated by the court in *Hudson*, supra. The court noted that "disclosing information about INS detainees could harm the United States and the detainees by subjecting the detainees or their families to intimidation at the hands of terrorists; deterring the detainees from cooperating with the government and impairing their usefulness in ongoing investigations; revealing the direction and progress of the investigations by identifying where the government is focusing its efforts; allowing terrorist organizations to interfere with pending proceedings by creating false or

misleading evidence; and facilitating contact between detainees and members of terrorist organizations." 352 N.J. Super. at 59.

FOIA Exemptions (b)(6) and (b)(7)(C) exempt from disclosure certain information that, if released, would constitute an unwarranted invasion of personal privacy. The assertion of these exemptions requires a balancing of the public's right to disclosure against the individual's right to privacy. The disclosure of information relating to particular immigration detainees, including their File number (A-number) and immigration enforcement history/status, would be protected under subsections (b)(6) and (b)(7)(C). An Alien number is a unique number assigned by the federal government to an individual applying for an immigration benefit or who has a pending enforcement action. R.14:3. An A-number is by definition, "a means of identification of an actual individual because they are assigned to a single person and, once used, are not assigned to anyone else." *U.S. v. Crounsset,* 403 F. Supp. 2d 475, 482 (E.D. Va 2005); *see also* 18 U.S.C. § 1028(d)(7)(A) (including Alien number as "means of identification" for purposes of fraud crimes). An A-number is similar to a social security number in that "[a]n INS A-File identifies an individual by name, aliases, date of birth, and citizenship, and all records and documents related to the

alien are maintained in that file." *United States v. Blanco-Gallegos*, 188 F.3d 1072, 1075 n. 2 (9th Cir. 1999); *see also* R.14:3.

Federal courts have routinely interpreted (b)(7)(C) to hold that where a FOIA request for law enforcement records invokes the privacy interests of any third party mentioned in those records (including investigators, suspects, witnesses, and informants), the (b)(7)(C) Exemption applies unless there is an overriding public interest in disclosure. *See Barouch v. U.S. Dep't of Justice,* 962 F. Supp. 2d 30 (D.C. Cir. 2013) (*citing Schrecker v. DOJ,* 349 F.3d 657, 661 (D.C. Cir. 2003) and *Lewis v. DOJ,* 609 F. Supp. 2d 80, 84 (D.D.C. 2009)); *see also U.S. Dep't of Justice v. Reporters Committee for Freedom of Press,* et al., 489 U.S. 749, 109 S. Ct. 1468, 103 L. Ed. 2d 774 (1989). Indeed, as a general rule, third-party identifying information contained in [law enforcement] records is "categorically exempt' from disclosure." *Lazaridis v. U.S. Dep't of State,* 934 F. Supp. 2d 21, 38 (D.D.C. 2013); *see also*, *Stern v. FBI,* 737 F.2d 84, 91-92 (D.C. Cir. 1984) ("Exemption (b)(7)(C) takes particular note of the 'strong interest' of individuals, whether they be suspects, witnesses, or investigators, 'in not being associated unwarrantedly with alleged criminal activity.").

The information concerning the immigration and enforcement history of a detainee on an I-247 form includes sensitive and private information involving their criminal history, whether they have been convicted of illegal entry into the U.S., whether they have returned to the U.S. after being deported, whether they have committed immigration fraud, and whether they pose a significant risk to national security. R. 3:9. Third-party individuals have a recognized privacy interest in not being publicly associated with immigration related investigations and/or actions, including whether they pose a threat to national security.[7] The disclosure of this third-party information would constitute an unwarranted invasion of personal privacy and could subject the individuals to harassment and undue public attention. The individuals' privacy interest in the personally identifiable information contained on the immigration detainer form outweighs any minimal public interest in its disclosure.

---

[7] Indeed, as a matter of policy, DHS extends privacy protections to aliens and protects the disclosure of such information, because disclosure without authorization could result in substantial harm, embarrassment, inconvenience, or unfairness to an individual. *See* U.S. Department of Homeland Security, *Handbook for Safeguarding Sensitive Personally Identifiable Information*, (March 2012). *See* http://www.dhs.gov/xlibrary/assets/privacy/dhs-privacy-safeguardingsensitivepiihandbook-march2012.pdf (defining alien numbers as sensitive personally identifiable information) (last viewed July 11, 2016).

There is a strong public interest in keeping the redacted information protected from public view. There is no strong corollary public interest in these limited categories of information being disclosed to the public. Voces can engage in the advocacy it seeks to perform based on the information already provided and/or can contact the individuals who were subject to the immigration detention holds, if additional information is needed. As such, the balancing test under Wisconsin's Open Records law weighs in favor of nondisclosure and supports Sheriff Clarke's decision to redact the sensitive and confidential law enforcement information from the I-247 federal immigration forms.

CONCLUSION

The production of the redacted information at issue in this case fall squarely within the Wisconsin Open Records Law exception as set forth in federal regulation 8 C.F.R. § 236.6. It also warrants protection under the balancing test required by the Wisconsin Open Records Law and the FOIA, which the MCSO records custodian utilized to make certain limited redactions. The circuit court and Court of Appeals erred in ordering the full production of the federal immigration I-247 detainer forms. A reversal is fully warranted.

Dated this 14th day of July, 2016.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel for Respondent-Petitioner-Appellant-Petitioner hereby certifies that three copies of the Brief and Short Appendix of Respondent-Petition-Appellant-Petitioner will be sent via U.S. Mail on July 14, 2016 to:

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Subscribed and sworn to before me
this 14th day of July, 2016.

Notary Public, State of Wisconsin.
My Commission expires: 3/12/17

KAREN GUMM NOTARY PUBLIC STATE OF WISCONSIN

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19 for a brief produced with a proportional serif font: minimum printing resolution of 200 dots per inch, 13-point body text, 11-point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text.

The length of this brief is 7,218 words.

Dated this 14th day of July 2015.

Oyvind Wistrom

CERTIFICATE OF COMPLIANCE -

WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this Brief excluding the Appendix of Respondent-Petitioner-Appellant-Petitioner which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on July 15, 2016.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 14th day of July 2016.

Oyvind Wistrom

Subscribed and sworn to before me
this 14th day of July 2016.

Notary Public, State of Wisconsin.
My Commission expires: 3/10/17

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STATE OF WISCONSIN
IN THE SUPREME COURT

STATE EX REL VOCES DE LA FRONTERA, INC., and CHRISTINE NEUMANN ORTIZ,

Petitioners-Respondents,

v.

Appeal No. 2015AP001152
Mil. Co. Case No. 15-CV-2800

DAVID A. CLARKE, JR.,

Respondent-Petitioner-
Appellant-Petitioner.

ON APPEAL FROM THE JUDGMENT OF THE
MILWAUKEE COUNTY CIRCUIT COURT
THE HONORABLE DAVID L. BOROWSKI PRESIDING

BRIEF OF THE PETITIONERS-RESPONDENTS

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I. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

(1). Whether 8 C.F.R. §236.6 expressly prohibits the disclosure of information concerning prisoners in the custody of the Milwaukee County Sheriff who are the subjects of I-247 forms sent by ICE to the Sheriff since November 20, 2014?

The trial court did not have the opportunity to address this issue because it was raised for the first time in the Court of Appeals and was never raised at the trial court level[1].

The Court of Appeals answered NO, ruling that 8 C.F.R. §236.6 does not apply to the disclosure of information concerning prisoners in the custody of Sheriff Clarke who are the subjects of I-247 forms because those prisoners are not in the custody of the federal government.

(2). Whether the public policy enunciated in § 19.31, Wis. Stats., mandating "a presumption of complete public access" out weighs a public policy favoring categorical deference to "law enforcement sensitive" information?

The trial court answered YES.

The Court of Appeals answered YES

[1] Sheriff Clarke erroneously asserts in the Statement of the Issue for Review section of his brief that "On June 3, 2015, Circuit Court Judge David L. Borowski determined that the federal immigration documents were not protected from disclosure under . . . .federal regulation 8 C.F.R. § 236.6, and ordered their production." This statement is factually incorrect.

II. STATEMENT REGARDING ORAL ARGUMENT AND PUBLICATION

The Petitioners-Respondents disagree with Sheriff Clarke's assertion that oral argument is necessary in this matter. Sheriff Clarke took a different position in his brief before the Court of Appeals where he asserted that oral argument would NOT be necessary "as the case can be adequately developed and analyzed through written briefs." The Petitioners-Respondents agree with that earlier position because the issues presented by this appeal are simple and require a straightforward application of well-settled law. Therefore, under §809.22(2)(a)(1), Wis. Stats., the appeal should be submitted on briefs without oral argument.

The Petitioners-Respondents agrees that publication of the decision would be appropriate pursuant to §809.23(1)(a)(5), Wis. Stats.

III. STATEMENT OF THE CASE

Voces de la Frontera (hereafter "Voces") agrees with Sheriff Clarke's assertion that all the material facts in this case are entirely undisputed. On February 5, 2015, Voces submitted an open records request to Milwaukee County Sheriff David Clarke requesting, *inter alia,* copies of all Form I-247 immigration detainer forms received by the Sheriff from U.S. Immigration Customs and Enforcement ("ICE") since November 2014. (R. 1:2). As of April 1, 2015, Sheriff Clarke had failed to produce the requested I-247 forms in his possession,

so Voces de la Frontera filed a Writ of Mandamus in Milwaukee County Circuit Court.

The I-247 forms at issue state as follows:

> It is requested that you maintain custody of the subject for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays, beyond the time when the subject would have otherwise been released from your custody to allow DHS to take custody of the subject. *This request derives from federal regulation 8 C.F. R. § 287.7*.

(Appellant's Appendix, App. C-001)(emphasis added).

For purposes of this appeal, the relevant paragraphs of 8 C.F. R. § 287.7, state as follows:

> (d) *Temporary detention at Department request.* Upon a determination by the Department to issue a detainer for an alien not otherwise detained by a criminal justice agency, such agency shall maintain custody of the alien for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays in order to permit assumption of custody by the Department.
>
> (e) *Financial responsibility for detention.* No detainer issued as a result of a determination made under this chapter I shall incur any fiscal obligation on the part of the Department, until actual assumption of custody by the Department, except as provided in paragraph (d) of this section.

