UNDER SEAL

STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

ERIC O'KEEFE, and WISCONSIN CLUB FOR GROWTH, INC., individually and on behalf of others similarly situated,	)	
Plaintiffs,	)	**Civil Case No. 14CV01139**
v.	)	**Case Code 30701**
WISCONSIN GOVERNMENT ACCOUNTABILITY BOARD, and	)	**Branch 5**
KEVIN J. KENNEDY, in his official capacity,	)	
Defendants.	)	

PLAINTIFFS' REPLY IN SUPPORT OF THEIR NOTICE OF CHALLENGE TO CONFIDENTIALITY DESIGNATIONS AND MOTION TO MODIFY PROTECTIVE ORDER

Plaintiffs Eric O'Keefe and Wisconsin Club for Growth, Inc. (collectively, the "Plaintiffs") submit this Reply in support of their notice of challenge to confidentiality designations and motion to modify the protective order.

I. INTRODUCTION

In their Response, Defendants do not dispute that they bear the burden of sustaining their confidentiality designations and showing good cause for their proposed sealing and redactions. Nor could they. Defendants stipulated to a proposed protective order—entered by this Court on good cause—that assigned them this burden. Defendants also stipulated, and this Court found, that if any information was kept confidential, it would have to be on one of three bases. For that reason, any designation would have to specify which of these three bases supported

confidentiality. Yet having originally urged this Court to assign this burden, Defendants have continually ignored it. At the time they made specific designations, they failed to identify the basis supporting each one. And now, having been challenged on this point in Plaintiff's first brief, Defendants still ignore it: they refuse to specify which of the three permissible bases for confidentiality apply to each of the specific documents they seek to redact or seal. .

What is more, Defendants invent at least two entirely new reasons for confidentiality: a murky "materiality" test and an implied assertion that some (but not all) GAB staffers or contractors should not be named. The brand-new "gatekeeping test of materiality" is most troubling; Defendants strategically employ it at the last minute to shift the burden of analysis to the Court, absolving Defendants of their duty to squarely respond to the Motion and identify—the specific legal basis justifying each claim of confidentiality. For various reasons, the test is unworkable. It demands continual re-analysis of the merits in piecemeal fashion, and in practice allows Defendants to simply hand-pick the documents and deposition excerpts they would prefer remain hidden from the public. (As shown below, there is no other explanation for the motley assortment of designations in Defendants' revised proposal.) More fundamentally, "materiality" as a limitation on public access and speech has no basis in Defendants' original stipulation, this Court's protective order, logic, or the law.

Continued secrecy serves no purpose other than to prevent Wisconsin taxpayers from understanding the inner workings of their government. It insulates government officials from embarrassment during a time when their actions and mission are under intense public and legislative scrutiny. In a democracy, this is intolerable. This Court can and should avoid this result by granting Plaintiffs' requested relief.

II. DEFENDANTS FAILED TO MEET THEIR BURDEN TO JUSTIFY THEIR CHALLENGED CONFIDENTIALITY DESIGNATIONS UNDER THE PROTECTIVE ORDER

Wisconsin public policy strongly favors open government. "[T]he people have not only the opportunity but also the right to know what the government is doing and to monitor the government." *Milwaukee Journal Sentinel v. City of Milwaukee*, 2012 WI 65, ¶ 4, 341 Wis. 2d 607, 612 (2012); *see also* Wis. Stat. § 19.31 ("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."). While the Protective Order in this case recognizes that three specific statutory confidentiality provisions may be implicated, it puts the burden on the producing party to specify which basis justifies confidentiality. This process is consistent with the pronouncement of Wisconsin courts that "statutory privileges interfere with the trial court's search for the truth and are to be construed strictly and narrowly." *State v. Denis L.R.*, 2004 WI App 51, ¶ 12, 270 Wis. 2d 663, 671 (Wi. App. 2004); *see also Franzen v. Children's Hosp.*, 169 Wis. 2d 366, 386, 485 N.W.2d 603 (Wi. App. 1992).

