STATE OF WISCONSIN DANE COUNTY BRANCH 8
CIRCUIT COURT

WISCONSIN MANUFACTURERS
AND COMMERCE INC.,

Plaintiff,

v. Case No. 23-CV-3275

WISCONSIN DEPARTMENT
OF JUSTICE,

Defendant.

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiff Wisconsin Manufacturers and Commerce Inc. ("WMC") filed this mandamus action under Wis. Stat. § 19.37, part of Wisconsin's public records law. In March 2022, WMC requested certain records from Defendant Wisconsin Department of Justice ("DOJ"). In September 2023, DOJ notified WMC that DOJ was withholding the records, citing attorney-client privilege and attorney work-product doctrine. WMC filed this mandamus action in December 2023, seeking access to those records.

For this Court's *in camera* review, DOJ filed under seal the records that WMC is seeking. (*See* R. 26.) DOJ also filed a privilege log and a name glossary for the privilege log. (R. 27; 28.) The Court issued an order sealing the records. (R. 32.)

DOJ filed a motion for summary judgment on Count 2 and a supporting brief on July 10. (R. 48; 49.) In its brief, DOJ argues that, with few exceptions, the requested records are exempt from disclosure under the public records law because they are attorney-client privileged communications or attorney work product.[1]

This Court should grant summary judgment to WMC on Count 2 pursuant to Wis. Stat. § 802.08(6), which authorizes circuit courts to grant summary judgment to non-moving parties. As DOJ admits, it must produce at least a dozen records for WMC.[2] This means WMC is entitled to at least partial summary judgment. In addition, DOJ has failed to meet its burden of proving that the other withheld records

[1] WMC concedes that attorney-client privileged communications and attorney work product are exempt from disclosure under the public records law. *See Seifert v. Sch. Dist. of Sheboygan Falls*, 2007 WI App 207, ¶ 28, 305 Wis. 2d 582, 740 N.W.2d 177; *George v. Record Custodian*, 169 Wis. 2d 573, 582, 485 N.W.2d 460 (Ct. App. 1992).

[2] DOJ provided certain records to WMC on July 23, 2024—presumably, the dozen or so records that DOJ recently conceded it must provide to WMC. (*See* R. 49:14 n.6.)

are privileged. This Court should deny DOJ's motion for summary judgment and grant summary judgment to WMC on Count 2.[3]

APPLICABLE LEGAL STANDARD

"Summary judgment is appropriate where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." *Premier Cmty. Bank v. Schuh*, 2010 WI App 111, ¶ 4, 329 Wis. 2d 146, 789 N.W.2d 388; *see also* Wis. Stat. § 802.08(2). A non-moving party "may be entitled to summary judgment even though that party did not seek it." *Techworks, LLC v. Wille*, 2009 WI App 101, ¶ 2, 318 Wis. 2d 488, 770 N.W.2d 727 (citing Wis. Stat. § 802.08(6)). When a party fails to meet its burden of proof at the summary-judgment stage, the opposing party is entitled to summary judgment. *See, e.g.*, *id.* ¶¶ 24, 27.

If a custodian denies a public records request by asserting that the requested records are privileged, the custodian has the burden of establishing the privilege. *See Juneau Cnty. Star-Times v. Juneau Cnty.*, 2011 WI App 150, ¶ 33, 337 Wis. 2d 710, 807 N.W.2d 655, *aff'd*, 2013 WI 4, 345 Wis. 2d 122, 824 N.W.2d 457. If the plaintiff does not have access to the requested records, the plaintiff may stand on its right to require the custodian to prove that the requested records are privileged. *See id.* ¶ 40 n.7. The plaintiff is entitled to summary judgment if the custodian fails to prove the documents are privileged. *See id.* ¶ 47.

[3] In Count 1 of the complaint, WMC alleges that DOJ unlawfully delayed its response to WMC's request for records. (R. 2:7–10.) DOJ's motion for judgment on Count 1 is pending in this Court. (*See* R. 15; 16; 19; 24.) For the reasons explained in WMC's previous brief, this Court should deny DOJ's motion for judgment on Count 1. (R. 19.)

ARGUMENT

DOJ violated the public records law by denying WMC's request for records. WMC will first explain why DOJ has failed to meet its burden of proving that the requested *emails* are exempt from disclosure under the public records law. Next, WMC will explain why DOJ has failed to prove that the requested *email attachments* are exempt from disclosure. Finally, WMC will explain why DOJ violated its duty to release partially redacted records to WMC if any of the requested records contain privileged information.

I. DOJ unlawfully withheld emails.

DOJ is unlawfully withholding records—about 1,200 emails—that WMC requested. Although DOJ denied WMC's request for records in its entirey, DOJ has since conceded that WMC is entitled to some of those emails.

