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FOR IMMEDIATE RELEASE

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**Office of Open Government Advisory:
Marsy's Law and Public Records**

MADISON, Wis. – The Wisconsin Department of Justice's (DOJ) Office of Open Government (OOG) has prepared the following advisory in response to inquiries as to the applicability of Wisconsin's public records law, Wis. Stat. §§ 19.31 to 19.39, in light of Marsy's Law, the constitutional amendment to Article I, section 9m, of the Wisconsin Constitution, which created additional rights and protections for crime victims in Wisconsin. This advisory is provided pursuant to Wis. Stat. § 19.39 and does not constitute an informal or formal opinion of the Attorney General pursuant to Wis. Stat. § 165.015(1).

Both Marsy's Law and Wisconsin Statutes Chapter 950 ensure that the rights of crime victims are protected. Ensuring public access to records also remains essential. As explained below, except where disclosure is mandated or barred by statute or common law, records custodians and authorities must continue applying the public records law balancing test when responding to public records requests for records that contain information about crime victims. In conducting that balancing test, however, records custodians and authorities should bear in mind that the amendment of the Wisconsin Constitution to incorporate Marsy's Law strengthened the already-significant public policy interest in protecting victims' rights.

Responding to Public Records Requests Generally

Records are presumed to be open to public inspection and copying, but there are exceptions. Wis. Stat. § 19.31. Requested records fall into one of three categories: (1) absolute right of access; (2) absolute denial of access; and (3) right of access determined by the public records law balancing test.

Under the third category, if neither a statute nor the common law requires disclosure or creates a general exception to disclosure, the records custodian must decide whether the strong public policy favoring disclosure is overcome by some even stronger public policy favoring limited access or nondisclosure. This balancing test determines

whether the presumption of openness is overcome by another public policy interest. If a records custodian determines that a record or part of a record cannot be disclosed, the custodian must redact that record or part of that record. *See* Wis. Stat. § 19.36(6).

Rights of Crime Victims Under Marsy's Law and Wisconsin Statutes

Under Marsy's Law, the Wisconsin Constitution provides crime victims the right to privacy, as well as the right to be treated with dignity, respect, courtesy, sensitivity, and fairness. These rights are now self-executing. Wis. Const. art. I, § 9m(3). Wisconsin Statutes Chapter 950, in existence before Marsy's Law, also continues to confer and effectuate victims' rights, further emphasizing the importance of privacy rights of victims, which must be honored vigorously by law enforcement agencies and other authorities. *See* Wis. Stat. §§ 950.04(1v)(ag), (1v)(dr).

The privacy rights codified under the crime victims' bill of rights in chapter 950 do "not impair the right or duty of a public official or employee to conduct his or her official duties reasonably and in good faith." *See* Wis. Stat. § 950.04(1v)(ag). Further, the statutory right of a victim to "not have his or her personal identifiers . . . used or disclosed by a public official, employee, or agency" applies to uses that are "unrelated to the official responsibilities of the official, employee, or agency." *See* Wis. Stat. § 950.04(1v)(dr).

Prior to the passage of Marsy's Law, the Attorney General [opined](#) that the rights set forth above do not prohibit law enforcement agencies or other public entities from disclosing personal identifiers of crime victims in response to public records requests, because those duties are related to the official responsibilities of those records custodians. As discussed below, records custodians must now analyze public records requests in light of the changes that Marsy's Law has made to the Wisconsin Constitution.

Required Duties of Public Officials Under the Public Records Law

The constitutional provisions of Marsy's Law and the statutory provisions in Wisconsin Statutes Chapter 950 do not create an absolute denial of access to information about victims contained in records. Rather, in the absence of other exemptions or laws barring the release of such records and information, records custodians and authorities must continue to apply the public records law balancing test.

In applying the balancing test, records custodians should be mindful that the victims' rights set forth in Marsy's Law are established in the Wisconsin Constitution and are now self-executing, thereby strengthening public policies that, in some instances, might favor more limited access or nondisclosure of records or information. In other instances, the presumption of complete access to records and the strong public policies favoring disclosure may still outweigh the privacy interests in nondisclosure.

Public Records Law Balancing Test Considerations Under Marsy's Law

As stated above, under the public records law balancing test, records custodians must determine whether the strong public policy favoring disclosure of records is overcome by some even stronger public policy favoring limited access or nondisclosure. An exhaustive list of policies or factors to consider under the balancing test is not possible, as each and every record must be analyzed on its own, on a case-by-case basis, considering the unique circumstances of each record. However, under Marsy's Law and Wisconsin Statutes Chapter 950, public policies favoring nondisclosure may include:

- Protecting the privacy of victims by avoiding any unnecessary public attention or possible harassment of victims;
- Affording dignity, respect, courtesy, and sensitivity to victims by minimizing victims' further suffering, exploitation, re-traumatization, and re-victimization;
- Protecting the confidentiality of victims' personally identifiable information and contact information when necessary to afford victims reasonable protection from the accused or to ensure victims' safety;
- Preventing any economic, physical, or psychological effects upon victims that release of records or information might cause; and
- Facilitating victims' cooperation with the investigation and prosecution of crimes.

Again, the presence of one or more policy favoring nondisclosure will not always justify withholding or redacting records. Further, in addition to the strong public policy favoring disclosure, there may be other factors in a particular case that favor disclosure. Taking all of these factors into account, records custodians must apply the balancing test to the facts of a particular case to determine whether disclosure is appropriate.

