State of Wisconsin\Government Accountability Board

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Attorney Monica Riederer
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Dear Attorney Riederer:

You have requested a copy of the petition which has been submitted to our agency seeking the recall of Governor Scott Walker, in an electronic format. We are prepared to provide four disks containing the entire contents of the petition filed with the Government Accountability Board. Given that we have received numerous objections to releasing the names and/or addresses of individuals who have signed the petition, we must carefully consider your request in light of Wisconsin's Public Records Law. After doing so, we have determined that the G.A.B. will provide you with the entire contents of the recall petition as you requested, without redacting information identifying the name and address of specific individuals who signed the petition.

There is no question that the recall petitions submitted to our office are records which are subject to the Public Records Law, as defined by Wis. Stat. §19.32(2). Consistent with the Legislature's declaration of policy in Wis. Stat. §19.31, Wisconsin law presumes that governmental records shall be open to public inspection. "Except as otherwise provided by law, any requester has a right to inspect any record." Wis. Stat. §19.35.

No statute specifically states that recall petitions are either subject to public release or are exempt from public release, except to the extent that officeholders are entitled to the petition in order to assess the validity of signatures and determine whether petition signatures should be challenged. Wis. Stat. §9.10(3)(b). Also, no statutory provision specifically authorizes the G.A.B. to redact information from the petition prior to release to the officeholder, or prevents the officeholder from subsequently distributing the petition to others to assist with the challenge process.

With regard to the requests that the Board has received to redact individual names and addresses of petition signers, the Board must balance the strong public interest in disclosure of the entire recall petition against any public interest favoring nondisclosure of the individuals' names and addresses. *State ex rel. Journal Co. v. County Court*, 43 Wis.2d 297, 305 (1969). We must consider all relevant factors to determine whether permitting access to the entire petition would result in harm to the public interest that outweighs the legislative policy recognizing the strong public interest in allowing access. Wis. Stat. §19.35(1)(a). The Wisconsin Supreme Court has held that a records custodian must determine whether the particular circumstances surrounding a records request create an "exceptional case" not governed by the strong presumption of openness. *Hempel v. City of Baraboo*, 2005 WI 120, ¶63. An exceptional case exists when the circumstances are such that the public policy interests favoring nondisclosure outweigh the public policy interests favoring disclosure, *notwithstanding the strong presumption favoring disclosure*. Hempel at ¶63.

The Wisconsin Supreme Court has also noted that the private interest of a person identified in a record is only indirectly related to the balancing test; it is the public interest in redacting information which is directly relevant in the balancing test. If there is a public interest in protecting an individual's privacy as a general matter, there is a public interest favoring the protection of the individual's privacy interest. *Linzmeyer v. Forcey*, 2002 WI 84, ¶31. Therefore, as part of the balancing test, the Board must weigh public policies that can be identified through their expression in other areas of the law or that may be practical or common sense reasons applicable in the totality of the circumstances. Because the requests from individuals requesting redaction of their names and addresses affect our response to your records request, we must evaluate any relevant public policies and practical or common sense reasons that apply to the circumstances of those individuals.

The redaction requests we have received fall into three general categories:

1. Individuals who are concerned that public release of their names and addresses will subject them to harassment and threats from people who disagree with the political position expressed in the recall petition.

2. Individuals who are concerned that public release of their name, address, and signature will subject them to greater potential for identity theft.

3. Individuals who have indicated they are victims of past domestic abuse or violence and fear for their personal safety if their address location is disclosed to the public. They have expressed concern that disclosure of their address will undo all of their efforts to protect themselves and their children from prior abusers and will result in additional harassment, threats, abuse, and physical harm.

In the Board's opinion the greatest claim to privacy can be made by the last category – individuals who have been victims of domestic abuse or violence, and that claim will be addressed below. A recent U.S. Supreme Court decision more directly addressed the first category of individuals, and that decision is also relevant to our analysis of the other two categories.