WMC will first explain why, as DOJ concedes, DOJ unlawfully withheld "emails sharing files." Second, WMC will explain why DOJ unlawfully withheld emails containing "small talk"—emails that DOJ concedes are neither attorney-client privileged nor attorney work product. Third, WMC will explain why DOJ unlawfully withheld emails about a press release and a public records request. Fourth, WMC will explain why DOJ unlawfully withheld emails regarding Microsoft Teams meetings and out-of-office emails. Fifth and finally, WMC will generally explain why DOJ failed to meet its burden of establishing that all the withheld emails are attorney-client privileged or attorney work product.

A. As DOJ tacitly concedes, it unlawfully withheld emails sharing files.

DOJ tacitly concedes that it unlawfully withheld a dozen requested records. As DOJ has stated, "DOJ is not claiming privileges on the following records: Bates 1012, 984, 983, 981, 631, 630, 629, 600, 598, 223, 222, and 189. Thus, DOJ will be disclosing these emails, unredacted, to WMC." (R. 49:14 n.6.) As DOJ notes, this "Court has called these 'emails sharing files.'" (R. 49:14 n.6; *see* R. 37:2.)

Because DOJ has since released these records to WMC,[4] this Court should declare that DOJ "violated the public records law when it initially denied outright the records requests." *See Wisconsin State Journal v. Blazel*, 2023 WI App 18, ¶ 3, 407 Wis. 2d 472, 991 N.W.2d 450. Although DOJ has voluntarily released these emails to WMC, this issue is not moot. "[T]he voluntary disclosure of a requested record does not render the action moot because a ruling on the merits 'will have the practical effect of determining the [requester's] right to recover damages and fees under Wis. Stat. § 19.37(2)(a) based upon the [custodian's] denial of its request." *Id.* ¶ 43 (alterations in original) (quoting *Portage Daily Reg. v. Columbia Cnty. Sheriff's Dep't*, 2008 WI App 30, ¶ 8, 308 Wis. 2d 357, 746 N.W.2d 525). This Court should thus declare that, as DOJ does not dispute, WMC is legally entitled to these emails and DOJ had no legal basis for initially withholding them.

B. DOJ unlawfully withheld emails containing "small talk."

DOJ also unlawfully withheld another discrete category of records: emails containing "small talk," such as discussions of "flannel Fridays." Because DOJ has

[4] *See supra* note 2.

not proven—or even argued—these emails are exempt from disclosure, this Court should order DOJ to release them to WMC.

To preserve an issue, "a party must raise and argue [that issue] with some prominence to allow the trial court to address the issue and make a ruling." *State v. Ledger*, 175 Wis. 2d 116, 135, 499 N.W.2d 198 (Ct. App. 1993). A party abandons an issue by not briefing or arguing it. *See, e.g.*, *id.*; *State v. Flynn*, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994).

Here, because DOJ did not raise an argument about the small-talk emails in its summary-judgment brief (*see* R. 49), DOJ abandoned this issue. This Court previously asked DOJ whether it had an argument for why these emails would be privileged. (R. 37:2.) In a letter response, DOJ conceded these emails are *not* "protected by attorney client privilege or attorney work product." (R. 41:4.) In its summary-judgment brief, DOJ recognizes that the Court questioned why DOJ had withheld these emails, but DOJ does not answer the Court's question. (R. 49:5.) DOJ has thus abandoned this issue. *See, e.g.*, *Ledger*, 175 Wis. 2d at 135.

The law thus requires DOJ to release these small-talk emails to WMC. "*If the [record] custodian states no reason or insufficient reasons for refusing to disclose the information, the writ of mandamus compelling disclosure must issue*." *Mastel v. Sch. Dist. of Elmbrook*, 2021 WI App 78, ¶ 12, 399 Wis. 2d 797, 967 N.W.2d 176 (emphasis in original) (citation omitted). For the custodian's stated reasons to be sufficient, "[the] government entity resisting disclosure of public records bears the burden 'to rebut the strong presumption' favoring disclosure." *Id.* (quoting *C.L. v. Edson*, 140

Wis. 2d 168, 182, 409 N.W.2d 417 (Ct. App. 1987)). Because DOJ's initial assertion of privilege is an indisputably insufficient reason for withholding the small-talk emails, this Court "must issue" a "writ of mandamus compelling" DOJ to release these emails to WMC. *See id.* (citation omitted).

This Court should also declare that DOJ "violated the public records law" by withholding these emails for insufficient reasons. *See Blazel*, 2023 WI App 18, ¶ 3.

C. DOJ unlawfully withheld emails about a press release and a public records request.

Tellingly, DOJ recognizes that "[s]ome emails might seem like they do not qualify for statutory protection from disclosure under the public records law, such as the emails discussing a 'press release' and 'public records request.'" (R. 49:13.) DOJ further concedes that "neither a press release or public records request would generally be protected by the attorney-client or attorney work product privileges standing alone." (R. 49:13.) Yet DOJ argues that "discussion among attorneys and client about them and their impact on litigation does garner protection." (R. 49:13.)