Federal appellate courts interpreting the scope of detainer requests issued pursuant to 8 C.F. R. § 287.7 have held that I-247 forms are mere requests to local law enforcement agencies to continue custody of a prisoner and such requests are not mandatory orders. *Galarza v. Szalczyk,* 745 F.3d 634, 640-645 (3rd Cir. 2014)(listing cases). The language of 8 C.F.R. § 287.7(e), makes clear that local law enforcement agencies that cooperate with I-247 detainer requests do not relinquish custody and the subject of the detainer requests continues in state custody "until actual assumption of custody by the Department." Accordingly, as

the Ninth Circuit has explained, "'the bare detainer letter alone does not sufficiently place an alien in INS custody to make habeas corpus available.'" *Campos v. I.N.S.*, 62 F.3d 311, 314 (9th Cir. 1995) (quoting *Garcia v. Taylor*, 40 F.3d 299, 303 (9th Cir. 1994) (superseded by statute on other grounds, as recognized in Campos)); *United States v. Female Juvenile, A.F.S.*, 377 F.3d 27, 35 (1st Cir. 2004) ("[A]n INS detainer is not, standing alone, an order of custody. Rather, it serves as a request that another law enforcement agency notify the [INS] before releasing an alien from detention so that the INS may arrange to assume custody over the alien."); *Zolicoffer v. United States Dep't of Justice*, 315 F.3d 538, 540 (5th Cir. 2003) (collecting cases, including *Campos*, and agreeing that absent an order of removal, "prisoners are not 'in custody' for purposes of 28 U.S.C. § 2241 simply because the INS has lodged a detainer against them").

In short, the detainer is only a notification that a removal decision will be made at some later date. *Campos*, 62 F.3d at 313-14. The bottom line is that receipt of an I-247 form by a local law enforcement agency does not convert a state prisoner into a federal detainee in the custody of ICE.

In response to Voces' open records request, on April 2, 2015, Sheriff Clarke provided redacted copies of twelve I-247 forms received by his office between November 20, 2014 and March 31, 2015. The twelve I-247 forms contained the following redactions: (1). Subject ID; (2). Event #; (3). File No.; (4). Nationality; and (5). a series of three different boxes out of 12 boxes

pertaining to immigration status. (R.6 at p. 3-30). On April 7, 2015, Sheriff Clarke agreed to un-redact the nationality information. (R.7 at p. 3).

During the evidentiary hearing on May 6, 2015, Catherine Trimboli was the sole witness who testified on behalf of Sheriff Clarke in her capacity as the Captain in charge of the open records division of the Milwaukee County Sheriffs Office. (R.19 at 30:19-22). In that position, Captain Trimboli had been delegated the responsibility of being the custodian of the records for the Sheriff and was the designated officer in charge of the records at issue in this case. (R. 19 at 30:23-25 and 31:1-5).

That testimony revealed that it is undisputed that the requested I-247 forms are records within the meaning of Wisconsin's open records statute. Captain Trimboli testified that the first thing she does when she receives an open records request is to determine whether the information sought constitutes a record, and in this case, she determined that the requested I-247 forms were, in fact, records in the possession of Sheriff Clarke. (R.19 at p. 51:8-14).

After she determined that the request was, in fact, for "records," in the possession of the Sheriff, Captain Trimboli testified that she next determined whether or not an applicable statutory exception to the disclosure of the record was listed in the open records statute. (R. 19 at 51:21-25, and 52:1-3). In this regard, Captain Trimboli testified as follows:

> Q. So you pulled out Section 19.36 and you look at those exceptions that are listed there to determine whether any apply to this?

A. Correct.

Q. And you did that in this case?

A. Correct.

Q. On March 31, 2015, correct?

A. Correct.

Q: And you determined that none of those statutory exceptions applied; isn't that right?

A. Correct.

(R.19 at 52:4-14).

Captain Trimboli then testified that the next step was to determine whether there is a common law exception that applies:

Q. So then the next step is to determine whether there is a common law exception that applies, correct?

A. Correct.

Q. And you did that as well, correct?

A. Yep.

Q. And you determined that none of the common law exceptions apply, isn't that right?

A. Correct.

(R. 19 at 52:15-22).

Captain Trimboli, then testified about her understanding of the balancing test under the statute:

Q. So you had to balance the interest in secrecy for the information versus the interest in public access, disclosure and transparency of that information, isn't that right?

A. Yea. We call it either disclosing and or non-disclosing the document, correct.

Q. You call it what?

A. Either disclosing a document or not disclosing a document. We don't call it secrecy.

Q. But if you don't disclose a document, it's secret, right?

A. In your opinion, yes.

Q. How about in the opinion of the millions of immigrant workers in the United States? Is it secret to them?

A. If they don't have it, I guess so.

Q. Okay. All right. So - - And it wasn't until after all of that was done that you call ICE and say, ICE, do you want to redact anything here?

A. No. It was all during the process. When I looked at the at the form and determined that there was not state law based on the statute, then we conduct a balancing test. If I look at a document and I see that there may be law enforcement sensitive or personally identifiable information on it, that is then the next step in determining if the information is releasable.

Q: How can you, a record custodian, conduct a balancing test when you don't know anything about the information that's being redacted?

A. I would ask somebody who knows what the information is.

Q. But how are you able to evaluate that information and the desire for secrecy of that that information or nondisclosure of that information versus public access to that information if you don't know anything about it?

A. If it's concurring with another law enforcement agency, we would take that - - another law enforcement agency telling us that something is a law enforcement sensitive identifier.

Q. So you just take their word for it? You don't scrutinize it to determine whether or not it has any merit? They say redact this, you redact it?

A. Yes. . . . .

(R. 19 at 52:23 – 54:15)

At no point during the proceedings at the trial court level did the Respondent-Appellant ever mention, much less argue that 8 C.F.R § 236.6

precluded disclosure of the requested I-247 forms. The first mention of 8 C.F.R § 236.6 by the Respondent-Appellant was in briefs filed with the Court of Appeals. However, the Court of Appeals nevertheless reached the issue of whether 8 C.F.R § 236.6 exempts the I-247 forms from disclosure under Wisconsin's open records law and found it did not because the mere receipt of an I-247 form does not convert a state or local prisoner into a federal prisoner. (Court of Appeals Decision at fn 3, Appellant's Appendix, App. B-008). As demonstrated below, the Court of Appeals is correct in its ruling because 8 C.F.R. § 236.6, by its terms, only applies to a state or local government entity that "holds any detainee *on behalf* of the Service." (emphasis added).

IV. ARGUMENT

A. 8. C.F.R. § 636.6 does not exempt I-247 forms from disclosure under Wisconsin's Open Records Law

It bears keeping in mind both the letter and the spirit of the public policy on which §19.35(1), Wis. Stats. is grounded when construing the scope of the limitations on public access to public records:

> **§19.31 Declaration of policy.**
>
> In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be 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. Further, providing persons with such information is declared to be an essential function of a representative government and an integral part of the routine duties of officers and employees whose responsibility it is to provide such

> information. To that end, ss. 19.32 to 19.37 shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business. The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied. (Emphasis added).

Proper judicial respect for the Legislature's strongly worded declaration of policy mandates that the provisions of §§19.36(1) and (2), Wis. Stats., must be "***construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business.***" §19.31, Wis. Stats. This means the following language of §§19.36(1) and (2), Wis. Stats., must be construed as narrowly as possible:

> **§19.36 Limitations upon access and withholding.**
>
> (1) Application of other laws. Any record which is ***specifically exempted*** from disclosure by state or federal law or authorized to be exempted from disclosure by state law is exempt from disclosure under s. 19.35 (1), except that any portion of that record which contains public information is open to public inspection as provided in sub. (6).
>
> (2) Law enforcement records. Except as otherwise provided by law, ***whenever federal law or regulations require*** or as a condition to receipt of aids by this state require that any record relating to ***investigative information obtained for law enforcement purposes be withheld from public access, then that information is exempt from disclosure*** under s. 19.35 (1). (emphasis added)

Consistent with the governing public policy, only those federal laws that ***"specifically exempt"*** or ***"require***" the redacted information to be ***"withheld from public access"*** are passed-through by §§19.36(1) and (2), Wis. Stats., as exceptions to the open record mandate. Sheriff Clarke argues for the first time on appeal that his redactions are mandated by 8 C.F.R. § 236.6. However, by its explicit terms, 8 C.F.R. § 236.6 does not apply to information about prisoners who are not in the custody of the United States:

> No person, including any state or local government entity or any privately operated detention facility, *that houses, maintains, provides services to, or otherwise holds any detainee on behalf of the Service* (whether by contract or otherwise), and no other person who by virtue of any official or contractual relationship with such person obtains information relating to any detainee, *shall disclose or otherwise permit to be made public the name of, or other information relating to, such detainee. Such information shall be under the control of the Service* and shall be subject to public disclosure only pursuant to the provisions of applicable federal laws, regulations and executive orders. Insofar as any documents or other records contain such information, such documents shall not be public records.

It bears notice that 8 C.F.R. §236.6 prohibits *anyone* from making public "the name of, or other information relating to" any detainee held on behalf of ICE. In other words, 8 C.F.R. governs the secrecy of information about the identity of federal immigration detainees housed in state, local or private facilities. The regulation does not apply to specific forms or categories of documents, rather it applies to information relating to the identity of federal immigration detainees and it specifically enumerates "the name of" as the primary category of information that *shall not be disclosed.*

The promulgation history of 8 C.F.R. §236.6 is dispositive of any doubt about the regulation's inapplicability to state or local prisoners subject to I-247 requests. In the immediate aftermath of the horrible attacks of September 11, 2001, the federal government took a large number of suspected terrorists into custody, some of whom were determined to be in violation of federal immigration law and were housed by the INS in two county jails in New Jersey pursuant to written contracts. *American Civil Liberties Union of New Jersey, Inc. v. County of Hudson,* 799 A.2d 629, 636-37 (NJ App 2002). The ACLU of New Jersey filed an

action under the New Jersey open records law in order to obtain the names of the INS detainees so that it could determine whether those detainees lacked legal representation. *See* Grant Martinez, Note, *Indefinite Detention of Immigrant Information: Federal and State Overreaching in the Interpretation of 8 C.F.R. § 236.6*, 120 Yale L. J. 667, 670 (2010). Notwithstanding the absence of an applicable federal statute or regulation, the INS had directed the Sheriff of Passaic County and the Director of the Hudson County Correctional Center not to release the information sought by the ACLU. *County of Hudson*, at 637-38. Nevertheless, the trial court entered judgment for the ACLU holding that New Jersey's open records statutes unambiguously required release of information regarding the identity of INS detainees housed at the two county jails. *Id.*, at 638-39. Five days after the entry of judgment, and direct response to the judgment, the INS promulgated 8 C.F.R. §236.6 as an interim rule, and the United States intervened at the court of appeals level and successfully sought to enforce the interim rule as a means of precluding the disclosure. *Id.* at 638, 645, 652-53.