In *Doe v. Reed*, 130 S. Ct. 2811 (2010), the U.S. Supreme Court held that public disclosure of referendum petitions does not as a general matter violate the First Amendment. In that case the plaintiffs had circulated a petition seeking the repeal of a law which expanded the rights and responsibilities of state-registered domestic partners, including same-sex domestic partners. After the State certified the petition as sufficient, several petition signers sought a court injunction to enjoin the public release of the petition, arguing that there is a reasonable probability that the signatories would be subjected to threats, harassment, and reprisals due to the political position expressed in the petition.

Without outlining a detailed analysis of the factual and legal issues involved in the *Doe* case, the Board believes that the Court's decision governs our actions regarding release of names and addresses of individuals in the first category described above. In addressing the plaintiffs' argument that Washington's Public Records Act violated the First Amendment, the Supreme Court noted that the law was not a prohibition on free speech, but a disclosure requirement. As such, proceeding under the law's mandate to publicly disclose the referendum petition required the government to document a substantial relationship between the disclosure requirement and a

sufficiently important governmental interest. *Doe* at 7. By way of comparison, the Court noted the constitutionality and significance of disclosure requirements in the context of campaign finance laws. *Doe* at 6-7.

For several reasons, the Court found that the State's interest in preserving the integrity of the electoral process was sufficient to defeat the plaintiffs' argument that Washington's Public Records Act was unconstitutional with respect to referendum petitions in general. Those reasons included not only detecting potential fraud but also detecting simple mistakes in the petition-gathering or in the State's review of the petition, such as detecting duplicate signatures or signatures of individuals who claim to have been deceived by the petition circulator. *Doe* at 8-9. Significantly, the Court stated that the State's interest also extends more generally to promoting transparency and accountability in the electoral process in ways that other measures cannot. *Doe* at 10.

The plaintiffs in the *Doe* case argued that, once the State posted the petitions on the Internet, the petition signers' names and addresses could be combined with publicly available phone numbers and maps to effectively create "a blueprint for harassment and intimidation." *Doe* at 11. The Court held that in general the public release of a referendum petition does not violate the First Amendment, and that the plaintiffs would need to demonstrate a reasonable probability that the government's disclosure would result in threats, harassment, or reprisals from government officials or private parties. *Doe* at 11. The facts necessary to support such a conclusion had not been established at that stage of the lawsuit but the Court noted that the plaintiffs would have the opportunity to present such evidence before the trial court.

Regarding the first category of petitioners listed above and applying the balancing test of the Public Records Law, it is the Board's opinion that the Supreme Court's decision in *Doe v. Reed* requires a release of the full petition contents pursuant to Wisconsin's Public Records Law. The petition contains the signer's printed name, signature, and address as well as the date of the signature. Most, but not all, of the petition pages omit other personal information such as telephone numbers or email addresses, because the petitioning committee attempted to cut it off from the petition pages prior to their submission to our office.

Wis. Stat. §19.35(1)(a) states that "Except as otherwise provided by law, any requester has a right to inspect any record." There is a strong public interest in releasing all of the information contained on the recall petition in that it may assist in detecting potential fraud and mistakes in the petition or the Board's review of the petition. It will also promote transparency and accountability in the electoral process by permitting individuals from both sides of the recall debate to assess the sufficiency of the petition for themselves and therefore evaluate the Board's determination of whether a recall election must be called.

In reviewing the requests of those petition signers concerned about harassment or retaliation due to their political views, we have not identified or received information that meets the "reasonable probability" standard described in the *Doe* decision, to the extent that such concerns outweigh the substantial public interests in releasing the entire contents of the recall petition submitted against Governor Walker. We have also not identified any State public policies expressed in other areas of Wisconsin law or based upon common or practical sense which elevate the harassment concerns of the individual petition signers above the public interest in disclosure. Petition signers have voluntarily chosen to participate in the political process in a public manner. No expectation of privacy is implied or justified under the Statutes when an individual chooses

to sign a public recall petition rather than simply expressing that conviction in the privacy of the voting booth.

