

FILED
07-13-2020
John Barrett
Clerk of Circuit Court
2020CV004088
Honorable David
Swanson-11
Branch 11

STATE OF WISCONSIN

CIRCUIT COURT

MILWAUKEE COUNTY

JOSE ACEVEDO and
MERIBEL ACEVEDO
c/o Kirk Claunch
301 W Central Ave.
Fort Worth, TX 76164
Petitioners,

v.

Petition for Writ of Mandamus
Case Code: 30952
Case No. 20-CV-

MILWAUKEE POLICE DEPARTMENT
749 West State Street
Milwaukee, WI 53233
Respondent.

PETITION FOR WRIT OF MANDAMUS

This is an action to enforce Wisconsin's Open Records Law, Wis. Stat. §§ 19.31-19.39. State law declares it the public policy of this state that every citizen is presumptively entitled to complete access to the records of the state and local government.

Petitioners, Jose Acevedo and Meribel Acevedo, hereby petition this Court for a writ of mandamus directing the Respondent, Milwaukee Police Department ("MDP"), to produce the 911 call and the police body camera video as requested by the Petitioners, and support thereof would show the following:

PARTIES

1. The Petitioners are individuals and residents of Milwaukee, Milwaukee County, Wisconsin. They are the parents of Jose Acevedo, deceased.

2. The Respondent is a department of the City of Milwaukee and has offices at 749 West State Street, Milwaukee, Wisconsin, 53233.

3. The Respondent is an "Authority" under Wis. Stat. §19.32(1).

FACTUAL BACKGROUND

4. At 7:28 a.m. on the morning of Sunday April 19, 2020, Milwaukee Police 911 dispatch received a call requesting police at 4502 W. Cleveland Ave., City and County of Milwaukee. Michael Mattioli made the 911 call and identified himself as an off-duty police officer who needed help at his house. (hereinafter referred to as the "911 call")

5. On the same 911 call another individual at the house identified by the initials "CP" told the 911 operator that help was needed because a man at the house was attacking them. CP identified that person as Joel Acevedo.

6. The length of the 911 call is 3 minutes and 35 seconds. The voice of Joel Acevedo can be heard in the background. Throughout the duration of the call distressed breathing and gasping can be heard. On the 911 call Joel Acevedo can be heard to say the words: "let me go home...."

7. In response to that call, Milwaukee Police Officer Robert Roach and Mark Sheremeta were dispatched at 7:34 a.m., to 4502 W. Cleveland Ave., and they were the first to arrive there. They arrived at the location, a single-family residence at 7:38 a.m.

8. Officer Roach was the first to enter the residence. At that time Officer Roach's body camera was recording the events. (hereinafter referred to as the "body camera video")

9. Upon entering the residence Officer Roach and Officer Sheremeta observed off-duty police officer Michael Mattioli straddling Joel Acevedo who was on the ground on his stomach. Joel Acevedo was not moving, his eyes were closed, and there were no signs of a struggle with Mattioli.

10. Officer Roach and Officer Sheremeta observed Mattioli's right arm underneath the neck area of Joel Acevedo in a rear naked choke hold. Mattioli's left hand was holding Joel Acevedo's head.

11. Joel Acevedo was taken to St. Luke's Hospital. He was listed in critical condition. He was unresponsive to outside stimuli and was on a ventilator. Joel Acevedo later died on April 25, 2020.

12. The Chief Medical Examiner performed an autopsy and reached a conclusion that the cause of death was "Anoxic Encephalopathy due to Traumatic Asphyxia" and ruled the death a homicide.

13. On May 13, 2020, a criminal complaint was filed against Michael Mattioli for First Degree Reckless Homicide. Attached as Exhibit A is a true and correct copy of the Criminal Complaint against Michael Mattioli.

PROCEDURAL BACKGROUND

14. On May 29, 2020, Jose and Meribel Acevedo, sent an open records request by and through their attorney, B'Ivory Lamarr, to the Respondent. A true and correct copy of that request is attached as Exhibit B.

15. The Petitioners requested police department records, specifically including but not limited to police officer bodycam video and the 911 audio call referenced above.

16. On June 1, 2020, the Respondent denied the request stating that the record requested was the subject of a pending internal investigation. In support of their denial, the Respondent cited Wis. Stat. §19.36 (10)(b) which says that “information relating to the current investigation of a possible criminal offense or possible misconduct connected with employment by an employee prior to the disposition of the investigation,” shall not be disclosed. A true and correct copy of the response from the Milwaukee Police Department is attached as Exhibit C.

17. In their June 1, 2020 denial letter, the Milwaukee Police Department said they were taking “extraordinary steps to maintain the integrity of the investigation while keeping the trust of the community.” (See Ex. C)

18. On Friday, July 10, 2020, the internal affairs division of the Fire and Police Commission of the City of Milwaukee completed their investigation and recommended disciplinary action against Michael Mattioli.