On April 22, 2002, the INS published the interim rule and entitled it as follows: "Release of Information Regarding Immigration and Naturalization Service Detainees in Non-Federal Facilities." 67 Fed. Reg. 77, pages 19508-19511. The supplementary information published in connection with the promulgation of the interim rule explained:

> This interim rule governs the release of the identity or other information relating to Service detainees by non-federal institutions. An alien may be detained pursuant to an administrative order of arrest in connection with removal

proceedings. Section 236(a) of the Immigration and Nationality Act (Act), 8 U.S.C. 1226(a), authorizes the Attorney General to detain aliens pending a determination of whether the alien should be removed from the United States. See 8 CFR 287.7. Section 241 of the Act, 8 U.S.C. 12 31, authorizes the Attorney General to detain aliens ordered removed. The Service may detain such aliens in a Federal detention facility, or may arrange for the alien to be housed by a state or local government entity or by a privately operated detention facility ("non-Federal providers") under contract with the Service or otherwise. However, even under such an arrangement, the detainee remains in the custody of, and subject to the authority and management of, the Service. Information relating to such detainees also remains subject to the authority and management of the Service.

This rule clarifies that non-Federal providers shall not release information relating to those detainees, and that requests for public disclosure of information relating to Service detainees, including Service detainees temporarily being held by non-Federal providers on behalf of the Service, will be directed to the Service. The rule bars release of such information by non-Federal providers in order to preserve a uniform policy on the release of such information. Accordingly, any disclosure of such records will be made by the Service and will be governed by the provisions of applicable Federal law, regulations, and Executive Orders. This rule does not address or alter in any way the Service's policies regarding its release of information concerning detainees; these policies remain unchanged.

. . . .

This rule, governing the release of information concerning the identity or other information relating to Service detainees housed in non-Federal facilities, is both necessary and proper to carrying out the Attorney General's detention authority under sections 236 and 241 of the Act, 8 U.S.C. 1226 and 1231; to "control, direct[], and supervis[e]" all of the "files and records" of the Service under section 103(a)(2) of the Act, 8 U.S.C. 1103(a)(2); and to arrange by contract with state and local governments " for necessary clothing, medical care, necessary guard hire, and the housing, care, and security of persons detained by the Service pursuant to Federal law," 8 U.S.C. 1103(a)(9)(A)), as well as his authority under 18 U.S.C. 4002, 4013(a)(4).

. . . .

The rule also reflects the nature and origin of the information concerning the immigration detainees. When a non-Federal provider assumes responsibility for housing a detainee, it does so as an agent of the Federal government. The only reason that the non-Federal provider knows the detainees' names or other related information about them is because the Federal government has made such information available pursuant to that agency relationship. The non-Federal provider, as agent, should not release the principal's potentially sensitive information without its consent, particularly where doing so may be inconsistent with the principal's interests. Instead, the Service as principal should determine whether and under what circumstances such information should be released consistent with federal law.

Id. (emphasis added).

On January 29, 2003, the final rule, 8 C.F.R. §236.6, was published in the Federal Register, with the same title. 68 Fed. Reg. 19, pages 4364-4367. The supplementary information confirmed that 8 C.F.R. §236.6 was promulgated to apply to federal immigration detainees who were being held by the federal government at state and local facilities pursuant contracts for housing those detainees:

> the Attorney General has explicit statutory authority to detain aliens in connection with removal proceedings, 8 U.S.C. 1226(a), 123 1, and to enter into agreements with State and local governments for the housing of aliens detained under provisions of the immigration laws. 8 U.S.C. 1103(a)(9)(A). The Attorney General has delegated substantial immigration responsibilities to the Commissioner of the INS. See 8 U.S.C. 1103(c); 8 CFR 2.1.
>
> These provisions plainly authorize the Attorney General or the Commissioner to set the terms of alien detention contracts and to provide by regulation that persons housing INS detainees on behalf of the federal government shall not publicly disclose the names and other information regarding those detainees, particularly where such disclosure would threaten harm to vital national interests.

Id. (emphasis added)

Thus, the precipitants for the promulgation of 8 C.F.R. §236.6 were the INS detainees housed in local county facilities in New Jersey. Sheriff Clarke misses the point when he insists at page 20 of his brief that the INS detainees in *Hudson* were in the "custody" of the counties and not the federal government. The point of these cases and the federal regulation is that the counties in *Hudson* housed the INS detainees on behalf of the federal government. They were not similarly situated to the Milwaukee County prisoners who were the subjects of the twelve I-247 forms at issue in this case. The Milwaukee County prisoners were not federal detainees, rather they were local prisoners who *might* in the future become federal

immigration detainees, . . . maybe. The INS detainees were federal prisoners who were housed in local county facilities pursuant to a contract for services. This distinction is explicitly addressed in the supplementary information provided by the U.S. Attorney General during the promulgation of 8 C.F.R. §236.6. There is simply no room for rational debate here. The *Hudson* case and the history of the promulgation of 8 C.F.R. §236.6 does not help Sheriff Clarke, rather, it dooms his appeal.

The other cases cited by the Respondent-Appellant are entirely consistent and support the argument that 8 C.F.R. §236.6 *only* applies to the confidentiality of all information about detainees who are in the custody of the Department of Homeland Security. In *Belbachir v. United States,* 2012 WL 5471938 (N.D. Ill. 2012) (an unreported case) a federal judge upheld the confidentiality of certain information about immigration detainees who were in the actual custody of the United States pursuant to 8 C.F.R. §236.6. Nothing in *Belbachir* even implies that information about a state prisoner who might become an immigration detainee of the federal government in the future is governed by 8 C.F.R. §236.6. The unreported *Belbachir* case simply does not stand for the proposition advanced by Sheriff Clarke.

Another case cited by Sheriff Clarke, *Ricketts v. Palm Beach County Sheriff,* 985 So.2d 591 (Fla. Dist. Ct. App. 2008), involved a petition for a writ of *habeas corpus* by an individual who had been in the custody of the county sheriff for state criminal charges. The *habeas* petitioner claimed a Fourth Amendment

violation based on his continued detention on the basis of the receipt of an I-247 form sent by ICE to the local sheriff, which was then followed up by an I-203 form. *Id.* at 592. The *Ricketts* Court noted that "[t]he jail receives monetary consideration pursuant to a contract with the federal government for holding federal prisoners, which consideration begins to run after the detainee is booked pursuant to the form I-203." *Id.* The *Ricketts* Court held: "we agree with the trial court that the appellant cannot secure habeas corpus relief from the state court on the legality of his federal detainer. The constitutionality of his detention pursuant to both the I-247 and I-203 federal forms is a question of law for the federal courts." Absolutely nothing in the *Ricketts* decision implies that 8 C.F.R. §236.6 applies to persons over whom the federal government has not taken custody.

Similarly, the final case relied upon by Sheriff Clarke also involved the confidentiality of information about a federal prisoner who had been arrested by ICE and was housed in a Connecticut state correctional facility pursuant to an "intergovernmental service agreement" between ICE and the state correctional center. *Commissioner of Correction v. Freedom of Information Commission,* 307 Conn 53, 57, 52 A.3d 636 (2012). After his release, the ICE detainee sought records regarding his detention from the state correctional center pursuant to the state open records law. *Id.* Since he had been a person in the custody of ICE, 8 C.F.R. §236.6 was held to preempt the state open records law and precluded the disclosure of the information sought. The Connecticut Supreme Court noted that the notices in the Federal Register explaining 8 C.F.R. §236.6 referred to INS

detainees being held in non-federal facilities and that the regulation was intended to ensure that the disclosure of information about INS detainees, wherever housed, would be subject to a uniform federal policy. *Id.*, at 70. Nothing in the decision implies that 8 C.F.R. §236.6 applies to information about state or county prisoners over whom ICE might take custody in the future.

The distinction regarding whether a person is in the custody of the Sheriff or of ICE is critical to the question of whether §19.36(1) and (2), Wis. Stats., applies to this case. If the federal regulation, 8 C.F.R.. § 236.6, applies to prisoners held by local law enforcement agencies who are NOT in the custody of ICE or DHS, then §19.36(1) and (2), Wis. Stats., might apply as an exception to Wisconsin's open records statute. However, 8 C.F.R.. § 236.6 does not apply to information on the I-247 forms unless the information relates to a person who is in the custody of ICE who is housed in a state or local facility. Nothing in the record implies that the twelve prisoners who were the subjects of I-247 forms were being held by Sheriff Clarke on behalf of ICE. In other words, they were not federal prisoners being housed at the Milwaukee County jail. Therefore, §§ 19.36(1) and (2), Wis. Stats., do not apply as exceptions to Wisconsin's open records statute because that federal regulation does not "specifically exempt" or "require" the redacted information on the I-247 forms to be "withheld from public access." Federal regulation 8 C.F.R. § 236.6 simply does not apply to this case.

The entire ICE I-247 detainer program is voluntary and many jurisdictions have declined to participate. As the record below demonstrates the Milwaukee

County Board passed a resolution signed by the County Executive urging the Sheriff not to participate in the program. (R. 6, Exhibits 5 and 6; *see also* R.9).

Furthermore, Sheriff Clarke's conduct in redacting some information but voluntarily disclosing other information, including the names and other identifying information about the 12 local prisoners who were the subjects of the I-247 forms, is at war with his resort to 8 C.F.R. § 236.6 as a belated defense. However, the plain language of 8 C.F.R.. § 236.6 requires that the name of the detainee not be disclosed. Before voluntarily disclosing the redacted I-247 forms, Sheriff Clarke never claimed that the names of the detainees were subject to the required confidentiality pursuant to 8 C.F.R.. § 236.6. Thus Sheriff Clarke cannot reconcile his belated use of 8 C.F.R. § 236.6 as a defense at the appellate level with his pre-appeals conduct as a record custodian who voluntarily disclosed the name of and much other identifying information. This inconsistency betrays the belated resort to 8 C.F.R. § 236.6 as a last ditch effort to grasp at straws after having lost at the trial court level. The bottom line is that 8 C.F.R. § 236.6 does not apply to this case.

B. The Wisconsin open records balancing test does not support non-disclosure of the redacted information on the I-247 forms because Sheriff Clarke has failed to even articulate a counter-vailing public policy served by making that information secret.