The Protective Order requires that "all designations must be made in good faith and state under the designation whether the confidentiality arises from '§ 12.13(5),' '§ 5.05(5s) and § 12.13(5),' or the 'Secrecy Order.'"). *See* Protective Order, ¶ 7. It also requires that "the party asserting the designation of confidentiality carries the burden of demonstrating that the designation is appropriate". *Id.* at ¶ 8. Defendants have failed to meet that burden.

A. Defendants Failed to Specify the Basis for Their Confidentiality Designations and Redactions, Which Lack Any Reasoned Basis

Defendants attached as Exhibit 1 to their Response an index to Plaintiffs' challenged set of documents submitted to this Court for in-camera review, along with a copy of the challenged set annotated with Defendants' additional redactions. "SEALED" watermarks covered the vast majority of documents. Defendants helpfully undertook the additional task of creating an index listing how Defendants initially designated each document (confidential, redacted in part, sealed). But incredibly, nowhere in the Response or Exhibit 1 do Defendants specify *which basis* under the Protective Order justifies continued confidentiality for the challenged documents. *See* Protective Order, ¶ 7 ("all designations must be made in good faith and state *under the designation* whether the confidentiality arises from '§ 12.13(5),' '§ 5.05(5s) and § 12.13(5),' or the 'Secrecy Order.'") (emphasis added). Simply calling a document confidential, redacting a portion, or covering it with a watermark that reads "SEALED"—is insufficient. Defendants have failed to provide Plaintiffs and the Court with the specificity required by the Protective Order. And critically, they avoided complying with the Protective Order not only when they made their initial designations many weeks and months ago, but also in their Response, after Plaintiffs had challenged their failure to be specific. Defendants have kept their argument general for a good reason: if they were forced to tie a specific legal principle to a specific redaction, the flaws in their designations would be transparent.

Beyond Defendants' failure to specify the basis for their designations, Defendants propose redactions for several reasons not contemplated by the Protective Order. *See* Affidavit of Paul Schwarzenbart at 4 (listing several reasons for redactions other than the three bases in the Protective Order, including that redactions are necessary to exclude "names of other persons the disclosure of which is not essential to the issues in this matter..."). Defendants' proposed

redactions in Exhibit A lack any legal, logical basis or consistency. Instead, they focus on materials that are particularly damaging to GAB's theory of the case. They show that rather than standing aside from the John Doe investigation, providing expert campaign finance to prosecutors, senior GAB officials were fully committed to a prosecution. GAB kept its team of hired lawyers and investigators to a close-knit circle of politically sympathetic confidantes. GAB staffers and contractors simply worked as line prosecutors and law enforcement, not on campaign finance-related tasks, and as a result, were badly out of their depth. They were motivated by ideological bias—not professionalism. More fundamentally, the materials are simply embarrassing, and likely to provide further support for legislative efforts underway to fix the GAB. These worries, of course, are not legal bases for redaction, and as discussed below, actually militate in favor of public disclosure and debate.[1]

A few examples paint the picture. Defendants demand redaction of the following information and statements in Exhibit A (Defendants' Attachment 1)[2]:

- Pages 14-15, Milwaukee County DA & GAB Meeting Notes
  - Defendants seek to redact list of names of possible special prosecutors considered by the GAB, including the [redacted]
- Pages 26-28, Board Meeting Minutes
  - In addition to redacting the discussion of the [redacted] Defendants seek to redac[redacted]

[1] In addition to the relevance of these materials to this case and to the current public and legislative debate about the GAB, the redactions are also largely useless. Many of the proposed redactions or sealings seek to limit disclosure of information that is either already public or referenced in Plaintiffs' First Amended Complaint.

[2] In advance of the hearing set for this Motion, Plaintiffs will submit to the Court a copy of the challenged set of documents that shows Defendants' proposed redactions and sealings, as Defendants' Attachment 1 obscures the material Defendants propose to redact.