**CAUSE OF ACTION – VIOLATION OF §19.35(1)
Wrongful Denial of the May 29, 2020 Request for Public Information**

19. The preceding paragraphs are hereby incorporated and re-alleged as if fully stated herein.

20. The Petitioners bring this Writ of Mandamus specifically requesting immediate production of the 911 call and the police body camera video identified herein.

21. Under Wis. Stat. §19.31, it is the declared public policy of this state that every citizen is entitled to the greatest possible information regarding the affairs of government. The statute provides that—~~“[t]he denial of public access generally is contrary~~

to the public interest, and only in an exceptional case may access be denied, establishing a presumption of complete public access to government records, consistent with the conduct of government business.”

22. Wisconsin Statute §19.35(1)(a) and (b) provide that “any requester has a right to inspect any record” and “to make or receive a copy of a record.”

23. Wisconsin Stat. §19.32(2) defines a record as “any material on which written, drawn, printed, spoken, visual or electromagnetic information is recorded or preserved, regardless of physical form or characteristics, which has been created or kept by an authority.”

24. Under Wis. Stat. §19.35(4)(a), “[e]ach authority, upon request for any record, shall, as soon as practicable and without delay, either fill the request or notify the requester of the authority’s determination to deny the request in whole or in part and the reason therefor.”

25. The Respondent’s reliance upon Wis. Stat. §19.36(10)(b) as an excuse not to disclose the 911 call and the police body camera video is misplaced and without merit.

ARGUMENT and AUTHORITIES

Scope of Wis. Stat. 19.36(10)(b)

26. The Respondent has maintained that the 911 call and the police body camera video comprise information relating to the internal investigation of Michael Mattioli.

27. Specifically, Wis. Stat. §19.36 (10)(b) does not allow access to or disclosure of:

“Information relating to the current investigation of a possible criminal offense or possible misconduct connected with employment by an employee prior to disposition of the investigation.”

28. Wisconsin caselaw has held that an “Investigation” under subdivision (10)(b) includes only that conducted by the public authority itself as a prelude to possible employee disciplinary action. An investigation achieves its “disposition” when the authority acts to impose discipline on an employee as a result of the investigation, regardless of whether the employee elects to pursue grievance arbitration or another review mechanism that may be available. *Local 2489 v. Rock County*, 689 N.W.2d 644, 651 (Wis.App. 2004)

29. The Respondent has maintained that the 911 call and the police body camera video comprise information relating to the internal investigation of Michael Mattioli.

30. The Petitioners would show that the 911 call and the police body camera video should be released immediately for three reasons. First, the criminal investigation is complete by the criminal prosecuting authority. A complaint was filed on May 13, 2020. (See Ex. A) Second, the Respondent cannot show how disclosure would undermine the reliability of a follow-on disciplinary proceedings by Mattioli’s employer. Third, the salient parts of the 911 call and police body camera video have already been publically disclosed in the criminal complaint against Michael Mattioli. The substantive essence of the horrible events which are recorded on the 911 call and the police body camera video are already common knowledge to the general public.

The “Investigation” as to the Homicide is Complete

31. The criminal investigation as to the events on the morning of April 19, 2020 has been concluded. The District Attorney filed a complaint against Mattioli on May 13, 2020. For all practical purposes the criminal “investigation” was over at that point. The internal investigation was concluded by the Fire and Police Commission of the

City of Milwaukee on Friday, July 10, 2020 and recommended disciplinary charges against Michael Mattioli. The simple fact that the 911 call and body camera video are relevant to disciplinary proceedings by Mattioli's employer should not be a reason to prohibit their disclosure to the public. To be clear, for purposes of this writ of mandamus, the petitioner is only asking for the 911 call and the police body camera video. To allow follow on disciplinary procedures to drag on and delay disclosure of the 911 call and the police body camera video is obstructive.

No Harm to the Integrity of the Internal Investigation or Disciplinary Proceedings

32. The Respondent cannot show how disclosure of the 911 call or the police body camera video would harm upcoming disciplinary proceedings with Mattioli's employer. The Respondent has said it has taken extraordinary steps to ensure the *integrity* of the investigation. With regard to the *integrity* of the upcoming disciplinary proceedings, courts should consider the particular reason for non-disclosure in a given matter. The fact that the video depicts a strangulation does not by itself establish that disclosure would undermine the reliability of disciplinary proceedings by Mattioli's employer. A key consideration is whether investigators have interviewed the available, principal witnesses to the incident – namely, the witnesses on the scene who saw the strangulation. In a routine case, officers typically conduct those interviews and take statements within days of an incident.

