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DISTRICT I

February 10, 2013

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You are hereby notified that the Court has entered the following order:

2013AP362-CR

State of Wisconsin v. Kelly M. Rindfleisch (L.C. #2012CF438)

Before Curley, P.J.

Kelly M. Rindfleisch appeals a judgment convicting her of one count of misconduct in public office. We granted the State's motion to supplement the appellate record with documents from the John Doe investigation that gave rise to the criminal charges. After we granted the motion, Rindfleisch moved to seal the documents. Because the supplemental return was transmitted to this court under seal, we construed the motion as a motion to maintain the supplemental record under seal. We gave various news media organizations permission to intervene for the sole purpose of objecting to Rindfleisch's motion. The news media

organizations and the State then filed written arguments in favor of unsealing the documents. Before deciding the motion, we provided Rindfleisch an opportunity to identify specific documents she believed should be exempted from public disclosure. By letter of February 7, 2014, Rindfleisch informed this court that she declined the opportunity to identify specific documents that she believed should be not be disclosed to the public. Therefore, we unseal all of the documents in the supplemental return subject to the limitations described below.

It is well established under Wisconsin law that all court records are open to the public absent exceptional circumstances. “[A] basic tenet of the democratic system [is] that the people have the right to know about operations of their government, including the judicial branch, and that where public records are involved the denial of public examination is contrary to ... public policy and the public interest.” *State ex rel. Bilder v. Delavan*, 112 Wis. 2d 539, 553, 334 N.W.2d 252 (1983). The legislature codified the common law presumption that all court proceedings are open to the public in the Open Records Law, WIS. STAT. § 19.31, with this sweeping declaration of policy: “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.”

The strong presumption that all court records are public can be overcome only in limited circumstances. Public records may be sealed if a statute authorizes sealing the records, disclosure infringes a constitutional right, or the administration of justice requires it. *State v. Buchanan*, 2013 WI 31, ¶43 n.12, 346 Wis. 2d 735, 828 N.W.2d 847. The records here were sealed by statute. Pursuant to WIS. STAT. § 968.26, judges conducting John Doe investigations

have the authority to conduct those investigations in secret. There are many reasons why secrecy may be vital to a John Doe investigation. The reasons include:

- (1) keeping knowledge from an unarrested defendant that could encourage escape;
- (2) preventing the defendant from collecting perjured testimony for trial;
- (3) preventing those interested in thwarting the inquiry from tampering with prosecutive testimony or secreting evidence;
- (4) rendering witnesses more free in their disclosures; and
- (5) preventing testimony that may be mistaken or untrue or irrelevant from becoming public.

State ex rel. Unnamed Persons v. State, 2003 WI 30, ¶60, 260 Wis. 2d 653, 660 N.W.2d 260 (citations omitted). “The policy underlying secrecy is directed to promoting the effectiveness of the investigation.” *Id.*, ¶61. “Therefore, any secrecy order ‘should be drawn as narrowly as is reasonably commensurate with its purposes.’” *Id.*

The John Doe investigation that resulted in criminal charges against Rindfleisch is over. Rindfleisch and others have been arrested, charged, and convicted. The first three reasons listed in *State ex rel. Unnamed Persons* for keeping the proceedings secret while an investigation is underway no longer apply to the records in the supplement. The fourth and fifth reasons do not apply because the records do not include testimony from witnesses to the events that gave rise to the criminal charges. Although the reasons listed in *State ex rel. Unnamed Persons* are not exhaustive, we agree with the State that at this point in time, weighing the strong presumption that all court records are open to the public against the waning interest in secrecy now that the investigation is over, the balance has shifted in favor of full public disclosure of the documents that are included in the appellate record.

Rindfleisch contends that the documents should remain under seal because the John Doe judge ordered them sealed. We have supervisory authority to unseal documents in our record consistent with the parameters of the law regardless of whether a prior circuit court order or trial judge order sealed the documents. WIS. CONST. art. VII, § 5(3) (“The appeals court ... shall have supervisory authority over all actions and proceedings in the courts in the district.”). Rindfleisch’s argument ignores the Wisconsin Supreme Court’s admonishment that “[s]ecrecy of John Doe proceedings and the records thereof is not maintained for its own sake.” *State v. O’Connor*, 77 Wis. 2d 261, 283, 252 N.W.2d 671 (1977).

Moreover, the John Doe judge’s use and dissemination order issued January 25, 2012, allows the documents at issue to be unsealed. That order provides “that the [Milwaukee County] District Attorney’s Office and *any agency assisting the District Attorney’s Office* are permitted to use and disseminate information, materials, and transcripts obtained and/or gathered in these proceedings as may be reasonably necessary in connection with the anticipated prosecution of Kelly Rindfleisch” (Emphasis added). The Attorney General’s Office, which is assisting the District Attorney’s Office by defending Rindfleisch’s conviction on appeal, has concluded that the documents in the supplemental return are necessary to its appellate defense of Rindfleisch’s conviction. We agree with the State that the John Doe judge’s use and dissemination order allows the documents to be unsealed because the State has determined that the documents are reasonably necessary in order to respond to Rindfleisch’s appellate challenge to her conviction.

Rindfleisch next contends that the documents should remain sealed because they include personal emails and other private communications. As we explained in our February 4 order, personal information collected incident to a criminal investigation is routinely included in criminal appellate records. Because we recognize, however, that blanket seizure of electronic

documents from an internet service provider may result in seizure of documents that may be protected from public release by law, such as social security numbers or medical information, we gave Rindfleisch an opportunity to review the supplemental return prior to our decision to allow her to submit a list of items she believed should be exempted from public disclosure. She declined to do so.

Accordingly,

IT IS ORDERED that the items in the supplemental record are unsealed and available for public inspection, subject to the limitations below.

IT IS FURTHER ORDERED that this order unsealing the items in the supplemental record is stayed until Wednesday February 19, 2014, at 9:00 a.m., to allow the record to be transferred for public inspection to the Office of the Clerk of the Court of Appeals at 110 E. Main Street, Suite 215, Madison, WI 53701.

IT IS FURTHER ORDERED that when the stay of this order is lifted on Wednesday February 19, 2014, at 9:00 a.m., the Clerk of the Court of Appeals will make available to the public a certified copy of the supplemental record for inspection, including the data contained on a computer disc in the supplemental record. The Clerk may set appointments or issue parameters for the viewing of the data on the computer disc via a secure computer provided by the Clerk's office in a way that facilitates expedient public inspection, but minimizes disruption to the efficient functioning of the Clerk's office.

IT IS FURTHER ORDERED that any person may request a copy of the supplemental record from the Clerk in accord with WIS. STAT. RULE 809.25(2)(a)2. Certified copies of the

paper documents in the record are available for 40 cents per page. A certified copy of the computer disc in the record is available for \$5.00, which is the approximate cost of reproduction. The Clerk's office will be accepting requests for copies beginning Thursday February 13, 2014, to be available for pick up on Wednesday February 19, 2014, at 9:00 a.m.

Diane M. Fremgen
Clerk of Court of Appeals