- Pages 42-45, Email Titled "Release of Rindfleisch Email"
  - Defendants seek to seal correspondence mentioning [redacted]
- Page 56, Email Titled "Discussion with Lawyer for Eric O'Keefe and Wisconsin Club for Growth"
  - Defendants seek to seal information about discussion with Todd Graves, counsel for Plaintiffs in this action
- Page 72, Email Titled "Do you want a copy of the brief draft?"
  - Defendants seek to seal a variety of staff comments in an email to the special prosecutor, including discussions [redacted]
- Page 80, Email titled "A few Thoughts"
  - Defendants seek to seal an email stating, [redacted]
- Page 82, Email from GAB investigator titled "GAB"
  - Defendants seek to seal [redacted]
- Page 83, Email titled "RE: Fwd John Doe Decision"
  - Defendants seek to seal correspondence stating [redacted]
- Page 101, Email Titled "Order re Extension Request"
  - Defendants seek to seal an email which states, [redacted]
- Page 102-103, Estimated Budget for GAB Case 2013-02
  - Defendants seek to seal budget for GAB investigation

- Page 108-110, Email between GAB staff members titled "Fwd: Petition for Supervisory Writ"
  - Defendants seek to redact three pages worth of comments and complaints about the agency and the investigation's organization and operations

- Page 116, Memo on Investigation Procedures Prepared for Board Meeting
  - Defendants seek to redact the names of twelve persons considered by the Board for hire as potential investigators, along with the names of four investigators the Board did hire for work on the investigation

- Page 142-144, Email titled "Re: press statement"
  - Defendants seek to redact GAB staff counsel's statement to special prosecutor that: [redacted]

- Page 145, Email titled Re:"
  - Defendants seek to redact GAB staff counsel's statement to special prosecutor that [redacted]

- Page 171-72, Public Letter from Judge Nichol to Speaker Vos:
  - Defendants seek to redact Judge Nichol's statement that, "I am writing to you today about your inaccurate comments broadcast on NBC15."

Each item in the challenged set—and many others not submitted by Plaintiffs for *in-camera* review—provides vital context and support for Plaintiffs' claims. Taken together with the testimony of fourteen witnesses and the 42,000-plus pages of documents produced in discovery in this case, each challenged document in its unredacted form helps paint a complete picture of an agency acting outside its statutory authority by participating in and funding a John Doe investigation. The lack of consistency in Defendants' jumble of proposed redactions suggests that its statutory argument cannot be correct, and that the GAB confidentiality statute and the John Doe secrecy order have not actually supplied the guiding principle for Defendants' proposed redactions. The proposed redactions and sealings further illustrate how Defendants have failed to carry their burden under the Protective Order of showing that either the GAB

secrecy statute or the John Doe Secrecy Order provides a basis to prevent Plaintiffs from disclosing or publicly filing discovery obtained in this matter.

B. Defendants Failed to Meet Their Burden to Show That the GAB Secrecy Statute Bars Disclosure by Plaintiffs

Defendants' designations rely on the faulty theory that the statute barring the GAB's disclosures also applies to Plaintiffs. Defendants state generally that "the information at issue consists of GAB records that relate to an investigation," before quoting the GAB secrecy statutes and suggesting that a violation of § 12.13(5) would result in criminal penalties. *See* Defs.' Resp. at 3, 5-6. According to Defendants, § 12.13(5) allows *them* to present information to the Court in public filings to "defend against the plaintiffs' claims," *see* Defs.' Resp. at 6, but Plaintiffs are barred from publicly filing information related to the prosecution of their claims—information that they lawfully received from Defendants in the course of discovery.[3] The Court should reject this strained reading of § 12.13(5), just as it rejected similar arguments made by Defendants in December 2014 in favor of sealing the redacted First Amendment Complaint.

The GAB secrecy statute does not prevent Plaintiffs from publicly filing documents Defendants lawfully produced under the protective order. As this Court recognized during the December 5, 2014 hearing on the public filing of the redacted amended complaint, the GAB secrecy statute at Wis. Stat. § 12.13(5) only applies with respect to disclosure *by the GAB*; by its plain text, it does not apply to disclosure by the parties subject to investigation.[4] A plain reading of the statute shows that GAB secrecy is not absolute:

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[3] Under this reading, Defendants alone would have the discretion to determine what is, and is not, worthy of being publicly filed. Even if Defendants believe this is a proper interpretation of the statute's discussion about "presentation of the information or record in a court of law," nothing in the statute vests sole discretion as to what may be filed on any one party.