33. The events which occurred on the morning of April 19, 2020 and the call and video depicting those events are the basis of the criminal complaint. The recordings at issue are to be considered as factual evidence, the same as an ordinary photograph. They do not comprise the work product of investigators. They are not part of Mattioli's

background or work history. There is nothing that can change what transpired on the 911 call or the video. By the simple fact that the call and video are nothing more than factual evidence, it stands to reason that the release of the 911 call and the police body camera video do not and cannot pose a threat to the integrity of the internal investigation or the upcoming disciplinary proceedings.

Common Knowledge

34. The fact that the Joel Acevedo was strangled to death by Michael Mattioli is already common knowledge to the public. Details of the strangulation as described in the criminal complaint against Mattioli already reveal the gruesome details of this horrific event. To allege that the release of the 911 call and the police body camera video over one month after the criminal complaint became public would somehow undermine the integrity of the internal investigation or the upcoming disciplinary proceedings is wholly without merit.

The Public Interest

35. The public interest in transparency favors disclosure. Non-disclosure of the 911 call and the police body camera video only serve to undermine confidence in law enforcement. The strong presumption favoring disclosure of public records “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.” *Kroeplin v. DNR*, 725 N.W.2d 286, 292 (Wis.App. 2006) quoting *Linzmeier v. Forcey*, 646 N.W.2d 811.

Balancing Test

36. Perhaps the real reason for the refusal to disclose the 911 call and the police body camera video is fear of public outcry especially in light of recent national events. In such situations, Wisconsin courts use the common law balancing test set forth in *Linzmeier*. The balancing test asks whether the public's interest in withholding what will be a very disturbing 911 call and body camera video, which some might argue could lead to civil unrest, outweighs the presumption of complete public access. *Zellner v. Cedarburg School Dist.*, 731 N.W.2d 240, 244 (Wis.2007)

Legal precedent from another jurisdiction

37. An opinion involving similar issues by the New Jersey Supreme Court is helpful to this analysis. In *New Jersey Media Group, Inc. v. Township of Lyndhurst*, 163 A.3d 887 (N.J. 2017), the New Jersey Supreme Court had to decide whether the disclosure of a dash-cam video showing police officer firing and killing a suspect after a high-speed chase was appropriate under New Jersey's Open Public Record Act while a pending investigation was underway. The New Jersey Supreme Court concluded that the danger to an ongoing investigation would typically weigh against disclosure of detailed witness statement and investigative reports while the investigation is underway. However, the New Jersey Supreme Court concluded that footage captured by dashboard cameras presented less of a risk and held that under the common law, the public's powerful interest in disclosure of that information, in the case of a police shooting, eclipses the need for confidentiality once the available, principal witness to the shooting have been interviewed. *Id.* at 892. See attached Exhibit D.

38. The New Jersey Supreme Court held that *"the fact that a video depicts a fatal shooting does not by itself establish that disclosure would undermine the reliability of an investigation."* *Id.*, at 907. The Court went on to say:

"The public's interest in transparency favors disclosure ...in matters of great public interest. Ready access to government records lies at the heart of OPRA. And in the case of a police shooting, non-disclosure of dash-cam videos can undermine confidence in law enforcement and the work that officers routinely perform. It can also fuel the perception that information is being concealed—a concern that is enhanced when law enforcement officials occasionally reveal footage that exculpates officer." *Id.*

The same underlying principles apply to the case at hand. The death of Joel Acevedo is of great public interest. Public interest in transparency also lies at the heart of Wisconsin's Open Record Law. In this case, the failure to produce the 911 call and the police body camera video will definitely undermine the public's confidence in law enforcement.

CONCLUSION

39. The criminal investigation of Michael Mattioli is complete. The internal investigation of Michael Mattioli is complete. Disclosure of the 911 call and the police body camera video will not harm the integrity of the upcoming disciplinary proceeding. However, failure to release the 911 call and video will certainly undermine public confidence in law enforcement at a time when public trust is needed the most. Accordingly, a writ of mandamus should issue against the Respondent compelling it to immediately produce the audio recording of the 911 call and the police body camera video made on the morning April 19, 2020.

RELIEF REQUESTED

WHEREFORE, Petitioners demand a writ of mandamus to issue against the Respondent under Wis. Stat. §19.37(1):

1. Compelling the Respondent to immediately produce the requested records;
2. Declaring the Petitioners' rights and limiting the Respondent's conduct with respect to the requested records;
3. Awarding the Petitioners punitive damages under Wis. Stat. §19.37(3);
4. Awarding the Petitioners their reasonable attorney fees, damages of not less than \$100, and other actual costs under Wis. Stat. §19.37(2), and;
5. Awarding such other relief as the Court deems appropriate.

Dated this 13th day of July 2020.

Electronically signed by Kirk Claunch
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