Frequently Asked Questions (FAQs)

Q: *Can an authority withhold all records or redact all information pertaining to victims?*

A: Generally, no. Authorities cannot create a bright-line rule or policy to withhold all victim records and information. Authorities must still apply the public records law balancing test to each and every record, on a case-by-case basis, to determine whether to release the records or information. As discussed above, the balancing test will determine whether the presumption of openness is outweighed by another public policy interest.

Q: *Can an authority redact information about victims of violent or sensitive crimes and release information about less serious crimes?*

A: Neither the public records law nor Marsy's Law makes a distinction between types of crimes or types of victims. Therefore, based on the definitions of "victim" and "crime" set forth in Wis. Stat. §§ 939.12 and 950.02(4)(a)1., authorities must determine whether crime victim information is contained in records.

However, public policies evident elsewhere, including in other statutes and case law, make clear that there will often be heightened privacy interests, which should be afforded more weight under the balancing test, in cases involving victims of violent or sensitive crimes. Child victims are also afforded additional rights and protections under Wisconsin Statutes Chapter 950. Where relevant, those public policies must be considered under the balancing test.

Q: *Do the protections for victims apply when the "victim" is a company?*

A: Under Marsy's Law, the definition of "victim" is limited to "persons," but "persons" is not defined. The definition of "victim" in Wis. Stat. § 950.02(4)(a) also refers to a "victim" as a "person." The statutory definition of "person," in turn, "includes all partnerships, associations, and bodies politic or corporate." *See* Wis. Stat. § 990.01(26). Accordingly, the statutory protections for victims do apply—and Marsy's Law's constitutional protections are highly likely to apply—when the "victim" is a company.

When applying the public records balancing test, however, the interest in protecting victim privacy will typically weigh less heavily in the balancing test when the victim is a company as compared to when the victim is a human being. For example, while there may be strong public policies favoring nondisclosure of a human being's address, those policies are extremely unlikely to support nondisclosure of the address of a company that takes steps to make its location known to the public.

Q: *Are victims entitled to notice that an authority is releasing records pursuant to a public records request? Do victims have the right to object to release of records?*

A: Generally, a "record subject" is not entitled to statutory notice of, and therefore does not have a statutory right to object to, a records release, except in limited circumstances. *See* Wis. Stat. § 19.356. Further, the definition of "record subject" only applies to an "individual about whom personally identifiable information is contained in a record." *See* Wis. Stat. § 19.32(2g).

However, in many circumstances, providing notice to victims will further the public policies reflected in Marsy's Law and the crime victims' bill of rights in chapter 950. Therefore, as a best practice, authorities should consider providing courtesy notice to victims when appropriate, and giving victims an opportunity to discuss their

concerns, before releasing records containing personally identifiable information about victims. Authorities should take this into account in their processes for responding to public records requests so that appropriate notice may be provided while still fulfilling the statutory requirement to fill or deny requests “as soon as practicable and without delay.” See Wis. Stat. § 19.35(4)(a).

Hypotheticals

An authority’s records custodian must conduct the public records balancing test on a case-by-case basis considering the circumstances of each record. Below are some hypothetical scenarios and possible balancing test considerations for each, although these considerations are not exhaustive. These hypotheticals are for illustration purposes only.

- *Situation #1: An authority receives a public records request seeking a law enforcement report concerning a sexual assault. The report includes the victim’s name, the victim’s home address, and details about the victim’s injuries.*

In applying the balancing test, the authority’s records custodian could consider the serious and sensitive nature of the crime, the effects the public release of certain sensitive details would have on the victim, and the victim’s continued cooperation with law enforcement, among other factors. If the records custodian determines that release of personally identifiable information or sensitive details about the victim, the victim’s home address, or the victim’s injuries would adversely impact the victim, the authority may decide to redact such information from the publicly released records if the records custodian concludes that the public policies favoring nondisclosure of that information outweigh the presumption of access to that information, based on those facts.

- *Situation #2: A requester submits a public records request to an authority seeking investigative records related to an armed robbery. The records include an interview of the victim. Later, the victim appeared on the local television news and recounted the victim’s experience.*

Among other factors, a records custodian could consider the nature of the crime, protection of the victim’s safety, and respect for the victim’s privacy. In applying the balancing test, the records custodian could conclude that, because the victim spoke publicly and voluntarily about the crime and the victim’s experience, the public policies favoring non-disclosure do not outweigh the presumed public interest in the release of certain information concerning the victim’s identity or the information the victim discussed on the news.

- *Situation #3: Someone broke into a closed gas station overnight and stole a number of items from its convenience store. An authority received a public records request for the investigative records, which name the gas station and its location.*

Under the balancing test analysis, the records custodian could consider the circumstances of the crime, including the lack of employees present, and respect for the victim's privacy, among other factors. Applying the balancing test, the records custodian could determine that any impact to the victim's privacy interests from disclosure would be minimal given that the gas station's location would be widely known and that, on balance, the release of the name and location of the gas station would not negatively impact the victim to an extent that outweighs the strong public interest in favor of disclosure.

Additional information about Marsy's Law can be found on the website for DOJ's Office of Crime Victim Services, available [here](#). If you have questions or concerns regarding the application of the public records law, please contact the Office of Open Government's Public Records-Open Meetings help line at (608) 267-2220 or via email at opengov@widoj.gov.