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STATE OF WISCONSIN
SUPREME COURT

KAREN SCHILL, TRACI PRONGA,
KIMBERLY MARTIN, ROBERT DRESSER, and
MARK LARSON,

Plaintiffs-Appellants,

v. Appeal No. 2008AP000967
Circuit Court Case No. 2007CV000304

WISCONSIN RAPIDS SCHOOL
DISTRICT, and ROBERT CRIST,

Defendants-Respondents,

and

DON BUBOLZ,

Intervenor-Respondent.

On Certification By The Court Of Appeals District IV
Of An Appeal From The Circuit Court For Wood County
The Honorable Charles A. Pollex,
Adams County Circuit Court Judge Presiding

PLAINTIFFS-APPELLANTS' BRIEF AND APPENDIX

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July 16, 2009

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

ISSUES PRESENTED

1. Are employees' purely personal emails created and/or maintained on a government-owned computer system public records under the Public Records Law; and

2. If so, are they subject to release under the balancing test when they offer no information regarding the affairs of government, and the strong public interest in protecting Wisconsin citizens' privacy and reputational interests outweighs the public interest in disclosure?

The circuit court answered these questions: "Yes."

On April 30, 2009, the court of appeals certified the appeal to the Wisconsin Supreme Court "to determine if the employees' personal emails are public records and, if they are, whether public policy reasons outweigh the public's interest in disclosure." The Court accepted the case on June 16, 2009.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Plaintiffs-Appellants Karen Schill, Traci Pronga, Kimberly Martin, Robert Dresser, and Mark Larson request oral argument and publication because, as the court of appeals noted, whether and to what extent public employees' personal emails are subject to the Public Records Law is an issue of first impression in Wisconsin. The Court's

guidance regarding this issue is critical as its decision will affect public employees statewide.

INTRODUCTION

The Legislature created the Wisconsin Public Records Law to provide the public with information regarding the acts of government. The law was not designed to expose purely personal information regarding public employees' private lives.

In this case, a citizen made a public records request to the Wisconsin Rapids School District ("District") for the emails from five teachers' school computers during a six-week period. The District decided to release all the emails on the computers as public records, even though some emails contained purely personal content, such as an email from a teacher to her spouse about childcare responsibilities, and an email from a friend to a teacher regarding social plans. The teachers challenged the release of their personal emails.

The District's decision to release the personal emails misconstrues the law because personal materials are not public "records" as defined by the law. Given the Public Record Law's underlying principle of providing access to the workings of government, it is the content and nature of the document, not solely its physical location at a governmental office, which determines whether the document is a public record.

Even if the personal emails were public records, they should not be released. There is no public interest in disclosing the personal information in these emails such as childcare responsibilities, dinner arrangements and social plans, yet there is a significant public interest in protecting Wisconsin citizens' privacy and reputational interests, as well as the effective functioning of public institutions. Given this imbalance, any presumption favoring disclosure is overcome. The Court should enjoin the District from disclosing the teachers' personal emails as public records.

STATEMENT OF THE CASE

Karen Schill, Traci Pronga, Kimberly Martin, Robert Dresser, and Mark Larson (collectively referred to as "Teachers") are teachers in the District. (R.4,5; A-Ap.153,159). In April 2007, Don Bubolz sent the District an open records request for the emails "from the computer [the Teachers] use during their school work day" from March 1, 2007, through April 13, 2007. (R.4; A-Ap.157). Shortly thereafter, the District notified the Teachers that it intended to release all of the Teachers' emails as public records pursuant to Mr. Bubolz's request. (R.4,5; A-Ap.154,159).

The District's Network and Internet Acceptable Use Policy ("Computer Policy") allowed the Teachers to use the District's email for personal use. (R.4,5,10; A-Ap.148,153,159). As a result, some of the emails the District chose to release pursuant to Mr. Bubolz's request are purely personal emails that do not relate to the District or to any official acts of government. (R.4,5; A-Ap.154,159). The District agrees that none of the Teachers used the District's email inappropriately or violated its Computer Policy by sending the personal emails. (R.13; A-Ap.130).

The Teachers did not object to the release of their work-related emails, but commenced an action in circuit court to enjoin the District from releasing their personal emails. (R.4; A-Ap.152-157). The Teachers asserted that the personal emails were not subject to release under the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 – 19.39[1], because: (1) personal emails are not "records" under the Public Records Law; and (2) even if the personal emails are records, under the balancing test, the privacy and reputational rights of Wisconsin citizens in their personal

[1] All statutory references are to the 2007-2008 statutes unless otherwise noted.

emails outweigh any public interest in disclosure. (R.7; A-Ap.163-171).