In this case, Sheriff Clarke's official records custodian, Captain Trimboli, first determined that the requested information was a "record" within the meaning of the statute, and no statutory or common law exceptions apply. (R. 19 at 51:8 to

52:22). And in his brief to this Court, at page 12, Sheriff Clarke agrees that "[t]here is no dispute that the immigration documents at issue are 'records' under the [open records] law." Therefore, "[i]n the absence of a statutory or common law exception, the presumption favoring release can only be overcome when there is a public policy interest in keeping the records confidential." *Linzmeyer v. Forcey,* 2002 WI 84, ¶11, 254 Wis.2d 306, 316 (2002). The Wisconsin legislature has articulated a particularly strong presumption in favor of disclosure and has mandated that "[t]o that end, §§ 19.32 to 19.37, Wis. Stats., shall be construed in every instance with a presumption of complete public access," and "[t]he denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied." § 19.31, Wis. Stats. "This presumption reflects the basic principle that the people must be informed about the workings of their government and that openness in government is essential to maintain the strength of our democratic society." *Linzmeyer,* at ¶15, 254 Wis.2d at 318.

It is the duty of the records custodian to specify the reasons for not disclosing a record and it is the Court's role to decide whether the reasons that are asserted are sufficient. *Fox v. Bock,* 149 Wis.2d 403, 416 (1989)("If the custodian decides not to allow inspection, he must state specific public policy reasons for the refusal. These reasons provide a basis for review in the event of court action. The custodian must satisfy the court that the public policy presumption in favor of disclosure is outweighed by even more important public policy considerations."). Finally, it is the burden of the party seeking nondisclosure to show that the "public

interests favoring secrecy outweigh those favoring disclosure." *Id.,* at 416.

Here, the records custodian testified bluntly that the routine practice of the Milwaukee County Sheriff's office is to subordinate the balancing test, without scrutiny, to any assertion by any law enforcement agency that the requested information is "law enforcement sensitive." (R. 19 at 52:23 – 54:15). That constituted the actual factual basis for not disclosing the requested information at issue in this case. Captain Trimboli testified bluntly in this regard:

> Q. So you just take their word for it? You don't scrutinize it to determine whether or not it has any merit? They say redact this, you redact it?
>
> A. Yes. We work with other law enforcement agencies and if they tell me one of their numbers that I don't know what it is, is law enforcement sensitive, yes, I believe them.

(R. 19 at 54:12 to 18).

In other words, the record establishes that Sheriff Clarke, in effect, has fabricated a presumption that is *per se* dispositive of the balancing test: any assertion that information contained in a record in the possession of the Sheriff that is deemed "law enforcement sensitive" will automatically outweigh the statutory presumption of openness. No knowledge about the nature, purpose, or character of the information is necessary. In Sheriff Clarke's office there is no balancing, rather there is carte blanche deference:

> Q. And what does law enforcement sensitive numbers mean?
>
> A. That it's sensitive to the law enforcement agency and, therefore, it's privy to their - - whatever it may be; an investigation or what have you.
>
> Q. Why is it sensitive?
>
> A. I couldn't tell you that. ICE is the one who considered it law

enforcement sensitive.

Q. So you do not have any basis that you can assert for why this information is law enforcement sensitive, right?

A. Based on the requests from another law enforcement agency, that's the reason why we believe it to be law enforcement sensitive.

Q. But you don't know anything about their thinking about it?

A. No.

(R. 19 at 40:13 to 41:3)

Q. You just took whatever they said and redacted? You just took whatever they said and redacted whatever they wanted?

A. We took what another law enforcement agency said as a request and, yes, we redacted it based on their request.

(R. 19 at 42:8-13).

Thus, the record establishes that Sheriff Clarke has unilaterally abrogated the open records balance test in favor of a process of his own design; one in which the interests of law enforcement *per se* outweigh the statutory public policy of openness.

Now, at the appellate level, Sheriff Clarke is making a slightly more nuanced, but not more persuasive argument. It is argued that four specific exemptions to the federal Freedom of Information Act, 5 U.S.C §§ 552(b)(6), (b)(7)(A), (b)(7)(C), and (b)(7)(E) allow withholding of the type of information redacted on the twelve I-247 forms. See Brief of Respondent-Appellant, at pp. 25 to 33. However, Sheriff Clarke fails to apply *any* facts from the record to the factors listed in the noted FOIA exemptions. Instead, at page 28 of his brief, Sheriff Clarke states that ICE has notified his office that when responding to a

FOIA request for I-247 forms, ICE redacts certain "sensitive and personally identifiable information" including "Subject ID, Event ID, File number or A-number, and information regarding immigration enforcement history/status." In support of this assertion, Sheriff Clarke cites to the record at R. 3:12. However, a review of the referenced citation reveals that it is an e-mail to Captain Trimboli dated March 31, 2015, from an ICE employee named Brandon Bielke who wrote:

> "Per the Privacy Act (Title 5 USC § 552a) sensitive personally identifiable information includes the following specific to the I-247: A Number (File No.), FBI Number, Date of Birth, Immigration Status, and Citizenship/Nationality. The Subject ID and Event # are law enforcement sensitive identifiers specific to administrative immigration proceedings."

(R. 3:12).

There is no testimony from any ICE representative anywhere in the record regarding whether the requested information is *per se* to be redacted. Brandon Bielke did not testify and his e-mail only characterizes certain information as "sensitive" under the Privacy Act. But by its explicit terms, the Privacy Act, (5 USC § 552a), protects against the disclosure of "records" containing personal information about an "individual." *See* 5 USC § 552a(b). For purposes of statutory coverage, "record" is defined as:

> "any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;"

5 USC § 552a(a)(4)

And the term "individual" is defined as "a citizen of the United States or an alien

lawfully admitted for permanent residence." 5 USC § 552a(a)(2). Accordingly, by definition, the provisions of the Privacy Act cited by Brandon Bielke exclude privacy protection for the subjects of I-247 detainer forms because those persons are neither citizens of the United States, nor are they aliens lawfully admitted for permanent residence.

Significantly, there is no evidence anywhere in the record that ICE invoked 8 C.F.R. §236.6 as being applicable, or of any of the subjects of the I-247 forms as being actually subjected to federal custody. There is only a citation to an e-mail by an out of court declarant that does *not* actually say that the requested information would be redacted by ICE if a FOIA request would have been made to ICE for the requested information. That a given federal agency might in a given hypothetical situation redact certain law enforcement or personally identifiable information in response to a FOIA request is of no value in evaluating whether a significant public policy would be harmed by the release of the information such that the public policy in favor of openness would be outweighed.

Sheriff Clarke goes on to argue at page 29 of his brief that FOIA exemption (b)(7)(E) supports redaction of records compiled for law enforcement purposes because "[i]f this information was released, an individual who gains unauthorized access to the ICE system could illicitly modify data and circumvent law enforcement." The Sheriff goes on to argue that "[t]here is also significant risk of identity theft and fraud is such internal and sensitive personally identifiable information is shared; the public has an interest in reducing identity theft/fraud and

protecting national security, interests not served by allowing access to this information." There is absolutely no evidence in the record to support the assertion that release of the requested information might increase the risk of identity theft or fraud in some tangible way. During her testimony Captain Trimboli demonstrated the utter lack of evidence about fraud concerns:

> Q: And you said that the A number is the equivalent of a Social security number?
>
> A: That's my understanding.
>
> Q: okay. And you said that - - And one of your concerns was that a Social security number can be used to open a bank account; I think you said get a credit card?
>
> A: Basically fraud. Commit fraud on somebody.
>
> Q: Comit fraud. With an A number can you get a Social Security - - I think - - Let me rephrase the question. With an A number, can you get a credit card?
>
> A: I have no idea what the A number is used for. I don't know enough about the federal government from the A number.
>
> Q: So you have absolutely no knowledge whatsoever about the extent to which an A number - - an A number can be used to commit fraud; isn't that right?
>
> A: Correct.
>
> Q: And you don't know to what extent law enforcement activity would be impaired by making public the A number; isn't that true?
>
> A: Correct.

(R-19 at 39:7 to 40:12)

Furthermore, the trial court made a specific finding of fact in this regard which has not been challenged by Sheriff Clarke on this appeal and which is due deference by this Court:

> One of the things we discussed at great length was the "a" number or what was referred to as an "a" number. The Sheriff's Department and the county has argued that the "a" number could be or is similar to a Social Security number, that it provides identifying information to one singular particular person. To the degree that the "a" number may be unique and unique identifying information, which it potentially is, I do not think that the comparison to a Social Security number is completely valid given that obviously the Social Security number is a person's entrée into many legal activities in the United States, from getting a driver's license, to getting a passport or visa, getting on an air plane, doing all kinds of legal activities.
>
> The "a" number were it to be provided in un-redacted form, as part of the records being held by the Sheriff's Department, is not of a similar nature, in my view other than it is a unique number, apparently, to that one person, but its closer to, and this is not an exact analogy, but its closer to a number that you would receive if you were arrested by the Sheriff's department for a battery and taken into custody or if you were in the Wisconsin State Prison system, for example, prisoners in the Wisconsin State Prison system have a unique number that identifies them and follows them through their time in and out of the prison system, but it's not to the degree that the Social Security number was used as an example as a similar number.
>
> It's not something that as the Sheriff's department argued would really be valuable or would be something that someone would be likely to steal, because I really can't envision what exactly someone would do with the so-called "a" number that would harm other citizens, that would lead to, as was argued, identity theft or identity fraud or taking someone else's identity or place in society. I really don't think that's a persuasive argument such as it goes.

(R-20, at 17:21 to 19:7)

Nevertheless, Sheriff Clarke insists such a policy concern about fraud is relevant, citing *Flores-Figueroa v. U.S.,* 555 U.S. 646 (2009). However, even a cursory review of that case lends no support to the argument. *Flores-Figueroa* is a case construing the scienter element of the federal statute, 18 U.S.C. § 1028A, making identity theft a crime. Nothing in the decision even implies that release of the redacted information in this case might contribute to the risk of identity theft or fraud.