[4] In their motion to file a redacted copy of the First Amended Complaint in the public file, which this Court granted after a hearing on December 5, 2014, Plaintiffs objected to Defendants' overbroad designations of confidentiality, noting that "the great bulk of materials designated as 'Confidential' are

(5) UNAUTHORIZED RELEASE OF RECORDS OR INVESTIGATORY INFORMATION.

(a) Except as specifically authorized by law and except as provided in par. (b), no investigator, prosecutor, employee of an investigator or prosecutor, or member or employee of the board may disclose information related to an investigation or prosecution under chs. 5 to 12, subch. III of ch. 13, or subch. III of ch. 19 or any other law specified in s. 978.05 (1) or (2) or provide access to any record of the investigator, prosecutor, or the board that is not subject to access under s. 5.05 (5s) to any person other than an employee or agent of the prosecutor or investigator or a member, employee, or agent of the board prior to presentation of the information or record in a court of law.

(b) This subsection does not apply to any of the following communications made by an investigator, prosecutor, employee of an investigator or prosecutor, or member or employee of the board:
1. Communications made in the normal course of an investigation or prosecution.
2. Communications with a local, state, or federal law enforcement or prosecutorial authority.
3. Communications made to the attorney of an investigator, prosecutor, employee, or member of the board or to a person or the attorney of a person who is investigated or prosecuted by the board.

Wis. Stat. § 12.13(5). Notably, subsection (b)3 allows GAB disclosures to entities like the Plaintiffs, who were "investigated" by the board. And once this happens, the target is not bound to keep quiet about its own conduct or the GAB investigation. In short, GAB secrecy does not apply to public disclosures by persons outside the GAB, and the statute must be narrowly construed because it is an exception to the public's right to know the inner workings of their government. *See Hathaway v. Joint School Dist. No. 1, City of Green Bay*, 116 Wis. 2d 388, 397 (1984).

Defendants' attempt to distinguish Attorney General Opinion 7-09 is unavailing. The reasoning of that opinion does have bearing here, and this Court found it persuasive when Plaintiffs cited it in support of their request to file a redacted version of the First Amended

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not now, or should not be, protected from public disclosure by any John Doe Secrecy Order or GAB confidentiality statute. However, it has not yet become necessary to use these materials with witnesses or in court filings, and at that point, it may well be that Defendants would agree to relax or remove some of the designations." Plaintiffs' Motion at 3.

Complaint in the public file. Contrary to Defendants' argument, the OAG 7-09 opinion confirms the narrow applicability of the GAB secrecy statute by specifically finding that only the GAB, its employees, and agents are covered by the secrecy statute. That only makes sense. It is the GAB—not the GAB's targets, who presumably are the parties being protected by the confidentiality provisions—that would be expected to make harmful and unfair disclosures about targets who were investigated. Because § 12.13(5) cannot be read to govern the disclosure of information by non-GAB parties such as Plaintiffs, it provides no legal basis for barring public disclosure by Plaintiffs of facts obtained from the GAB in discovery. Furthermore, statutes implicated by § 12.13(5)—including both § 12.60(1)(bm) and Wis. Stat. § 5.05(5s)—do not prohibit disclosure by Plaintiffs for identical reasons.

Defendants gloss over Plaintiffs' arguments regarding the inapplicability of the GAB secrecy statute to persons outside the GAB. Instead, Defendants contend that Plaintiffs' arguments regarding the inapplicability of GAB secrecy to persons outside the GAB render the protective order "meaningless." *See* Defs.' Resp. at 5. In essence, Defendants posit that information should be kept confidential because they marked it confidential under the Protective Order. The Court should reject this circular reasoning. Defendants' confidentiality designations are not self-proving. The parties never agreed to unlimited secrecy. Instead, the Protective Order requires a good faith basis for designating documents under one of three categories, and then explicitly states that parties may challenge the legal basis of confidentiality designations. *See* Protective Order at ¶ 8. The fact that one party unilaterally chose to affix a confidentiality designation to a document or excerpt of deposition testimony is irrelevant to the legal issue at hand: whether there is, in fact, a legal basis to prohibit Plaintiffs' allegations of governmental misconduct from being known to the public. *See Baxter Int'l, Inc. v. Abbott Labs.*, 297 F.3d 544,