As an initial matter, DOJ has failed to develop an argument on why these particular emails are privileged. Courts "do not consider undeveloped arguments." *State v. O'Connell*, 179 Wis. 2d 598, 609, 508 N.W.2d 23 (Ct. App. 1993). DOJ does not even clearly allege that these emails about a press release and a public records request addressed an "impact on litigation." (*See* R. 49:13.) This Court should decline to consider that undeveloped, implied suggestion.

In any event, DOJ is correct to acknowledge that attorney communications about things like press releases are not automatically privileged. Such communications are not privileged if they do not involve legal advice.

"Political or public relations advice does not become privileged simply because it is given by an attorney." *Evans v. City of Chicago*, 231 F.R.D. 302, 314 (N.D. Ill. 2005). "When an attorney is consulted in a capacity other than as a lawyer," such as "a policy advisor" or "media expert," then "that consultation is not privileged." *In re Cnty. of Erie*, 473 F.3d 413, 421 (2d Cir. 2007) (citing *In re Lindsey*, 148 F.3d 1100, 1106 (D.C. Cir. 1998) (per curiam)).

"Fundamentally, legal advice involves the interpretation and application of legal principles to guide future conduct or to assess past conduct." *Alomari v. Ohio Dep't of Pub. Safety*, 626 F. App'x 558, 570 (6th Cir. 2015) (quoting *In re Cnty. of Erie*, 473 F.3d at 419). "[W]hen a government lawyer's duty encompasses providing both legal and non-legal advice, the Government must show that the communication at issue involves the provision of legal services rather than, for example, 'political, strategic, or policy issues.'" *Cause of Action Inst. v. United States Dep't of Just.*, 330 F. Supp. 3d 336, 348 (D.D.C. 2018) (citation omitted).

Communications regarding a draft press release are *not* privileged if they do not involve legal advice. *See, e.g.*, *Slocum v. Int'l Paper Co.*, 549 F. Supp. 3d 519, 525 (E.D. La. 2021) (holding an attorney's communication on a "proposed public relations announcement" was not privileged because it did not provide "legal advice"); *Calvin Klein Trademark Tr. v. Wachner*, 124 F. Supp. 2d 207, 209–10 (S.D.N.Y. 2000)

(holding a draft press release was not privileged because it "disclose[d] neither confidential client communications made for the purpose of seeking legal advice nor attorney work product"). By contrast, communications regarding "press releases" and "media interactions" *are* privileged if they "were sent to or from counsel seeking or providing actual legal advice." *See In re Premera Blue Cross Customer Data Sec. Breach Litig.*, 296 F. Supp. 3d 1230, 1244 (D. Or. 2017).

Attorney communications on public relations are not necessarily work product, either. A communication about how a client "should address media coverage," for example, is not work product because it was not "prepared 'because of' the prospect of litigation." *See Phillips v. C.R. Bard, Inc.*, 290 F.R.D. 615, 645 (D. Nev. 2013).

Here, DOJ has failed to meet its burden of proving that the emails about a press release and a public records request are privileged. It offers just a one-paragraph conclusory argument on the issue. (*See* R. 49:13.)

And even if these emails contain some privileged information, DOJ violated its duty to release partially redacted emails to WMC. *See infra* § III. "Importantly, redaction is available for documents which contain legal advice that is incidental to the nonlegal advice that is the predominant purpose of the communication." *In re Cnty. of Erie*, 473 F.3d at 421 n.8. An attorney's privileged comments on "a draft press release," for example, "must be redacted" even if the document is otherwise "not privileged." *See Burroughs Wellcome Co. v. Barr Lab'ys, Inc.*, 143 F.R.D. 611, 619 (E.D.N.C. 1992).

In short, this Court should order DOJ to provide WMC with the emails about a press release and a public records request. This Court should also declare that DOJ "violated the public records law" by withholding these emails. *See Blazel*, 2023 WI App 18, ¶ 3.

D. DOJ unlawfully withheld emails about Microsoft Teams meetings and out-of-office replies.

DOJ argues that the attorney-client and work-product privileges apply to the Microsoft Teams meetings invitations and acceptance emails and the "out of office emails." (R. 49:14.) But DOJ does not seem to argue that these emails are privileged in their entirety. Instead, DOJ asserts that these emails have privileged "subject line[s]" or "title[s]." (R. 49:14.)

For all the reasons discussed below in § I.E., WMC disputes that these emails' subject lines or titles are privileged.