Next, at pages 30 to 31 of his brief, Sheriff Clarke argues that FOIA

exemption 5 U.S.C. § 552(b)(7)(A) supports redaction of records on the basis of national security interests related to terrorism, similar to the concerns in evidence in the *Hudson* case. The factual record is entirely devoid of any evidence supporting such an assertion. Perhaps in a manner analogous to the way a bull fighter dangles a red cape in front of a bull in the hopes of getting the bull to charge in a certain direction, Sheriff Clarke dangles rhetoric about ominous terrorism related concerns in front of this Court, even going so far as to assert that disclosing the redacted information might harm the United States by "allowing terrorist organizations to interfere with pending proceedings by creating false or misleading evidence and facilitating contact between detainees and members of terrorist organizations." Sheriff Clarke's brief at 30-31, quoting *Hudson.* It would be an understatement to say that Voces de la Frontera, and its members, find this argument offensive, especially in today's political climate.

Sheriff Clarke continues his parade of horribles, at pages 32 and 33 of his brief suggesting that because federal courts have in the past construed 5 U.S.C. § 552(b)(7)(C) to preclude release of law enforcement records "unless there is an overriding public interest in disclosure," and citing *Lazaridis v. U.S. Department of State*, 934 F.Supp.2d 21, 38 (D.D.C. 2013), that "third party identifying information contained in [law enforcement] records is 'categorically exempt' from

disclosure."[2] Again, without reference to any facts in the record (because no such facts exist) Sheriff Clarke seems to argue that Wisconsin courts should, by judicial fiat, abrogate the balancing test in favor of a similar "categorical exemption." However, such an argument is precluded by *Portage Daily Register v. Columbia County Sheriff's Department,* 2008 WI App 30, ¶ 17-20, 308 Wis.2d 357, 368-69 (Wis. App. 2008), in which the court rejected the argument that it would result in "dangerous potential" unless law enforcement agencies are given the same common-law exception given to a district attorney's prosecution records:

> Although a police report is generally categorically exempt from disclosure under *Foust* if it resides in a prosecutor's file, the Sheriff's Department has an independent responsibility to determine whether a police report should be withheld. Whereas a prosecutor may generally rely on the categorical exemption, the Sheriff's Department must make that determination on a case-by-case basis.

The *Portage Daily Register* Court held "that the Sheriff's Department did not state a legally specific policy reason for its denial" and therefore found the balancing test required disclosure.

It is cynically ironic that Sheriff Clark further argues at page 33 of his brief that the 12 prisoners in his custody who were the subjects of the I-27 forms "have a recognized privacy interest in not being publically associated with immigration related investigations and/or actions, including whether they pose a threat to national security." The reason that this argument is cynically ironic is that Sheriff Clarke routinely publicizes the fact that a person was subject to an immigration

[2] This citation to *Lazaridis,* is irresponsible because the "categorically exempt" information in that case consisted of the redaction of the names and identifying information of federal law enforcement officers pursuant to federal law. *Id.*, at 38.

detainer on the official website of the Milwaukee County Sheriff. (R-19, at page 28:1 to 29:16). Several print outs from Sheriff Clarke's website are part of the record below and demonstrate that the word "Hold" was printed immediately above the inmate's photograph and the words "VIOLATION/FEDERAL LAW IMMIGRATION" were printed below the photo in the case of one detainee and the words "OUT OF COUNTY CHARGES U.S. IMMIGRATION" for others. (R-6, Exhibit 8). The point is that Sheriff Clarke's concerns about protecting the privacy interests of the subjects of I-247 forms ring very hollow. Most importantly, those hollow concerns don't harm an identifiable public policy to the level that it outweighs the very strong legislatively mandated public policy in favor of openness and disclosure.

Consistent with the holding in *Linzmeyer,* it is certainly permissible for the factors listed at 5 U.S.C. § 552(b))6) and (b)(7) of the federal Freedom of Information Act to be considered as a potential "framework that records custodians can use to determine whether the presumption of openness in law enforcement records is overcome by another public policy." *Linzmeyer,* at ¶33. In *Linzmeyer* the Wisconsin Supreme Court considered the case of a public school teacher and volleyball coach who objected to the public release of a police report from "an investigation into allegations that he had made inappropriate statements to, and had engaged in inappropriate conduct with, a number of his female students." *Id.,* at ¶ 4. In applying the aforementioned framework, the *Linzmeyer* Court stated that "[t]he fundamental question we ask is whether there is a harm to

a public interest that outweighs the public interests in inspection of the Report." *Id.*, at ¶ 24. The Court held: "Applying the framework to the present case, we conclude that the public interests in preventing disclosure do not outweigh the public interests in release of the information." *Id.*, at ¶ 33.

In this case Sheriff Clarke has utterly failed to marshall any facts in support of his argument that the potential exceptions under FOIA for certain law enforcement records merit consideration in the context of Wisconsin's open records balancing test. Similarly Sheriff Clarke did not identify, at the trial court level, any public policy that would be tangibly harmed by disclosure to an extent that justifies subordinating Wisconsin's strong blue sky public policy.

III. CONCLUSION

For the foregoing reasons, Voces de la Frontera and Christine Neumann Ortiz respectfully request that the the order of the circuit court entering writ of mandamus compelling production of the twelve unredacted I-247 forms be affirmed.

Dated this 4th day of August, 2016.

/s/ Peter Earle

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that three true and accurate copies of the Brief of the Petitioners-Respondents, along with this and other attached certifications, will be sent via U.S. Mail on August 4, 2014 to the following counsel:

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I have submitted an electronic copy of this Brief which complies with the requirements of §809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief to be filed on August 4, 2016.

Dated this 2nd day of August, 2016.

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Subscribed and sworn to before me
this 2 day of August, 2016.

Notary Public, State of Wisconsin
My Commission expires: 6/7/19

SANDRA J. GANNON NOTARY PUBLIC STATE OF WISCONSIN

CERTIFICATION

I hereby certify that this Appellate Brief of the Plaintiff-Respondent in response to the Defendants'-Appellants' Opening Brief of the Defendants-Appellants, conforms to the rules contained in sec. 809.19(b) and (c) for a brief produced with a proportional serif font. The length of this Brief is 7975 words.

Dated this 2nd day of August, 2016.

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ELECTRONIC CERTIFICATION

I hereby certify I have submitted an electronic copy of this brief which complies with the requirements of §809.19(12) and 809.19(13). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on August 4, 2016.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

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STATE OF WISCONSIN
IN THE SUPREME COURT

No. 2015AP001152

VOCES DE LA FRONTERA, INC. and
CHRISTINE NEUMANN-ORTIZ,

Petitioners-Respondents,

v.

DAVID A. CLARKE JR.,

Respondent-Petitioner-
Appellant-Petitioner.

REPLY BRIEF OF RESPONDENT-PETITIONER-APPELLANT-PETITIONER

ON APPEAL FROM THE JUDGMENT OF THE MILWAUKEE COUNTY CIRCUIT COURT THE HONORABLE DAVID L. BOROWSKI PRESIDING

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ARGUMENT

I. Federal Regulation 8 C.F.R. § 236.6 exempts from disclosure information contained on I-247 immigration detainer forms.

Milwaukee County Sheriff David A. Clarke Jr. maintains that 8 C.F.R. § 236.6 is applicable to the federal immigration form (I-247) by virtue of the fact that the forms requested that the Milwaukee County Sheriff's Office (MCSO) detain and hold certain undocumented immigrants for up to 48 hours on behalf of ICE. Voces de la Frontera, and its executive director Christine Neumann Ortiz, do not generally challenge the applicability of 8 C.F.R. § 236.6 to state open records requests and they apparently concede that the subject of federal immigration should remain within the exclusive purview of the federal government. They argue rather that 8 C.F.R. § 236.6 should be construed narrowly to apply only to information regarding immigration detainees who are formally in *custody* of the federal government. This narrow interpretation cannot stand.

Petitioners-Respondents argue that because the immigrants remained in custody of the MCSO during the 48-hour temporary hold, 8 C.F.R. § 236.6 is not applicable. Sheriff Clarke does not dispute that the immigrants temporarily detained by MCSO remained in local law enforcement custody

during the 48-hour temporary detention hold permitted via the I-247. He contends rather that it does not matter under 8 C.F.R. § 236.6 whether the detainees were formally in federal or local law enforcement custody. This is supported by the language of 8 C.F.R. § 236.6, which does not distinguish between immigration detainees who are held in local custody on behalf of ICE pursuant to a temporary detention hold (I-247) and those detainees being housed in a local facility while still formally in custody of the federal government.

Petitioners-Respondents' impermissibly narrow interpretation of the regulation is contrary to both its express language, as well as the limited court decisions interpreting it. In advocating for a narrow interpretation, they seek to insert additional language into the regulation to support their position. This is not permissible. "[S]tatutory interpretations begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry." *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. Plain meaning may be ascertained not only from the words employed in the statute (or regulation), but also from the context. *Id.* at ¶ 46. This Court must interpret the statutory language in the context in which those words are

used; "not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Id.*

Petitioners-Respondents rely on *American Civil Liberties Union of New Jersey, Inc. v. County of Hudson*, 352 N.J. Super. 44, 799 A.2d 629 (N.J. App. 2002) and the regulatory history of 8 C.F.R. § 236.6 to support their position. There is no dispute that 8 C.F.R. § 236.6 was promulgated in response to a ruling by the trial court in *County of Hudson* that New Jersey's open records law required the release of information regarding the identity of INS detainees housed at two county jails. The facts of that case were admittedly slightly different in that the immigration detainees in *County of Hudson* were in federal custody before being transferred to a local facility pursuant to an agreement wherein the county agreed to accept and provide for the "custody and control and safekeeping of the detainees." *Id.* at 58. While Petitioners-Respondents contend the inmates in *County of Hudson* were still in federal custody, even while being housed at the county detention facility, this is a distinction without a difference. Regardless of who formally retained custody of the inmates, the federal regulation should be applicable. There is no meaningful difference between an immigration

detainee in federal custody who is being housed in a local law enforcement facility pursuant to an agreement with the federal government and an individual who is detained in local custody at the express request and pursuant to the authority of the federal government. Both situations fall within the scope of 8 C.F.R. § 236.6, as both situations involves a local law enforcement agency that "houses, maintains, provides services to, or otherwise holds any detainee on behalf of the service."

In both of these situations, the local agency should not be tasked with releasing potentially sensitive federal law enforcement information relating to these immigration detainees. This is clearly an area in which federal law should control. The vagaries of the laws of the various states are not well adapted for the special national security, law enforcement, and privacy concerns implicated by the release of this type of information. As explained in the final rule implementing 8 C.F.R. § 236.6, "[t]his rule simply relieves the non-federal entity of responsibility for releasing or withholding information regarding detainees, and places that responsibility with the federal government subject to standards established by federal law." *68 Fed. Reg. 19, page 4365.*

Petitioners-Respondents seek to distinguish the cases relied upon by Sheriff Clarke. *Belbachir* was cited by Sheriff Clarke to support the general proposition that 8 C.F.R. § 236.6 protects the confidentiality of information relating to federal immigration detainees. The case did not relate to immigration detainees who were being housed or temporarily detained by a local law enforcement agency. There was never an assertion made by Sheriff Clarke that it did.