546 (7th Cir. 2002) (holding that parties' secrecy agreements did not warrant maintaining documents under seal, as "[a]llowing such an agreement to hold sway would be like saying that any document deemed provisionally confidential to simplify discovery is confidential forever.").

But at any rate, Defendants are wrong that the Protective Order here is "rendered meaningless"; it has in fact served an important role in this litigation by creating a workable framework under which the parties can produce non-privileged materials, designate them as confidential, and defer the issue of public access to a later time. But discovery has closed, and it is now time for the ease of wide-ranging secrecy designations to yield to closer scrutiny.

Tellingly, the Defendants fail to meet their burden to satisfy this scrutiny. Yes, they attempt to distinguish an attorney general opinion that would compel disclosure, but they fail to address the text or spirit of the statute itself. For example, as already discussed, the statute does allow parties who receive information from the GAB to disclose it; by its terms, it only restricts the GAB. Further, it allows the GAB to disclose investigative material directly to counsel for parties being investigated. Wis. Stat. § 12.13(5)(b)(3). Clearly, the purpose of such provisions is to grant protection to those being investigated, allowing them to have investigative information but protecting them from harmful disclosures the GAB might make in order to embarrass them or, perhaps, to coerce settlement. The GAB confidentiality provisions do not exist to protect the GAB from scrutiny or criticism; they do not exist to shield from public view the kinds of embarrassing or damaging internal communications that have doomed many a litigant when disclosed in civil discovery, motion practice, and trial. GAB's claim for the special protections that it was prepared to deny those it was investigating must be rejected. The fundamental principle of openness to the public must prevail. The public interest in disclosure requires more

than pleadings filed under seal or laden with redactions, especially where the producing party has failed to specifically designate the legal basis under the Protective Order to prohibit disclosure.

C. Defendants Failed to Justify Confidentiality Under the John Doe Secrecy Order

Defendants also fail to meet their burden to show that "John Doe secrecy" prohibits disclosure. They rely on an oversimplified and selective reading of the John Doe Judge's use and dissemination order to contend the John Doe secrecy order bars disclosure of documents and materials they have marked "confidential" here. The Court should not be persuaded. Defendants quote only what they call the "operative" portions of Judge Peterson's use and dissemination order to argue that the order only allows public disclosure of those Doe materials designated by the special prosecutor, GAB, and their counsel, contending that it "plainly does not authorize disclosures by the plaintiffs." Defs.' Resp. at 8.

Defendants contend that the only permissible disclosure is that authorized in the sole discretion of the GAB and other prosecution-related individuals who are not even parties to this case. But this cannot be right. If it were, there would be no reason for the trial judge to ever be consulted before Doe-related documents were publicly disseminated. The rest of the dissemination order makes clear that this is not, in fact, the case. It broadly allows for the public use and public disclosure of Doe-related documents "to the extent required in the course of the referenced lawsuits and/or any other related cases **as may be ordered by** the John Doe Judge, the federal **or state court judges**..." (emphasis added). Judge Peterson authorized public disclosure at the discretion of this court and others, and it defies logic to read the John Doe use and dissemination order as barring disclosure if it is initially sought by anyone other than the GAB and prosecution team.

Additionally, the John Doe use and dissemination order, by its terms, does not even apply to much of the discovery Defendants attempt to seal or redact as confidential here. It is limited to three categories of information:

> (1) all papers filed with the John Doe Judge, including affidavits and supporting exhibits; (2) all records and information the prosecution team and the GAB has heretofore examined and reviewed prior to the February 25, 2014 Order; and (3) John Doe materials contained in or referred in briefs, affidavits, or other materials filed in any of the related cases...