And even if these emails' subject lines or titles are privileged, then DOJ was required to redact the privileged content and provide WMC with redacted copies of these emails. As explained below in § III, DOJ violated its duty to redact under Wis. Stat. § 19.36(6) if any of the requested records contain some privileged content.

In sum, this Court should order DOJ to provide WMC with the Microsoft Teams meetings invitations and acceptance emails and the "out of office" emails. This Court should also declare that DOJ "violated the public records law" by withholding these emails. *See Blazel*, 2023 WI App 18, ¶ 3.

E. Regarding the withheld emails generally, DOJ failed to carry its burden of proving they are privileged.

As just explained, DOJ unlawfully withheld particular emails. WMC now will explain why DOJ failed to carry its burden of proving that all the withheld emails are privileged attorney-client communications or attorney work product.

1. DOJ failed to establish that all the withheld emails fall within the narrow attorney-client privilege.

"The party asserting the [attorney-client] privilege has the burden to show that it applies." *Juneau Cnty. Star-Times*, 2011 WI App 150, ¶ 33 (alteration in original) (citation omitted). "The attorney-client privilege is narrowly construed, because the privilege is 'an obstacle to the investigation of the truth.'" *Id.* ¶ 36 (quoting *Lane v. Sharp Packaging Sys., Inc.*, 2002 WI 28, ¶ 21, 251 Wis. 2d 68, 640 N.W.2d 788).

"A mere showing that the communication was from a client to his attorney is insufficient to warrant a finding that the communication is privileged." *State v. Hydrite Chem. Co.*, 220 Wis. 2d 51, 64, 582 N.W.2d 411 (Ct. App. 1998) (quoting *Jax v. Jax*, 73 Wis.2d 572, 581, 243 N.W.2d 831 (1976)). "The privilege contemplates a *confidential* disclosure *by a client to his attorney* which the client reasonably believes to be related to obtaining *professional legal services*." *Jax*, 73 Wis. 2d at 579–80 (emphases added).

The attorney-client privilege applies even more narrowly to communications *from a lawyer to a client*. The privilege "does not protect communications from the lawyer to the client unless disclosure of the lawyer-to-client communications would directly or indirectly reveal the substance of the client's confidential communications

to the lawyer." *Journal/Sentinel, Inc. v. Sch. Bd. of Sch. Dist. of Shorewood*, 186 Wis. 2d 443, 460, 521 N.W.2d 165 (Ct. App. 1994).

Under those principles, DOJ has failed to prove that every single withheld email is attorney-client privileged. DOJ's reliance on this privilege falls short in three respects: (1) DOJ has failed to explain who the clients are, (2) DOJ has failed to prove the emails are confidential, and (3) DOJ has not proven that the emails were intended solely for legal advice.

First, DOJ stumbles out of the gate because it has not clearly explained which persons on the disputed emails are DOJ's clients. As noted above, attorney-client communications are privileged only if they "reveal the substance of the *client's* confidential communications to the lawyer." *Journal/Sentinel, Inc.*, 186 Wis. 2d at 460 (emphasis added). DOJ simply asserts that its client is "the State of Wisconsin." (R. 49:12.) But DOJ does not explain whether the Wisconsin Department of Natural Resources (DNR) or Wisconsin Department of Health Services (DHS)—two agencies whose staff members were included on the requested emails—are DOJ's clients.

DOJ's failure to clearly identify its client is problematic because "it is not reasonable to assume, in all cases, that the State as an entity is the client of a governmental lawyer who works for only one agency thereof." *Gray v. Rhode Island Dep't of Child., Youth & Fams.*, 937 F. Supp. 153, 159 (D.R.I. 1996). "The client clearly includes the attorney's own agency." *Id.* (citation omitted); *see also In re Lindsey*, 148 F.3d at 1104 ("In the governmental context, the 'client' may be the agency and the attorney may be an agency lawyer." (citation omitted)). By failing to identify who the

client is, DOJ has failed to prove that the requested emails reveal the substance of a *client*'s communications. DOJ has thus failed to establish attorney-client privilege.

Second, DOJ also failed to prove the requested emails contain *confidential* communications. "If the communication is confidential, the attorney-client privilege applies." *Estrada v. State*, 228 Wis. 2d 459, 463, 596 N.W.2d 496 (Ct. App. 1999). "If it is not [confidential], the privilege does not apply." *Id.* A statute defines when an attorney-client communication is confidential: "A communication is 'confidential' *if not intended to be disclosed to 3rd persons* other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.* at 464 (emphasis in original) (quoting Wis. Stat. § 905.03(1)(d)).