The case of *Ricketts v. Palm Beach County Sheriff*, 985 So.2d 591 (Fla. Dist. Ct. App. 2008), however, supports Sheriff Clarke's position that 8 C.F.R. § 236.6 is applicable regardless of whether the immigration detainee is in local, state or federal custody. Petitioners-Respondents contend that "[a]bsolutely nothing in the *Ricketts* decision implies that 8 C.F.R. 236.6 applies to persons over whom the federal government has not taken custody." (Voces Brief, p. 15). This is not accurate. It is clear from the decision that Ricketts remained in the custody of the county sheriff, as he was never booked on the federal I-203 and never taken into federal custody. *Id.* at 592. The district court nevertheless noted with apparent approval that the sheriff withheld copies of the immigration documents under state law on the basis of 8 C.F.R. § 236.6. This ruling supports

Sheriff Clarke's position that the regulation applies even if the detainees are still in local custody, as the court embraced the application of the regulation to an inmate who was still in county custody.

While Sheriff Clarke agreed to produce redacted copies of the immigration forms as a form of compromise on April 2, 2015, after this lawsuit was filed and after oral arguments were presented to the trial court. R.18:27-29; R.19:56. His good faith effort to resolve a pending legal matter should not now be used as a sword against him.

Additionally, the fact that 8 C.F.R.§ 236.6 was not specifically relied upon as a basis for the non-disclosure of the documents before the trial court is not controlling, as it was relied upon extensively during the appeal to the Wisconsin Court of Appeals. At that time, Petitioners-Respondents argued vigorously that Sheriff Clarke was precluded from relying on 8 C.F.R. § 236.6 because it was not relied upon before the trial court. While an *issue* cannot generally be raised for the first time on appeal, applicable *legal authority* that was not argued before the circuit court can be relied upon on appeal. *See Helgeland v. Wisconsin Municipalities,* 2006 WI App 216, ¶ 9 n. 9, 296 Wis. 2d 880, 724 N.W.2d 208; *Estate of Hegarty ex rel.*

Hegarty v. Beauchaine, 2001 WI App 300, ¶ 12, 249 Wis. 2d 142, 638 N.W.2d 355.

Based on the authority presented herein, and the clear language in the federal regulation, Sheriff Clarke asks the Court to reverse the decisions of the circuit court and the Court of Appeals.

II. The I-247 forms would also be protected from disclosure pursuant to the balancing test required by the Wisconsin Open Records Law.

Petitioners-Respondents spend much time attacking the records custodian's procedure for conducting the balancing test and criticizing the legal arguments advanced on behalf of Sheriff Clarke. However, they fail to present any countervailing evidence to support their position that the redacted information should have been disclosed or that such information was necessary for Voces to engage in the purported advocacy it seeks to perform.

Captain Trimboli's approach in seeking to balance the interests in responding to the open records request was entirely reasonable under the circumstances. She was faced with a request for federal immigration detainer forms containing information that she admittedly knew little about. She testified that after looking at the form itself and based on both the

personally identifiable information and the law enforcement sensitive information contained on the forms, she felt it was necessary to contact somebody from ICE to ask them about the significance of the numbers and information on the forms. R. 19:32-33, 53-54. She initially spoke to a local ICE agent in Milwaukee and was advised that the File No. (or A-number) was equivalent to a social security number and the rest of the information on the form was personally identifiable and law enforcement sensitive information. R.19:33.

She continued to gather additional information. On March 31, 2015, she provided ICE with a copy of the open records request and the I-247 form with suggested redactions to Brandon Bielke, the Supervisory Special Agent with ICE Homeland Security Investigation. She requested assistance in determining whether the information on the I-247 forms was properly redacted. R.3:13; R.19:50. In response to her email, she was notified that the A-number (File No.), FBI Number, Date of Birth, Immigration Status and Citizenship/Nationality were sensitive personally identifiable information under the Privacy Act, and that the Subject ID and Event # are law enforcement sensitive identifiers specific to administrative immigration proceedings. R.3:12. Mr. Bielke notified Ms. Trimboli that he would work

with the ICE Office of Chief Counsel for further advice on handling the request. Id.

On April 3, 2015, Ms. Trimboli received additional guidance from Charlotte Leavell, the Associate Legal Advisor at the Government Information Law Division of ICE. R.14:2-3 She provided detailed legal guidance on the application of specific FOIA exemption and how they related and applied to each of the specific items contained on the I-247. R.14:2-3. After further review and consultation, on April 7, 2015, Captain Trimboli issued a revised open records disclosure which now also included the nationalities of the immigration detainees as listed on the I-247 forms. R.19:42-43, 56, 61-62.

Despite their assertion to the contrary, Captain Trimboli did not testify that it was the routine practice of the Milwaukee County Sheriff's Office to "subordinate the balancing test, without scrutiny, to any assertion by any law enforcement agency." (Voces Brief, p. 19). Such an argument is disingenuous and misleading. Captain Trimboli testified about the process she undertook in conducting the balancing test and explained that when she did not understand certain information, she would seek guidance from other agencies that understood the information. R.19:53-54. This

does not mean that MCSO subordinated the balancing test to another law enforcement agency or followed their direction without scrutiny. Quite the contrary. For instance, ICE notified Captain Trimboli on March 31, 2015, that they would typically redact birthdates, as such information was considered sensitive personally identifiable information. R.3:12. Despite this guidance, Captain Trimboli conducted her own independent analysis and in balancing the countervailing interests, she decided not to redact birthdates, as such information was typically released and could be found on the Milwaukee County Sheriff's inmate locator website. R.19:62.

Mr. Bielke admittedly relied, in part, on the Privacy Act, 5 U.S.C. § 552a(2)(a), in formulating the guidance he provided. That reliance was appropriate notwithstanding the narrow statutory definition of "individual" under the Privacy Act, which only extends statutory privacy rights to U.S. citizens and lawful permanent residents. In 2007, however, DHS issued a policy statement extending certain provisions of the Privacy Act to non-U.S. persons including visitors and illegal aliens. Additional information on the extension of privacy rights to aliens can be found at www.dhs.gov/privacy. This was also explained by Ms. Leavell, when she

wrote, "it is DHS/ICE policy to extend privacy protections to aliens." R.14:2.

In criticizing the process used in conducting the balancing test, Petitioners-Respondents focuses exclusively on the guidance provided by Brandon Bielke, rather than also recognizing the subsequent guidance from ICE's legal counsel, Charlotte Leavelle. For instance, they ignore the express guidance from Ms. Leavell about what ICE would do when faced with a similar document request. They assert that the record does not establish "that the requested information would be redacted by ICE if a FOIA request would have been made to ICE for the requested information." (Voces Brief, p. 22). This is inaccurate. In her guidance to the MCSO, Ms. Leavell specifically stated, "if responding to a FOIA request, ICE would redact things like internal event numbers, subject numbers, file numbers and alien numbers, because this is all information that can be found in an alien file and used to identify an individual." R.14:3.

In balancing the interests of disclosure against non-disclosure under the various exemptions under the FOIA, there were concerns relating to the possibility of someone gaining unauthorized access to the ICE system or potentially committing identify theft. (Clarke Brief, p. 29). Petitioners-

Respondents assert that there is absolutely no evidence in the record to support the assertions relating to increased risk of identify fraud. (Voces Brief, pp. 22-23). This criticism again directly ignores the guidance provided by Ms. Leavell. She explained that "FOIA exemption [5 U.S.C § 552](b)(7)(E) can be asserted to withhold internal identifying numbers (such as the "subject ID", "event ID" and "File number")... If internal identifying numbers and codes are released an individual who gains unauthorized access to an ICE system could illicitly modify data and circumvent law enforcement." R. 14:2.

Concerns related to the impact on enforcement proceeding from the disclosure of information relating to immigration detainees was also cited by Sheriff Clarke as supporting the application of the exemption under 5 U.S.C. § 552(b)(7)(A). The reference to the court's quotation in *County of Hudson,* supra, was intended merely to illustrate the types of concerns potentially created by the release of personally identifiable and sensitive law enforcement information. Counsel for Sheriff Clarke never sought to suggest that Voces would misappropriate the requested information to create false or misleading information or facilitate contact between detainees and terrorist organizations.

Additionally, contrary to their assertion, Sheriff Clarke is not advocating for the abrogation of the balancing test or the categorical exemption under the Open Records law for all immigration-related information or all law enforcement records. He merely articulated in his brief the past legal standard embraced by the courts in evaluating the production of law enforcement record that involve an unwarranted invasion of personal privacy under FOIA exemption 5 U.S.C. § 552(b)(7)(C). In such cases, courts have routinely stressed the heightened protections that should be afforded such information. Wisconsin law has similarly recognized these interests in Wis. Stat. § 19.35(1)(am), which exempts from disclosure law enforcement records that are collected or maintained "in connection with a complaint, investigation or other circumstances *that may lead to* an enforcement action, administrative proceeding, arbitration proceeding or court proceeding," as well as "[a]ny record containing personally identifiable information that" would endanger an individual's life or safety, identify a confidential informant, or endanger the security of the inmate. *See also Linzmeyer v. Forcey,* 2002 WI 84, 254 Wis. 2d 306, 646 N.W.2d 811.

Petitioners-Respondents find apparent merriment in the purported "cynical irony" that Sheriff Clarke would seek to protect the disclosure of sensitive personally identifiable information relating to detainees while simultaneously providing status information on these inmates on the MCSO website. There is a big difference between disclosing a person's immigration status on the county's website and disclosing federal I-247 detainer forms that contain a multitude of detailed sensitive and personal information about the subject, which includes the basis for the person's possible removal from the United States, his or her A-number, as well as internal tracking numbers and file numbers used by ICE. This is neither cynical nor ironic.

While Petitioners-Respondents' brief is replete with platitudes and personal attacks against Sheriff Clarke's legal position, mysteriously absent from their brief is any justification as to why Voces needs the information it is seeking. This would be directly relevant to the balancing test the parties are asking this Court to employ. Sheriff Clarke specifically asserted in his principal brief that "Voces can engage in the advocacy that it seeks to perform based on the information already provided and/or can contact the individuals who were subject to the immigration detention holds, if

additional information is needed." (Clarke Brief, p. 34). Voces did not respond to this contention and did not advance any justification as to why it is seeking the additional previously redacted information. Without such countervailing justification, and based on the legitimate concerns advanced by Sheriff Clarke, this Court should find that the interests of non-disclosure outweighed the public interest in disclosure.