The vast majority of the items Defendants have designated as confidential do not fall into any of those categories and therefore would not be protected from disclosure by "John Doe secrecy." These items include deposition excerpts, meeting minutes, emails, drafts, briefs, agendas, internal communications, notes, testimony, and plans of Defendants and others involved in the investigation. Any assertion by Defendants that "John Doe secrecy" reaches into this case to bar public disclosure of these items must fail.

The Court should reject Defendants' attempts to hide behind general notions of "John Doe secrecy" to bar disclosure. Many of the documents Defendants seek to keep secret are not even "John Doe" documents. Furthermore, to the extent the challenged documents are properly covered by the John Doe secrecy and dissemination orders, the qualified use order and Protective Order state that this Court, a "state court judge," can order public disclosure of Doe-related documents. The time has come for those disclosures.

III. CONTINUED SECRECY IMPLICATES THE FIRST AMENDMENT

Citing no case law regarding the First Amendment, Defendants scoff at Plaintiffs' assertion that a continued blanket of secrecy under the protective order poses any Free Speech or First Amendment concerns. Defendants next attack a straw man, re-casting Plaintiffs' arguments as misplaced or untimely facial or as-applied constitutional challenges to the GAB statutes or

John Doe Secrecy Order. Plaintiffs do not mount a First Amendment challenge to the GAB statutes or the John Doe secrecy order; those provisions cannot apply on their own terms, as outlined above. Rather, Plaintiffs posit that no lingering concern over the general "confidentiality" of the GAB's defunct investigation, and no worry over embarrassing GAB staffers or contractors, can justify restrictions on disclosure and speech. This Court should reject Defendants' loosely-argued invitation to abdicate its duty to ensure Plaintiffs, the targets of the proceeding, and the general public may exercise their rights to free speech and enjoy the privilege of open courts.

Indeed, this Court has an unflagging duty to consider the First Amendment rights of litigants and the public. It must make a determination about whether the First Amendment allows a protective order barring disclosure and discussion of a government agency's documents and testimony that are central to this case and central to the current political and legislative debate about the GAB. As outlined in Plaintiffs' initial motion, the First Amendment is implicated for a simple reason. If Defendants are correct that this Court can use its Protective Order to require redactions of key facts and allegations about the GAB's misconduct, the Protective Order would then operate as an unconstitutional gag on Plaintiffs' core political speech about the GAB's misconduct. *See Butterworth v. Smith*, 494 U.S. 624, 632 (1990) (recognizing that the "publication of information relating to alleged governmental misconduct [is] speech which has traditionally been recognized as lying at the core of the First Amendment."); *see also Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 838 (1978). The Court can judicially notice that the GAB's conduct is a current topic of intense political debate in the Wisconsin Legislature and the

public at large.[5] An order that prohibits discussion of facts regarding this misconduct—and that is based on nothing other than the GAB's subjective preferences about what parts of its conduct it wants to keep secret—would violate Plaintiffs' First Amendment rights. *See Mills v. Alabama*, 384 U.S. 214, 218 (1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.").

IV. DEFENDANTS' PROPOSAL THAT THE COURT UNDERTAKE A "GATEKEEPING TEST OF MATERIALITY" IS LEGALLY IMPROPER AND PRACTICALLY UNWORKABLE

Rather than squarely respond to the Motion's clear challenge to the improper designations, Defendants try to sidestep their burden of establishing confidentiality under the Protective Order by shifting the obligation to the Court. In particular, Defendants propose that this Court conduct an analysis of every challenged document, redacted section, and deposition excerpt marked confidential that Plaintiffs seek to publicly file and determine that each item is "material," before the confidentiality designation may be lifted and the item publicly filed. Defendants' request that the Court perform this "gatekeeping test of materiality" is not only peculiar and unworkable, but without any basis in logic or law. Nothing in the Wisconsin rules of discovery, local rules, or case law requires such an extraordinary and free-wheeling undertaking by a court in assessing the merits of a confidentiality designation.