In the governmental context, federal courts have explained when a communication is too widely distributed to be confidential. A communication is not confidential simply because its "circulation [is] limited to the confines of the agency." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 863 (D.C. Cir. 1980). To conclude otherwise "would be far too broad a grant of privilege." *Id.* Instead, "the test is whether the information was 'circulated no further than among those members "of the organization who are authorized to speak or act for the organization in relation to the subject matter of the communication."'" *Cause of Action Inst.*, 330 F. Supp. 3d at 351 (quoting *Coastal States*, 617 F.2d at 863). "Put another way, the privilege remains intact so long as dissemination does not extend beyond those on a 'need to know' basis." *Id.* (quoting *F.T.C. v. GlaxoSmithKline*, 294 F.3d 141, 147–48 (D.C. Cir.

2002)); *see also, e.g.*, *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 609 (8th Cir. 1977) (holding attorney-client privilege applies only if "the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents").

The government fails to satisfy that test when it "does not even attempt to make such a showing." *See Alexander v. F.B.I.*, 186 F.R.D. 154, 162 (D.D.C. 1999). Even if the government submits an affidavit, it fails to establish confidentiality if it does not prove "that the documents were circulated only to those in the agency authorized to speak or act for the agency on the subject matter of the communications." *See Pennsylvania Dep't of Pub. Welfare v. U.S. Dep't of Health & Hum. Servs.*, 623 F. Supp. 301, 305–06 (M.D. Pa. 1985); *compare GlaxoSmithKline*, 294 F.3d at 147 (holding that a privilege log and an affidavit were specific enough to make this showing).

DOJ has failed to establish confidentiality because it has not proven the requested emails "were circulated no further than among those members who are *authorized to speak or act for the organization in relation to the subject matter of the communication*." *See Alexander*, 186 F.R.D. at 162 (quoting *Coastal States*, 617 F.2d at 863). Like the government in *Alexander*, DOJ here "does not even attempt to make such a showing…; this type of information is not even alleged conclusorily." *See id.* DOJ filed only one affidavit along with its motion for summary judgment on Count 2—and this affidavit simply authenticates DOJ's letter denying WMC's request for records. (R. 50.)

DOJ's view that virtually all the 1,200 requested emails are confidential is implausible. At least 35 persons were included on the requested emails at one point or another. (*See* R. 28.) As DOJ concedes, some of those persons are non-attorney staff. (R. 49:11.) DOJ has described some of those persons as support staff. (R. 28.) For example, DOJ's "LitTech" "Support Staff" were included on one or more of the requested emails. (*See* R. 28.) The Sher Edling law firm's communications director was also included on one or more emails. (R. 28.)

So the requested emails most certainly included recipients who were "not one of the third persons under § 905.03, Stats., to whom communications can permissibly be disclosed while maintaining the [attorney-client] privilege." *See Estrada*, 228 Wis. 2d at 464. Because DOJ failed to establish confidentiality, it has failed to meet its burden of proving the withheld emails are attorney-client privileged.

Third and finally, DOJ has not proven that all the requested emails were "communications made for the purpose of facilitating the rendition of *professional legal services* to the client." *See* Wis. Stat. § 905.03(2) (emphasis added). "[A] lawyer *not* acting in her capacity as a lawyer is *not* a lawyer for the purpose of the attorney-client privilege." *In re Cnty. of Erie*, 473 F.3d at 421 n.9 (emphases added). Instead, "when a government lawyer's duty encompasses providing both legal and non-legal advice, the Government must show that the communication at issue involves the *provision of legal services* rather than, for example, 'political, strategic, or policy issues.'" *Cause of Action Inst.*, 330 F. Supp. 3d at 348 (emphasis added) (citation omitted).

So even if DOJ sufficiently explained who its client is and proved the withheld emails are confidential, the emails would *not* be attorney-client privileged to the extent they do *not* involve legal advice. As explained above in § I.C., for example, the emails about a press release are likely not privileged because they likely contain non-legal advice.

In sum, DOJ failed to meet its burden of proving any of the withheld emails are attorney-client privileged. As an initial matter, DOJ has not explained who its client is and thus failed to prove the requested emails reveal *client* communications. Even more fatally, DOJ has failed to prove all the withheld emails are *confidential*—and it cannot make this showing due to the large number of recipients on these emails, including support staff.

2. DOJ also failed to establish that all the withheld emails are attorney work product.

The work-product doctrine "applies to documents 'prepared in anticipation of litigation' regardless of whether litigation had commenced at the time of their preparation or whether the 'litigation' is the proceeding in which the protection is asserted." *Dilger v. Metro. Prop. & Cas. Ins. Co.*, 2015 WI App 54, ¶ 21, 364 Wis. 2d 410, 868 N.W.2d 177 (citation omitted). This doctrine applies to "[m]ental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." *Id.* (citation omitted). "This work-product rule is not limited to private parties; ... the privilege applies to the work products of Government attorneys as well." *Jordan v. U.S. Dep't of Just.*, 591 F.2d 753, 775 (D.C. Cir. 1978).