CONCLUSION

Based on the arguments presented herein and in his principal brief, Sheriff Clarke respectfully requests that the decision of the circuit court be reversed and the petition for a writ of mandamus be dismissed.

Dated this 10th day of August, 2016.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel for Respondent-Petitioner-Appellant-Petitioner hereby certifies that three copies of the Reply Brief of Respondent-Petitioner-Appellant-Petitioner will be sent via U.S. Mail on August 10, 2016 to:

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Counsel for Petitioners-Respondents

Oyvind Wistrom

Subscribed and sworn to before me
this 10th day of August, 2016.

Notary Public, State of Wisconsin.
My Commission expires: 03.25.18

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19 for a brief produced with a proportional serif font: minimum printing resolution of 200 dots per inch, 13-point body text, 11-point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text.

The length of this brief is 2875 words.

Dated this 10th day of August 2016.

Oyvind Wistrom

CERTIFICATE OF COMPLIANCE -

WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this Reply Brief of Respondent-Petitioner-Appellant-Petitioner which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on August 10, 2016.

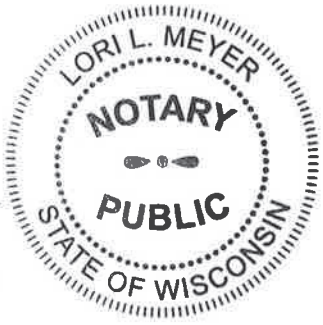
A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 10th day of August 2016.

Oyvind Wistrom

Subscribed and sworn to before me
this 10th day of August 2016.

Notary Public, State of Wisconsin.
My Commission expires: 03.25.18



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STATE OF WISCONSIN
SUPREME COURT

Appeal No. 2015AP001152

VOCES DE LA FRONTERA, INC.
and CHRISTINE NEUMAN ORTIZ,

Petitioners-Respondents,

v.

DAVID A. CLARKE, Jr.

Respondent-Petitioner-Appellant-Petitioner.

On Appeal from Milwaukee County Circuit Court
The Honorable David L. Borowski, Presiding
Milwaukee County Case No. 15-CV-002800

Non-Party Brief of the Wisconsin Freedom of Information Council, Wisconsin Newspaper Association, and Wisconsin Broadcasters Association

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This case asks whether redacted information on federal immigration forms in the possession of the Milwaukee County Sheriff must be withheld under the Wisconsin Open Records law, Wis. Stat. § 19.31 *et seq*. ("Open Records Law"). Respondent-Petitioner-Appellant Petitioner Sheriff David A. Clarke ("Clarke") overapplies federal law to claim the information must remain redacted, obscuring the straightforward provisions of the Open Records law that mandate release. Clarke also discounts the presumption of access under Wisconsin law in favor of weak and unsupported reasons for non-disclosure. *Amici curiae* the Wisconsin Freedom of Information Council, Wisconsin Newspaper Association and Wisconsin Broadcasters Association (collectively, "Amici") urge this Court to affirm the court of appeals and direct disclosure of the unredacted immigration forms.

ARGUMENT

I. FEDERAL LAW HAS A LIMITED ROLE IN THIS CASE

The parties extensively cite federal immigration regulations and the United States Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), but this is actually a state

law case. Federal law plays only a bit part, and must be interpreted against the broad policy in favor of access in Wisconsin's Open Records Law.

The Open Records Law applies to various state and local authorities defined in Wis. Stat. 19.32(1). For these authorities, the legislature has declared the state's official policy of maximal public access to government information. Wis. Stat. § 19.31. This Court has recognized that "[the] statement of policy in § 19.31 is one of the strongest declarations of policy to be found in the Wisconsin statutes." *Zellner v. Cedarburg Sch. Dist.*, 2007 WI 53, ¶49, 300 Wis. 2d 290, 731 N.W.2d 240 (citing *Munroe v. Braatz*, 201 Wis. 2d 442, 549 N.W.2d 451 (Ct. App. 1996)).

The federal government has its own records access law in the FOIA, but it does not apply to the states. Rather, it applies to federal agencies, 5 U.S.C. § 552(f), necessarily excluding local governments and police departments, among others, *e.g.*, *Willis v. U.S. Dep't of Justice*, 581 F. Supp. 2d 57, 67-68 (D.D.C. 2008); *State* ex rel. *Hill v. Zimmerman*, 196 Wis. 2d 419, 428 & n.6, 538 N.W.2d 608 (Ct. App. 1995). Exemptions to release

under the FOIA are thus inapplicable to local or state government decisions to release documents under a state open records law, as Wisconsin and other jurisdictions have recognized. *E.g.*, *State* ex rel. *Lank v. Rzentkowski*, 141 Wis. 2d 846, 856 & n.5, 416 N.W.2d 635 (Ct. App. 1987); *Bradley v. Saranac Bd. of Educ.*, 565 N.W.2d 650, 656-57 (Mich. 1997); *Queen v. W. Va. Univ. Hosp.*, 365 S.E.2d 375, 382 (W.Va. 1987).

Furthermore, the FOIA is different and less expansive than the Open Records Law. Wisconsin laws "reflect a strong policy of transparency and access," *Sands v. Whitnall Sch. Dist.*, 2008 WI 89, ¶68, 312 Wis. 2d 1, 754 N.W.2d 439, and the state has "more effectively enforced" its public records statute than "federal courts have enforced the [FOIA]," *In re Wis. Family Counseling Servs, Inc.*, 95 Wis. 2d 670, 672-73, 291 N.W.2d 631, 633-34 (Ct. App. 1980) (footnote omitted). "Unquestionably, the lesser effectiveness of the federal courts is due in part to the consignment of Congress of nine categories of information to the exemption discretion of federal agencies." *Id*.

Clarke accuses Petitioner-Respondent Voces de la Frontera ("Voces") of "circumvent[ing] federal law by

requesting the I-247 forms from [the county] rather than directly from the federal government," and claims that exemptions under FOIA "protect the disclosure" of the I-247 forms. (Clarke Opening Br. at 11.)[1] However, Clarke's argument that requesters can only obtain records from the agency that generated them is entirely unsupported, and it would defy both the policies of the FOIA and the Open Records law to confine requesters to such a bureaucratic and illogical rule. Furthermore—and as the federal government presumably understood in this case—a federal agency that releases a record into the public domain waives future claims that FOIA exemptions apply to the record. *See, e.g.*, *Cottone v. Reno*, 193 F.3d 550, 553-54 (D.C.Cir. 1999); *Starkey v. U.S. Dep't of Justice*, 238 F. Supp. 2d 1188, 1193-94 (S.D. Cal. 2002).[2]

---

[1] Clarke did not previously argue that the federal FOIA exemptions applied. (*See* App.B-12 & n.4.)

[2] Notably, neither Clarke nor the federal government has claimed the I-247 forms or redacted information are exempt from disclosure as "inter-agency" or "intra-agency" privileged communications under FOIA Exemption 5, which protects some records shared by the federal government with certain outside entities. 5 U.S.C. § 552(b)(5). Clarke could not meet this standard in any case. *See U.S. Dep't of Interior v. Klamath Water Users Protective Assoc.*, 532 U.S. 1, 8-11 (2001).

At most, federal law is relevant to Open Records Law cases in two discrete situations: 1) when a federal law—not including a FOIA exemption—"specifically exempts" or "requires" the record to remain confidential, Wis. Stat. § 19.36(1), (2), or 2) as non-binding guidance when, for example, a custodian applies the balancing test to law enforcement records, *Linzmeyer v. Forcey*, 2002 WI 84, ¶¶32-33, 254 Wis. 2d 306, 646 N.W.2d 881. *Amici* discuss these scenarios in turn.

II. FEDERAL REGULATIONS DO NOT MANDATE DENIAL OF THE REDACTED INFORMATION.

Clarke contends that federal immigration regulations at 8 C.F.R. § 236.6 shield the redacted information in the immigration forms from disclosure by way of Wis. Stat. §§ 19.36(1) and (2). However, the regulation he cites does not apply by its plain language.

Courts interpreting exemptions to the Open Records Law must observe the legislature's statutory presumption that government records are public. Wis. Stat. § 19.31. "Any exceptions to the general rule of disclosure must be narrowly construed." *Fox v. Bock*, 149 Wis. 2d 403, 411,

438 N.W.2d 589 (1989); *Hathaway v. Jt. Sch. Dist.*, 116 Wis. 2d 388, 397, 342 N.W.2d 682 (1984) ("unless the exception is explicit and unequivocal, it will not be held to be an exception").

Wis. Stat. §§ 19.36(1) and (2) reinforce this directive:

> **(1)** APPLICATION OF OTHER LAWS. Any record which is **specifically exempted** from disclosure by state or federal law or authorized to be exempted from disclosure by state law is exempt from disclosure under s. 19.35 (1) . . . .
>
> **(2)** LAW ENFORCEMENT RECORDS. Except as otherwise provided by law, whenever federal law or regulations **require** or as a condition to receipt of aids by this state **require** that any record relating to investigative information obtained for law enforcement purposes be withheld from public access, then that information is exempt from disclosure under s. 19.35 (1).

Id. (emphasis added). The legislature's choice of words like "specifically exempted" and "require" means confidentiality provisions from other laws must give records custodians "no other option" but to withhold the information. *See Citizens for Responsible Dev'p v. City of Milton*, 2007 WI App 114, ¶14, 300 Wis. 2d 649, 731 N.W.2d 640 (interpreting analogous open meetings law) ("a government may have a valid reason for *desiring* to

close its meetings that nevertheless fails to establish closed meetings are *required*").

Voces argues that 8 C.F.R. § 236.6 is inapplicable because its exemption provisions are limited to immigration documents for detainees that local law enforcement is holding on behalf of the federal government. (Voces Resp. Br. at 9-10.) Clarke responds that the regulation's language "does not distinguish between immigration detainees" in state custody for whom an immigration hold has been requested and those held at a local facility while "formally in the custody of the federal government." (Clark Reply Br. at 2.)