Defendants' request that the Court perform a "materiality review" on documents labeled confidential is apparently based on the view that materiality to the issues in the action is a

[5] *See, e.g.*, "GAB Head Asks Lawmakers to Delay Overhaul of Elections Agency, the *Milwaukee Journal-Sentinel*, Sept. 30, 2015, *available at* http://www.jsonline.com/news/statepolitics/gab-head-asks-lawmakers-to-delay-overhaul-of-elections-agency-b99587503z1-330102791.html; *see also* http://www.thewheelerreport.com/wheeler_docs/files/1212darling.pdf; http://host.madison.com/ct/news/local/writers/jessie-opoien/wisconsin-republicans-critical-of-gab-in-light-of-nonpartisan-audit/article_2fd2d1b4-d6b6-5f40-82a0-52cd21005a82.html.

threshold requirement for public filing. But the concepts are legally distinct, with materiality having no bearing on whether an item is properly designated confidential under one of the three bases in the Protective Order. Defendants apparently recognize this, as they concede that at least some of the 181 pages of documents in Plaintiffs' challenged set (Exhibit A to Plaintiffs' Motion) may be filed publicly, even if they are *not* material to the issues in Defendants' view.[6] Under this proposal, *some* "immaterial" documents may be disclosed and publicly filed, while others cannot—subject only to the subjective whims of the producing party. The Protective Order does not contemplate implementation of the "gatekeeping test of materiality" that Defendants urge. Instead, the protective order provides only three justifications for the producing party's confidentiality designations, none of which is materiality.

Beyond these concerns, use of a gatekeeping test for materiality would be inefficient, unwieldy and time-consuming. It would effectively shift the burden of proving confidentiality from the producing party (as stipulated and ordered in the Protective Order) to Plaintiffs and the Court, who respectively would have to argue for, and determine, "materiality" on each document Plaintiffs seek to file publicly. In a case with more than 42,000 documents and more than 300 deposition exhibits, many of which encompass multiple pages, this would be an undertaking of massive proportions—the type of discovery obligation ordinarily undertaken by a special master. Defendants have designated the majority of the 42,000 pages of discovery produced in this action as either confidential (and therefore under seal) or subject to redactions. Defendants have designated hundreds of redactions to the transcripts of the 14 depositions Plaintiffs have taken;

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[6] *See* Affidavit of P. Schwarzenbart at 5, ("A watermarked "Sealed" on the document means the document should remain sealed absent a demonstration that the document is material to the issues in this case...As to the balance of the documents in the 181 pages, defendants to not object to the public filing of documents neither watermarked as sealed nor marked as redacted, although defendants do not concede that all such documents are material or relevant to the issues in this action.").

for some depositions–including the six depositions of GAB board members and the deposition of the corporate representative of the GAB's document management vendor—Defendants have designated entire transcripts as confidential and under seal.

Faced with their inability to provide specific and consistent reasons for their sweeping redactions and sealings as required by the Protective Order, Defendants have resorted to this procedural escape hatch. While creative, it is legally baseless, creates hours of unnecessary expense and work by Plaintiffs and the Court, and still fails to cure Defendants' improper designations. A materiality test does not obviate the need for the relief sought in Plaintiffs' motion; nor does it cure Defendants' vast over-designation of documents. Only the relief sought in Plaintiffs' motion (that the Protective Order be modified as to the treatment of "confidential" materials) will cure Defendants' vast and baseless designations and allow to be public that which should be made public.

V. PLAINTIFFS' PROPOSAL IS WORKABLE

Plaintiffs request the Court modify the Protective Order to protect the privacy interests of individuals and groups identified in the discovery as targets, subjects, or "of interest" to the investigation. Plaintiffs' proposal is simple and workable. Section III of the Protective Order, titled "The Handling and Treatment of Confidential Information or Items," should be modified to allow the disclosure of all materials designated as "confidential," except for actual seized evidence, which will never be disclosed. For all other discovery designated as "confidential," Plaintiffs may disclose such documents without restriction, with one exception: if the document or item contains identifying information of a person or group that is a subject, target, or "of interest" to the investigation, that information must be redacted. If Plaintiffs desire to publicly file a document containing the information of an affected individual *without redaction*, Plaintiffs

must notify the person or group in writing of their identification and request written consent. Until further order of the Court, plaintiffs would file a sealed report each month regarding each request that was granted.