"Not every document created by a government lawyer, however, qualifies for the [work-product] privilege (and thus, the exemption [from disclosure as a public record])." *Nat'l Ass'n of Crim. Def. Lawyers v. Dep't of Just. Exec. Off. for United States Att'ys*, 844 F.3d 246, 251 (D.C. Cir. 2016). "[I]f an agency were entitled to withhold any document prepared by any person in the Government with a law degree simply because litigation might someday occur, the policies of the [Freedom of Information Act or FOIA] would be largely defeated." *Id.* (alteration in original) (citation omitted). "To avoid that result, [courts] have long required a case-specific determination that a particular document in fact was prepared in anticipation of litigation before applying the privilege to government records." *Id.*

Those federal principles apply under Wisconsin law, too.[5] A document is privileged as attorney work product if, "in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation." *Lane*, 2002 WI 28, ¶ 61 (alteration in original) (citation omitted). "For that standard to be met, the attorney who created the document must have 'had a subjective belief that litigation was a real possibility,' and that subjective belief must have been 'objectively reasonable.'" *Nat'l Ass'n of Crim. Def. Lawyers*, 844 F.3d at 251 (citation omitted).

[5] Federal case law on the attorney work-product doctrine is persuasive in Wisconsin. *See Lane v. Sharp Packaging Sys., Inc.*, 2002 WI 28, ¶ 61, 251 Wis. 2d 68, 640 N.W.2d 788. Similarly, "FOIA and the cases interpreting it can be used as persuasive authority in deciding Wisconsin Public Records cases." *Democratic Party of Wisconsin v. DOJ*, 2016 WI 100, ¶ 13 n.6, 372 Wis. 2d 460, 888 N.W.2d 584.

Crucially, this privilege "protect[s] the work product of an attorney in respect to a *specific case*." *State ex rel. Youmans v. Owens*, 28 Wis. 2d 672, 683, 137 N.W.2d 470 (1965) (emphasis added). A document is *not* privileged work product if it "was not gathered for any particular litigation." *See id.* at 684.

Federal courts explain how this particularity requirement works. To show that a government document is attorney work product, "the agency must demonstrate in its affidavits or indices that the documents were prepared with the possible litigation of a specific case in mind." *Grove v. U.S. Dep't of Just.*, 802 F. Supp. 506, 514 (D.D.C. 1992) (citing *Coastal States*, 617 F.2d at 865–66). "[W]here an attorney prepares a document in the course of an active investigation focusing upon specific events and a specific possible violation by a specific party, it has litigation sufficiently 'in mind' for that document to qualify as attorney work product." *Bagwell v. U.S. Dep't of Just.*, 588 F. Supp. 3d 58, 73–74 (D.D.C. 2022) (quoting *SafeCard Servs., Inc. v. S.E.C.*, 926 F.2d 1197, 1203 (D.C. Cir. 1991)).

This particularity requirement has a sound rationale: "the prospect of future litigation touches virtually any object of a prosecutor's attention, and … the work product exemption, read over-broadly, could preclude almost all disclosure from an agency with substantial responsibilities for law enforcement." *SafeCard Servs.*, 926 F.2d at 1203 (internal citation and quotation marks omitted).

Here, DOJ has failed to prove that all the withheld emails were for "a specific case" or "any particular litigation." *See Youmans*, 28 Wis. 2d at 683–84. Without an affidavit or other evidence to make that showing, DOJ just makes generalized

assertions that the withheld emails are work product. (*See* R. 49:12.) That undeveloped, conclusory argument is insufficient to meet DOJ's burden of establishing an exemption under the public records law.

* * * * *

In summary, DOJ failed to prove that the withheld emails are attorney-client privileged or attorney work product. The Court should thus (1) order DOJ to release the requested emails to WMC, and (2) declare that DOJ violated the public records law by withholding them.

II. DOJ unlawfully withheld email attachments.

In addition to unlawfully withholding the requested emails, DOJ also unlawfully withheld attachments to emails.

DOJ first argues that the email attachments are attorney work product because they "would reveal the legal advice being sought and the mental impressions of the attorney…." (R. 49:15–16.) But, as with the emails, DOJ has failed to prove the attached documents were "prepared in anticipation of litigation or for trial." *See* Wis. Stat. § 804.01(2)(c)1. More precisely, DOJ has failed to show that the attachments were for "a specific case" or "gathered for any particular litigation." *See Youmans*, 28 Wis. 2d at 683–84. To make that showing, DOJ "must demonstrate in its affidavits or indices that the documents were prepared with the possible litigation of a specific case in mind." *See Grove*, 802 F. Supp. at 514 (citing *Coastal States*, 617 F.2d at 865–66). Because DOJ has not made that showing, it has failed to prove the attachments are privileged work product.