Clarke does not explain how the language of the regulation supports his interpretation, instead citing policy reasons for why he believes "the federal regulation *should* be applicable" and "federal law *should* control." (*Id*. at 3-4 (emphasis added)). Setting aside these policy arguments, the regulation clearly only applies to records for detainees held "on behalf of the [U.S. Immigration & Customs Enforcement] Service" (hereinafter "ICE" or "the Service"). 8 C.F.R. § 236.6. The regulation does not apply to records of detainees that the federal agency has

requested to be held, or detainees who could be held in the future, but detainees actually held "on behalf of the Service." *See id*. While the federal government could have employed broader language in its regulations, it did not, and Clarke is accordingly obliged to follow the language as written.

As the court of appeals well explained, the detainees at issue here were not being held by the county on behalf of the Service, and the exemption to disclosure in 8 C.F.R. § 286.6 did not apply. (App.B.-013-016.) This was thus not a situation where Clarke had "no choice" but to redact the forms due to the federal law, and indeed, he released most of the document. (App.B.-019-020.) Even ICE apparently did not advise that 8 C.F.R. § 236.6 mandated nondisclosure. (*See* Clarke Reply Br. at 8-11.)

Federal law did not "specifically exempt" the I-247 forms here from full disclosure or "require" confidentiality, and Wis. Stat. § 19.36(1) and (2) do not apply.

III. THE REDACTED INFORMATION SHOULD BE RELEASED UNDER THE BALANCING TEST.

Without a statutory basis for redacting the I-247 forms, Clarke turns to the balancing test, which allows non-disclosure of records in "exceptional case[s]." Wis. Stat. § 19.31. This is not an exceptional case.

A. Clarke Improperly Employed a Blanket Exception to Disclosure When Conducting the Balancing Test.

To satisfy the balancing test, "public policy interests favoring nondisclosure [must] outweigh the public policy interests favoring disclosure, notwithstanding the strong presumption favoring disclosure." *Hempel v. City of Baraboo*, 2005 WI 120, ¶63, 284 Wis. 2d 162, 699 N.W.2d 551. Records custodians who perform this test must consider "'all the relevant factors'" and exercise their discretion in a fact-intensive analysis. *Id*. ¶¶62-63 (quoting *Woznicki v. Erickson*, 202 Wis. 2d 178, 192, 549 N.W.2d 699 (1996)). Should the custodian decide not to allow inspection, he or she "must state specific public-policy reasons for the refusal," which "provide a basis for review in the event of a court action." *Newspapers, Inc. v. Breier*, 89 Wis. 2d 417, 427, 279 N.W.2d 179 (1979).

Amici agree with the lower courts that Clarke, acting through records custodian Captain Trimboli, did not properly conduct the balancing test. According to her own testimony, Captain Trimboli failed to exercise her discretion as to the redacted material, accepting at face value the representation of federal employees that they would not release the material under federal disclosure laws. (App.B.-004-005, 021.) This is a procedural failing in the first instance. *See Hempel*, 284 Wis. 2d 162, ¶¶62-63.

Furthermore, the Wisconsin legislature has not made a determination that these federal exceptions apply under the state Open Records Law, *see* Section I, *supra*, or that records custodians can defer to federal employee preferences about disclosure as a "routine practice." (App.B-012 n.4.) The Milwaukee County Sheriff's office—"indeed, any municipality, cannot implement a policy that provides for a blanket exception from the Open Records law." *Hempel*, 284 Wis. 2d 162, ¶71.

Because Clarke has failed to articulate any or sufficient reasons for withholding the redacted materials, the Court's inquiry should stop there. *Breier*, 89 Wis. 2d at 427 ("[I]t is not the trial court's . . . role to hypothesize

reasons or to consider reasons for not allowing inspection which were not asserted by the custodian."). In the balancing test context especially, where no clear statutory exception or prior legislative determination applies regardless of the custodian's analysis, the custodian must be held to his or choices. *See Journal Times v. City of Racine Bd. of Police & Fire Comm'rs*, 2015 WI 56, ¶75, 362 Wis. 2d 577, 866 N.W.2d 563. The records should be produced. *Breier*, 89 Wis. 2d at 427.

B. The Balancing Test Favors Disclosure of the I-247 Form Redactions.

Should the Court reach Clarke's reasons for non-disclosure as asserted in litigation, it should find these reasons insufficient under the Open Records Law.

Clarke again overstates the applicability of federal law, claiming the balancing test "requires consideration of . . . FOIA [exemptions] found at 5 U.S.C. §552(b)(6) and (7)." These exemptions, relating to personal privacy and law enforcement records, respectively, are not "required" considerations under state law. At most, the factors in 5 U.S.C. § 552(b)(7)—along with prior Wisconsin caselaw—

provide a "framework that records custodians can use to determine whether the presumption of openness in law enforcement records is overcome by another public policy." *Linzmeyer*, 254 Wis. 2d 306, ¶33.

1. Releasing the Redacted Material Will not Interfere with Law Enforcement Operations

Clarke claims release of the I-247 form redactions could reasonably be expected to interfere with ongoing law enforcement proceedings, and that release may disclose techniques and/or procedures for law enforcement investigative purposes that are not commonly known. (Clarke Opening Br. at 27 (citing 5 U.S.C. § 552(b)(7)(A), (E).) The central concern here appears to be that if someone were to hack into the federal government's computer systems, the currently-redacted subject ID, file number, and event ID could be used to modify agency data. (Clarke Opening Br. at 29; Clarke Reply Br. at 12.)

These remote and generalized concerns are not enough to overcome the presumption in favor of access for the documents at issue. *Milwaukee J. Sentinel v. Dep't of Admin.*, 2009 WI 79, ¶65, 319 Wis. 2d 439, 768 N.W.2d 700. While records custodians do not necessarily have to

supply hard facts to support non-disclosure when responding to a requester, "[f]actual support for the custodian's reasoning is likely to strengthen the custodian's case before a circuit court." *Hempel*, 284 Wis. 2d 162, ¶79. Clarke supplies no such support.

Meanwhile, Wisconsin courts have repeatedly emphasized the importance of releasing law enforcement records to the public. *E.g.*, *Linzmeyer*, 254 Wis. 2d 306, ¶27 (discussing importance of public oversight of law enforcement); *Kroeplin v. DNR*, 2006 WI App 227, ¶¶44-52, 297 Wis. 2d 254, 725 N.W.2d 286, *rev. denied*, 2007 WI 59 (same). As one court has noted, the powers of arrest and custody are among the most "awesome weapons in the arsenal of the state" but are also powers that "may be abused." *Breier*, 436.

> It would appear to be a travesty of our judicial and law enforcement system to . . . permit persons to be held in custody without the public having the right to know why the individual is in custody or upon what or for what offense he is charged.

Id. at 437.

This logic applies to the redactions at issue here, which conceal information about detainees and the reasons ICE believes they must be detained beyond the normal period of state custody. (App.A-015-017.) For example, Clarke redacted information on whether the detainee has re-entered the country after a previous removal, has knowingly committed immigration fraud, poses a significant risk to national security or public safety, and whether the detainee has been served a warrant of arrest for removal proceedings. (App.A.-016-017.) Theoretical concerns about computer hacking do not overcome the presumption in favor of releasing data such as this, implicating public safety, detainee rights, and law enforcement oversight.

2. Releasing the Redacted Material Will not Violate Detainee Privacy

Clarke also claims that releasing the redacted material would compromise detainee privacy. (Clarke Opening Br. at 27-28 (citing 5 U.S.C. §§ 552(b)(7)(C), (b)(6)).

Wisconsin caselaw has only affirmed non-disclosure on the basis of personal privacy concerns when the public

interest in privacy demands it. *Linzmeyer*, 254 Wis. 2d 306, ¶33 (affirming release of police report containing allegations of inappropriate teacher conduct with students, even though the teacher was never arrested or charged and release could cause some embarrassment). Here, the circuit court thoroughly analyzed and rejected any claims that releasing numbers and other information unique to each detainee on the forms would lead to identity theft or other invasions of privacy. (App.A-017-019.)

Clarke again looks to the FOIA to suggest that third parties mentioned in law enforcement records are "categorically exempt" from disclosure under records laws, due to concerns for embarrassment and personal privacy. (Clarke Opening Br. at 32.) But as previously discussed, local records custodians cannot devise categorical exemptions to the Open Records law when applying the balancing test. *See* Section III.A., *supra*. The legislature has chosen to make an exception to disclosure only for law enforcement informants, but not all third parties who appear in law enforcement records. *See* Wis.

Stat. § 19.36(8).[3] In any case, the I-247 records do not implicate "third parties" or confidential informants.

Clarke has not met his burden to show the public's interest in redacting the information due to detainee privacy concerns outweighs the substantial public interest in disclosure.

3. The Public's Interest in Disclosure Outweighs the Public Interest in Non-Disclosure

Finally, Clarke faults Voces for failing to articulate reasons for disclosure. (Clarke Reply Br. at 14-15.) Yet Clarke ignores the extensive factual findings made by the circuit court in support of disclosure, including Voces' desire for public oversight of law enforcement and immigration law implementation, a "hot-button issue." (App.A-020-022.) The court found these interests "compelling." (*Id.*)

Clarke makes the unique argument that Voces would not understand some of the information, such as internal tracking numbers, and therefore that no public

[3] Clarke also cites Wis. Stat. § 19.35(1)(am) as a basis for non-disclosure, but that statute only applies to records that requesters seek about themselves and is not implicated here. (Clarke Reply Br. at 13.)

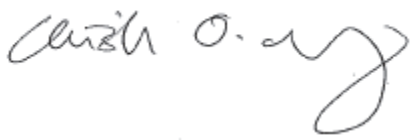
benefit is served by disclosing it. (Clarke Opening Br. at 30.) Obviously, allowing custodians to preemptively determine what requesters will "understand" or need is a dangerous approach that invites abuse. Greater public understanding of government cannot be achieved when presumed public ignorance is used to justify further non-disclosure.

The balancing test supports disclosure of the redacted I-247 forms.

CONCLUSION

For all of the foregoing reasons, Amici respectfully request that this Court affirm the court of appeals and direct disclosure of unredacted I-247 forms to Voces.

Dated this 1st day of September, 2016.



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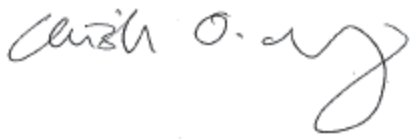

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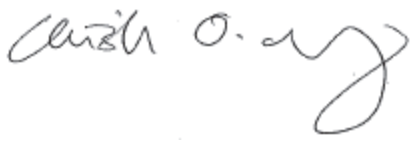

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