The second category of petition signers who have contacted our office have expressed concerns regarding increased potential for identity theft due to their names, addresses and signatures being made public by the G.A.B. It is again worth noting that these individuals made the deliberate choice to engage in the recall process and the face of the petition makes clear that to do so requires submitting their name, address and signature to a governmental agency. Neither the petitions nor any pronouncement of the Board provide an indication that the signers' information would remain confidential once submitted to the Board. To the contrary, the Board's practice during the 2011 recalls established the Board's policy of making the petitions available to the public and posting them online. In addition, information disseminated by the Board as well as reported by the media described the process by which petition information would be reviewed by the officeholder to determine whether and which challenges to file.

The fact that the officeholder has a right to the information and may make it publicly available as part of the challenge process also weakens the argument for the G.A.B. to withhold the same information. *Milwaukee Journal Sentinel v. Wisconsin Dep't. of Admin.*, 2009 WI 79, ¶61. Because names and addresses of individuals are also widely available through other public sources such as government databases or telephone directories, the main concern of this group of signers appears to be the public release of signatures as a way to enable identity theft.

We acknowledge that other areas of Wisconsin law illustrate some concern that the government should minimize the risk that its information might be used to commit identity theft, or to generally protect the privacy of citizens. For instance, individuals may opt out of having their personal information disclosed by the Department of Motor Vehicles in information containing personal identifiers of ten or more individuals. Wis. Stat. §85.103. Residents may also register for the State's "Do Not Call" list to avoid receiving unsolicited telemarketing calls from businesses (although calls for political purposes are exempt from this restriction). Wis. Stat. §100.52.

The existence of these statutory provisions, however, contrasts with the Statutes' silence regarding the ability of the G.A.B. to withhold the name, address, or signature of an individual who signed a recall petition. In addition, the focus of the petition review process is centered on the signature of the petitioners. Therefore the generalized concerns of individuals who have voluntarily signed a recall petition regarding identity theft cannot outweigh the public interest in evaluating the Board's review of the recall petition, permitting a proper opportunity for officeholder challenges, and promoting transparency and accountability in the electoral process.

Finally, we analyze the category with arguably the most legitimate plea for privacy received by the Board, from individuals who have previously endured domestic abuse or violence and who have taken steps to shield their current location from their perpetrators. Board staff has heard from a number of individuals who have described the extent to which they have tried to protect themselves and their children from harm, which they fear will be undone by the G.A.B.'s release of the petition which does not redact their names, or at least their addresses. Hearing a petition signer state that a past abuser is subject to a court restraining order but would not hesitate to comb through one million signatures to find one address and cause serious injury or even death creates a legitimate concern, to say the least. No agency would desire to be connected to such an

outcome, however inadvertently, and we trust that Wisconsinites as a whole would not wish that result on any individual, regardless of political persuasion.

In conducting the balancing test under the Public Records Law, the Board recognizes other provisions of Wisconsin law as well as practical and common sense reasons which might justify the G.A.B. redacting the names and/or addresses of such individuals. For example, Article I, §9m of the Wisconsin Constitution states that crime victims should be treated with "fairness, dignity, and respect for their privacy." The election laws themselves create the closest parallel, in that Wis. Stat. §6.47 provides certain privacy rights to victims of domestic abuse, sexual assault, or stalking. Such individuals may file documentation with a municipal clerk verifying that another person has been charged with or convicted of such an offense in which the individual was a victim and reasonably continues to be threatened by the other person. In such cases the municipal clerk must withhold the name and address of the individual from public inspection of the poll list or voter registration list. Wis. Stat. §6.47(2).

Significantly, however, the Statutes do not extend a similar right with regard to names and addresses contained on a recall petition. Whether due to oversight or a recognition that the choice to sign a recall petition is different in nature than the private act of voting, the fact remains that the Legislature did not establish a specific right to protect information on a recall petition pertaining to a confidential voter.