DOJ has also failed to show the email attachments are attorney-client privileged. The same shortcomings regarding the emails apply equally to the attachments. *See supra* § I.E.1.

DOJ seems to recognize that the email attachments might not be privileged. It contends that, "assuming for the sake of argument that the attachments standing alone are not privileged or attorney work product, they are nonetheless protected from disclosure by way of protection to the underlying emails." (R. 49:16.) DOJ reasons that it "considers the underlying email and any attachments to be a single 'record.'" (R. 49:15.) DOJ wrongly assumes that any privilege that might apply to the emails automatically applies to their attachments. Instead, "privilege is assessed separately for emails and attachments." *Idenix Pharms., Inc. v. Gilead Scis., Inc.*, 195 F. Supp. 3d 639, 644 n.5 (D. Del. 2016) (collecting cases).

DOJ's string cites do not hold otherwise. (*See* R. 49:16–17.) In one case cited by DOJ, the court held that certain *emails* were privileged even though the emails "contain[ed] attachments or other e-mail communications that are not otherwise independently privileged." *Hilton-Rorar v. State & Fed. Commc'ns Inc.*, No. 5:09-CV-1004, 2010 WL 1486916, at *8 (N.D. Ohio Apr. 13, 2010). Contrary to DOJ's argument, *Hilton-Rorar* shows that an email and an email attachment are assessed separately for privilege. Other cases in DOJ's string cite merely stand for the unremarkable notion that a communication does not lose its privileged status simply because it contains some publicly available information. (*See* R. 49:16–17.) WMC does not argue otherwise.

If "the attachments standing alone are not privileged or attorney work product" (R. 49:16), then they are not privileged, period.

In short, the Court should order DOJ to provide the email attachments to WMC. The Court should also declare that DOJ "violated the public records law" by withholding these attachments. *See Blazel*, 2023 WI App 18, ¶ 3.

III. If any of the requested records are privileged in part, DOJ violated its duty to separate the privileged information from the non-privileged information.

As explained above, DOJ unlawfully withheld the requested emails and their attachments because it has failed to prove they are privileged. Assuming for the sake of argument that some or all of those documents are privileged in part, DOJ violated its duty to redact those documents and provide WMC with partially redacted copies.

The public records law requires a custodian to separate disclosable information from non-disclosable information. The relevant statute provides, "If a record contains information that is subject to disclosure under [Wis. Stat. §] 19.35(1)(a) or (am) and information that is not subject to such disclosure, the authority having custody of the record shall provide the information that is subject to disclosure and delete the information that is not subject to disclosure from the record before release." Wis. Stat. § 19.36(6).

This statutory mandate does *not* give a custodian a choice between "separating the information or simply denying the open records request." *Osborn v. Bd. of Regents of Univ. of Wisconsin Sys.,* 2002 WI 83, ¶ 45, 254 Wis. 2d 266, 647 N.W.2d 158. Instead, "the statute *requires the custodian to provide the information subject to disclosure* and delete or redact the information that is not." *Id.* (emphasis added). A

custodian "is not relieved of its duty to redact under Wis. Stat. § 19.36(6) simply because the [custodian] believes it is burdensome." *See id.*

Contrary to this bright-line rule, DOJ asserts that it did not need to release any partially redacted documents to WMC because such documents would be "meaningless." (R. 49:18.) DOJ cannot assert that defense for the first time during litigation, and that defense fails on the merits.

A. DOJ cannot assert a new "meaninglessness" defense during litigation.

A court generally may *not* consider "reasons for denying a public records request that were not asserted by a custodian prior to the commencement of a mandamus action." *Journal Times v. Police & Fire Comm'rs Bd.*, 2015 WI 56, ¶ 65, 362 Wis. 2d 577, 866 N.W.2d 563. "The duty of the custodian is to specify reasons for nondisclosure and the court's role is to decide whether the reasons asserted are sufficient." *Id.* ¶ 63 (quoting *Newspapers, Inc. v. Breier*, 89 Wis. 2d 417, 427, 279 N.W.2d 179 (1979)). Courts recognize only one exception to this default process: a court "may consider a 'clear statutory exception' to disclosure, although the custodian did not rely on the exception in its response to a public records request." *Id.* ¶ 74 (quoting *State ex rel. Blum v. Bd. of Educ., Sch. Dist. of Johnson Creek*, 209 Wis. 2d 377, 387–88, 565 N.W.2d 140 (Ct. App. 1997)).

Here, DOJ provided at the outset only two reasons for withholding responsive records. It stated that every requested record was exempt from disclosure under either the attorney-client privilege or the attorney-work-product doctrine. (R. 5.) Yet DOJ now—during litigation—asserts a new ground for withholding records. Now,

DOJ asserts it need not release any redacted documents because the information in those redacted documents will be meaningless. Meaninglessness is not, however, a clear statutory exception to disclosure under the public records law.