Defendants contend this procedure for notifying non-parties with "alleged privacy interests" is inappropriate and unnecessary, misconstruing Plaintiffs' proposed notice-and-consent process as "involving non-parties in this lawsuit." Plaintiffs do not seek leave to request that other parties be joined, intervene, or otherwise appear before this court. Despite Defendants' contentions, Plaintiffs also do not seek to assert any interests on behalf of these third parties, but instead simply recognize that serious privacy concerns are implicated when individuals and groups innocent of wrongdoing are identified as targets in an investigation now closed and held unconstitutional. Defendants' assertion that Plaintiffs "did nothing to protect against disclosure of the identities of non-parties" during discovery in this matter is belied by the facts: Plaintiffs were not the producing party responsible for designating discovery responses as confidential, and Plaintiffs did not solicit deposition testimony designed to elicit discovery about targets or other affected third parties. In any event, Defendants' professed indignation about the "hypocrisy" of Plaintiffs' proposal to redact information implicating the privacy interests of individuals outside the agency is an attempt to obfuscate the real issue. Plaintiffs' proposed notice-and-consent process protects individuals named in discovery as targets or "of interest" to the investigation, and it does not complicate this lawsuit by adding additional parties to this proceeding.

VI. CONCLUSION

Wisconsin taxpayers have a strong interest in the public disclosure of information concerning the inner workings of their government. Despite their burden of articulating a legal basis in support of secrecy, Defendants have failed to prove their confidentiality designations are

warranted under the terms of the Protective Order. In the absence of any legitimate basis for continued secrecy, the Court should reject Defendants' attempts to permanently cloak from public view the records, documents, and testimony showing the extent of the GAB's involvement in the John Doe investigation. The Court also should reject Defendants' attempt to sidestep their burden of establishing confidentiality under the Protective Order by shifting the obligation to the Court, as no materiality test is required to determine whether the designations are proper. Plaintiffs respectfully request that this Court issue an order amending Section III of the Protective Order to allow Plaintiffs to disclose documents and testimony obtained from Defendants in this litigation and marked "confidential," including the set of documents submitted to the Court for in-camera review, as long as the disclosure does not include seized evidence; and (2) requiring Plaintiffs to provide notice to affected parties and groups and gain their consent before disclosing any material that reveals them to be a target, subject, or "of interest" to the investigation.

Dated: October 2, 2015

Respectfully submitted,

FOX, O'NEILL & SHANNON, S.C.

Matthew W. O'Neill
State Bar No. 1019269
622 North Water Street, Suite 500
Milwaukee, WI 53202
(414) 273-3939
mwoneill@foslaw.com

Todd P. Graves (*pro hac vice*)
Edward D. Greim (*pro hac vice*)
Lucinda H. Luetkemeyer (*pro hac vice*)
GRAVES GARRET, LLC

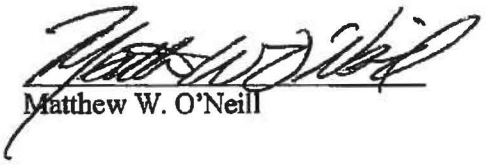
1100 Main Street, Suite 2700
Kansas City, Missouri 64105
Tel: 816-256-3181
Fax: 816-817-0863
tgraves@gravesgarrett.com
edgreim@gravesgarrett.com
lluetkemeyer@gravesgarrett.com

Counsel for Eric O'Keefe and Wisconsin Club for Growth, Inc.

Certificate of Service

The undersigned hereby certifies that, on October 2, 2015, a complete copy of the foregoing was served via E-Mail and First Class U.S. Mail, postage prepaid, to the following counsel of record:

Counsel for Defendants
Paul W. Schwarzenbart
Thomas H. Brush
STAFFORD ROSENBAUM
222 W. Washington Avenue
Madison, Wisconsin 53701



Matthew W. O'Neill