

STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT II

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Case No. 14AP2536-FT

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DEMOCRATIC PARTY OF  
WISCONSIN, et al.,

Petitioner-Respondent,

v.

WISCONSIN DEPARTMENT OF  
JUSTICE, et al.,

Respondent-Appellant.

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RESPONDENTS' MOTION FOR IMMEDIATE STAY  
PENDING THEIR PETITION FOR SUPREME COURT  
REVIEW AND FOR EX PARTE CONSIDERATION

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**INTRODUCTION**

Pursuant to Wis. Stat. §§ 808.07 and 809.14 the Wisconsin Department of Justice seeks immediate relief from this Court's October 14, 2015, order that lifted the circuit court's stay of its October 30, 2014, order for a writ of mandamus. As this Court is aware, this case concerns the public release of two prosecutor training videos discussing prosecutorial techniques and sex crimes involving minors. DOJ maintains that it is contrary to the public interest to release the videos. DOJ will be petitioning the Wisconsin Supreme Court for review of this Court's recent order affirming the circuit court. For supreme court review to have

any meaning, it is necessary that the stay imposed by the circuit court remain in place until these proceedings are complete. If not, DOJ will effectively be denied its right to petition for further review because, once released, there is no possibility of un-releasing the videos.

Because of these circumstances and the public importance of the issues, DOJ respectfully asks that this motion be considered at the earliest opportunity. DOJ further believes that the circumstances justify ex parte action on this procedural request.

The circuit court recognized the weightiness of these concerns, even while it ruled in favor of the petitioner. In granting a stay, the circuit court understood the importance of the stay until this case is finally resolved, and thus acknowledged the irreparable harm that would occur if further proceedings were effectively nullified.

This Court should do the same while the supreme court considers DOJ's petition for review, which will be filed in a matter of days. The Court should either enter a new stay pending final resolution of this case or, to the same end, reconsider its lifting of the circuit court's stay.

## ARGUMENT

The decision to grant a stay pending appeal is governed by factors found in *State v. Gudenschwager*, 191 Wis. 2d 431, 529 N.W.2d 225 (1995). To support a stay pending appeal, a requesting party must make showings that: (1) it is likely to succeed on the merits of its appeal; (2) unless a stay is granted, the moving party will suffer irreparable injury; (3) no substantial harm will come to other interested parties; and (4) the stay will do no harm to the public interest. *Id.* at 440. None of these factors is dispositive. They are interrelated such that more of one may excuse less of another. *Id.* at 441. Thus, for example, the degree to which a party must demonstrate a likelihood of success “is inversely proportional to the amount of irreparable injury” that would be suffered absent the stay. *Id.*; see also *Scullion v. Wis. Power & Light Co.*, 2000 WI App 120, ¶ 18 n. 14, 237 Wis. 2d 498, 614 N.W.2d 565.

The circuit court believed that these factors were met and issued a stay pending appeal. That decision made sense under the circumstances, and the same considerations merit a stay remaining in place while DOJ seeks further review with the Wisconsin Supreme Court. Above all, without a stay, further review would be rendered meaningless because, once the videos in question are released, there will be no going back. Thus, this is a prime example of a case where a stay is appropriate.

Beginning with the second factor—irreparability—it is clear that the denial of a stay would essentially nullify any further review, even if the supreme court were to accept DOJ’s position. If DOJ were to prevail on appeal, but without a stay, the public will have suffered irreparable injury because the videos will have been released contrary to the public’s interest. Once a record is released publically, that cannot be undone. These circumstances show why a stay is especially appropriate in a public records case. *See, e.g., Armada Broad., Inc. v. Stirn*, 183 Wis. 2d 463, 470, 516 N.W.2d 357 (1994) (in a public records case, noting that the court of appeals granted motion for stay pending appeal); *State ex rel. Richards v. Foust*, 158 Wis. 2d 531, 535, 463 N.W.2d 378 (Ct. App. 1990) (granting stay pending appeal) *rev’d on the merits*, 165 Wis. 2d 429, 477 N.W.2d 608 (1991).

Because the showing of irreparable harm is so strong here, the showing under the remaining factors need not be as strong. In any event, the other factors also support a stay here.

Regarding the first factor—a likelihood of success—“a high probability of success on appeal is not necessarily required for a stay; rather, . . . the degree of likelihood of success that justifies a stay in a particular case will depend on the relative strength of the other factors.” *Scullion*, 237 Wis. 2d 498, ¶ 18 n. 14.

Here, there is precedent supporting DOJ's view that information and strategy stemming from a prosecutor's experiences and cases should not be subject to disclosure. See *State ex rel. Richards v. Foust*, 165 Wis. 2d 429, 477 N.W.2d 608 (1991) (holding that closed prosecutor's files were not subject to disclosure and noting the public importance of keeping historical data, witness statements, and on-the-ground investigatory details private); *Linzmeyer v. Forcey*, 2002 WI 84, ¶ 30, 254 Wis. 2d 306, 646 N.W.2d 811 ("Law enforcement records are generally more likely than most types of public records to have an adverse effect on other public interests if they are released"); *id.* at ¶ 41 (noting as an important factor whether "techniques and procedures for law enforcement investigations or prosecutions would be revealed").

And that is not the only consideration. Wisconsin public policy places a high value on victim privacy, which DOJ believes is implicated here regardless whether individual names are used. Indeed, "minimiz[ing] further suffering by crime victims" is an established public policy in Wisconsin. *Schilling v. State Crime Victims Rights Bd.*, 2005 WI 17, ¶ 26, 278 Wis. 2d 216, 692 N.W.2d 623. Releasing in-depth discussions among professionals about past events that was intended only for training is contrary to that goal—such release may reopen old wounds and garner new public attention.

Although this Court disagreed that these cases and considerations should be extended to cover the present scenario, these topics involve the weighing of public policy, and the supreme court may come to a different conclusion.

The remaining factors ask whether harm will come to the petitioners or the public if a stay is granted. There is no good reason to think that harm to either would occur. These videos relate to law enforcement techniques and otherwise discuss past crime-related events. The petitioners have provided no reason to think that they need them immediately. Rather, the videos were initially sought in anticipation of an election that is now past.

Likewise, there is no time-sensitive information in the videos that the public might need now instead of later. Rather, the public interest is best served by allowing this litigation to reach finality after the supreme court decides whether to accept review. If review is granted, that court will be the ultimate arbiter of what best serves the public, but only if a stay is imposed or continued now. It is DOJ's view that the public is best served when prosecutors feel free to exchange strategies at a training, without the concern that the information will be widely available, especially when the information includes details about sex crimes against minors. DOJ should be allowed the opportunity to meaningfully present that issue to the supreme court, as it intends to do in the coming days via a petition for review.

## CONCLUSION

Pending further review by the supreme court, DOJ respectfully moves this Court to stay the effect of the circuit court's October 30, 2014, order and this Court's October 14, 2015, order by either issuing a new stay or by reconsidering its lifting of the stay that the circuit court had entered.

Dated this 15th day of October, 2015.

Respectfully submitted,

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