Breier thus forbids this Court from considering DOJ's argument on meaninglessness. Instead, *Breier*'s default rule controls here: DOJ may rely only on the grounds that its custodian raised in the written denial of WMC's request for records. In other words, DOJ must prove that every requested record is privileged in its entirey and thus unable to be partially redacted.

B. Even if DOJ could assert meaninglessness now, that defense would fail on the merits for two separate reasons.

Even if it were not too late for DOJ to raise a new "meaninglessness" defense, that argument would fail on the merits for two reasons. That argument has thin legal support, and DOJ has not shown that redacted records would be meaningless here.

First, DOJ's new argument rests on a thin legal reed. The only Wisconsin case that DOJ cites for this supposed exception to the public records law is a single footnote: *Democratic Party of Wisconsin v. DOJ*, 2016 WI 100, ¶ 24 n.10, 372 Wis. 2d 460, 888 N.W.2d 584.

But that footnote is not nearly as broad as DOJ suggests it is. In that footnote, the court merely indicated "that redaction [was] not an option because the records at issue are videos, rather than text documents, and cannot be redacted." *See Democratic Party of Wisconsin*, 2016 WI 100, ¶ 81 (Abrahamson, J., dissenting (citing majority op., ¶ 24 n.10)). Here, by contrast, none of the requested documents appear to be videos. (*See* R. 27.) Rather, DOJ indicates that the requested records are "all

emails, some with attachments." (R. 49:5.) Because the requested records are not videos, footnote 10 in *Democratic Party of Wisconsin* is inapplicable here.[6]

Second, WMC disputes DOJ's assertion that partially redacted documents would be meaningless in this case. As the record custodian, DOJ "bears the burden 'to rebut the strong presumption' favoring disclosure." *Mastel*, 2021 WI App 78, ¶ 12 (citation omitted). DOJ has not met that burden. Instead, DOJ offers just one conclusory paragraph that asserts redaction here "would not be possible" or would leave "no text of any substance." (R. 49:21.)

Even when a document contains privileged information, it may be redactable. *See, e.g.*, *George v. Record Custodian*, 169 Wis. 2d 573, 582 & n.2, 485 N.W.2d 460 (Ct. App. 1992). "[T]he focus of the FOIA is information, not documents, and an agency cannot justify withholding an entire document simply by showing that it contains some exempt material." *ACLU of N. California v. U.S. Dep't of Just.*, 880 F.3d 473, 489 (9th Cir. 2018) (quoting *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977)). "[W]here only *portions* of the documents are covered by the [attorney-client] privilege, the non-exempt parts may be appropriately segregated and disclosed." *Id.* at 488.

Some of the arguments discussed above are relevant to possible redactions. As explained above, some of the requested emails may contain non-legal advice. The

[6] To preserve the issue for possible supreme court review, WMC maintains that the supreme court should withdraw any language in *Democratic Party of Wisconsin* which suggests that Wis. Stat. § 19.36(6) does not require "meaningless" releases of partially redacted records. Wisconsin "has no law allowing a public official to refuse to release a redacted document even if it is 'meaningless' or 'useless.'" *Democratic Party of Wisconsin*, 2016 WI 100, ¶ 92 (Abrahamson, J., dissenting).

existence of non-legal advice is significant here because "redaction is available for documents which contain legal advice that is incidental to the nonlegal advice that is the predominant purpose of the communication." *In re Cnty. of Erie*, 473 F.3d at 421 n.8. Also as explained above, DOJ has not shown that the requested emails pertain to any specific case. "Where the requested document is generic, pertaining to a broad class of future cases, it should generally be easier to separate material that is exempt from material that is non-exempt." *ACLU of N. California*, 880 F.3d at 489.

In short, if some or all of the withheld records are privileged, the Court should order DOJ to redact the privileged content and release the non-privileged content to WMC. The Court should also declare that DOJ "violated the public records law" by failing to separate exempt and non-exempt information as required by Wis. Stat. § 19.36(6). *See Blazel*, 2023 WI App 18, ¶ 3.

CONCLUSION

This Court should deny DOJ's motion for summary judgment and grant summary judgment to WMC on Count 2.

Dated this 7th day of August 2024.

Respectfully submitted,

Electronically signed by

Scott E. Rosenow

Scott E. Rosenow
Wis. Bar No. 1083736
Nathan J. Kane
Wis. Bar. No. 1119329

WMC Litigation Center
501 East Washington Avenue
Madison, Wisconsin 53703
(608) 661-6918
srosenow@wmc.org
nkane@wmc.org

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed a Plaintiff's Response to Defendant's Motion for Summary Judgment with the clerk of court using the Wisconsin Circuit Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 7th day of August 2024.

Electronically signed by

Scott E. Rosenow

Scott E. Rosenow