More generally, Wis. Stat. §995.50 recognizes the right of privacy in Wisconsin, including the right to recover compensatory damages and seek equitable relief to prevent an unreasonable invasion of privacy. But that statute specifically states that "It is not an invasion of privacy to communicate any information available to the public as a matter of public record." Wis. Stat. §995.50(c). The Attorney General has also opined that the right to privacy does not affect the duties of custodians of public records to maintain and deliver official records. 68 Atty. Gen. 68.

Wis. Stat. §19.35(1)(am)3. also provides that the right to inspect or copy a record under that paragraph does not apply to any record containing personally identifiable information that, if disclosed, would endanger an individual's life or safety. That provision, however, applies only when a requester seeks to inspect a record containing personally identifiable information pertaining to the requester as well as information which would endanger another person's life or safety. It does not appear to apply to your request on behalf of an organization which does not have personally identifiable information contained in the record which is sought.

It is not difficult, therefore, to find indications where Wisconsin statutes and case law express some public policy in favor of privacy and redacting information that might endanger an individual identified in the record. Common sense also indicates that individuals with hostile or criminal motives would have an easier time locating a prior victim if the G.A.B. allows the public release of an entire recall petition rather than redacting specific information as requested by victims of domestic abuse or sexual assault. The Supreme Court decision in *Doe v. Reed* did not specifically address this circumstance where the anticipated harassment or threats arose from the personal circumstance of the petition signer rather than from the political position expressed by the petition.

The difficult question is whether the public interest favoring nondisclosure of such information outweighs the strong public interest in disclosure of the entire recall petition. We believe it is relevant that our release of the entire petition in response to public records requests, as well as our posting of it on the Internet, would be in the form of pdf files which are not automatically or

electronically searchable. Unless the individual requesting redaction of information is able to pinpoint the page number and line number of the petition containing their name, it would be a difficult chore for the G.A.B. staff to locate that information. At this time it is not a practical possibility to locate individual signatures on the petition.

We also note that the Board may create and post a database which is searchable electronically further along into our process, but that database would contain only the signer's name, without the address or any other contact information. Therefore, no contemplated action of the G.A.B. would permit an individual to easily or electronically search for a petition signer's name and obtain that person's address.

We are aware that other organizations, possibly including your clients, may wish to create their own searchable databases to be made available to the public, and the G.A.B. cannot control the dissemination of that information unless it firsts redacts names or addresses pursuant to individual requests. There are no statutes which contemplate the Board entertaining such requests or providing a time period that they may be submitted prior to fulfilling a public records request or making the information available on the Internet. To the contrary, Wis. Stat. §9.10(2)(d) states that "After the recall petition has been offered for filing, no name may be added or removed."

Based upon the information that has been submitted to our agency to date, in light of the public's right to timely access to public records, and especially given the short statutory timeline for the G.A.B. to review the recall petition, we do not believe it is a practical or prudent option to delay release of the petition in order to locate and possibly redact individual names or addresses

Weighing all of these concerns and public interests, we have concluded that the balancing test of the Public Records Law favors disclosure of the entire recall petition without redaction of information on a recall petition, even when individual signers have expressed a concern arising from prior abuse or violence committed against them by a person who is now subject to a restraining order. During recall elections in 2011, the Board posted the entire petitions in pdf format on its website, and has followed the same practice with the recall petitions currently pending against four State Senators.

Few processes in the electoral system or elsewhere are more public than the signing of recall petitions against state elected officials. Petition signers chose to participate in the public process of initiating a recall election of the Governor as well as other officeholders, and any concerns regarding their personal safety and privacy may not have been considered when signing a petition. In addition, officeholders and the public have a right to view the petitions, not only for the legal process of filing challenges to signatures, but to help ensure the transparency and accountability of the petition review process, and of Wisconsin's electoral system. Absent a court order requiring redaction of specific information, therefore, the G.A.B. intends to respond to your request by providing the entirety of the recall petition filed against the Governor.

The petition is contained on four disks and the cost is $10 per disk. Please contact Michael Haas at 608-266-0136 or michael.haas@wi.gov to discuss arrangements for delivery of this record.

Government Accountability Board

Kevin J. Kennedy
Director and General Counsel