The circuit court rejected the Teachers' position and ordered the release of the personal emails. (R.13; A-Ap.133). The circuit court found that the personal emails were records, without any analysis, and that they should be disclosed under the balancing test, largely because of the presumption favoring disclosure under the law. (R.13; A-Ap.127). The Teachers subsequently asked the circuit court to reconsider its decision to release the entire email as a public record, and instead order the District to redact purely personal text and any personal email addresses prior to release. (R.18; A-Ap.107-111). The circuit court denied the Teachers' motion. (R.18; A-Ap.111-113). The Teachers appealed to the court of appeals. On April 30, 2009, the court of appeals certified the appeal to this Court. (A-Ap.101-106). On June 16, 2009, the Court accepted the case. The Teachers ask this Court to reverse the circuit court's decision and enjoin the District from releasing their personal emails.

ARGUMENT

I. PUBLIC EMPLOYEES' PERSONAL EMAILS MAINTAINED ON GOVERNMENT-OWNED COMPUTERS ARE NOT RECORDS AS DEFINED BY THE PUBLIC RECORDS LAW

The Court should reverse the circuit court's ruling because public employees' personal emails maintained on government-owned computers are not records as defined by the Public Records Law. The Court performs a two-step analysis to determine whether a record custodian should release material pursuant to a public records request. *Linzmeyer v. Forcey,* 2002 WI 84, 254 Wis. 2d 306, 646 N.W.2d 811. First, the Court determines whether the Public Records Law applies to the materials in question by reviewing the statutory language, and then any statutory and common law exceptions. *Id.* at ¶10. If the law applies, then the second step is to determine if other public policy exceptions overcome the law's presumption of openness. *Id.* The application of the Public Records Law is a question of law entitled to *de novo* review. *Hempel v. City of Baraboo*, 2005 WI 120, ¶21, 284 Wis. 2d 162, 699 N.W.2d 551.

The Public Records Law does not apply to the personal emails because they are not public "records" as defined by the law. In construing a statute, the Court begins with the statutory language. *State ex rel. Kalal v. Circuit*

Court for Dane County, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. The Legislature defined the term public "record" as:

> any material on which written, drawn, printed, spoken, visual or electromagnetic information is recorded or preserved, regardless of physical form or characteristics, which has been created or is being kept by an authority. "Record" includes, but is not limited to, handwritten, typed or printed pages, maps, charts, photographs, films, recordings, tapes (including computer tapes), computer printouts and optical disks. *"Record" does not include drafts, notes, preliminary computations and like materials prepared for the originator's personal use* or prepared by the originator in the name of a person for whom the originator is working; *materials which are purely the personal property of the custodian and have no relation to his or her office*; materials to which access is limited by copyright, patent or bequest; and published materials in the possession of an authority other than a public library which are available for sale, or which are available for inspection at a public library.

Wis. Stat. § 19.32(2) (emphasis added). Based on the plain language of § 19.32(2) above, personal emails fall outside the definition of public records. The Teachers certainly prepared the personal emails for their "personal use." They did not prepare them in the context of their job duties; they do not relate to school district business; and neither the Teachers nor the District relied on them to make business-related decisions. Thus, under the statute's

plain language, the personal emails are not "records" subject to disclosure.

Not only does the plain meaning support such a finding, but the context in which "record" is defined does as well. Statutes are interpreted in the context in which they are used, not in isolation, but as part of a whole, in relation to the language of surrounding, or closely-related statutes. *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58 at ¶46; *see also Beard v. Lee Enterprises, Inc.*, 225 Wis. 2d 1, 22, 591 N.W.2d 156 (1999) (statutes are to be interpreted in a manner that advances the purposes of the law). The Public Records Law's purpose is to give the public "the greatest possible information *regarding the affairs of government* and *the official acts* of those officers and employees who represent them." Wis. Stat. § 19.31 (emphasis added); *see also Building and Constr. Trades Council of South Cent. Wisconsin v. Waunakee Cmty. Sch. Dist.,* 221 Wis. 2d 575, 585 N.W.2d 726 (Ct. App. 1998) (the purpose of the Public Records Law is to shed light on the workings of government). As a result, "public records must have some relation to the functions of the agency." 72 Op. Att'y Gen. 99 (1983).

In addition, the law excludes "materials which are purely the personal property of the custodian and have no

relation to his or her office." Wis. Stat. § 19.32(2). Moreover, regarding the state's duty to retain public records, the law defines public records as materials that are "made, or received by any state agency or its officers or employees in connection with the transaction of *public business*. . . ." Wis. Stat. § 16.61 (2)(b) (emphasis added). Viewed in this context, the Teachers' personal emails are not "records" under the law because they have no connection to any governmental purpose or function. They are purely personal in nature.

A. The Storage Of The Personal Emails On Government-Owned Computers Is Insufficient To Render Them Public Records

Even though the District retained the personal emails on a government-owned computer, it takes more than a material's physical location to render the material a public record. The Wisconsin Attorney General's Office has instructed that: "Content, not medium or format, determines whether [a] document is a 'record' or not." *Wisconsin Public Records Law Compliance Outline*, Wisconsin Department of Justice Office of the Attorney General, p. 3, 2008. (A-Ap.193). The content must have some nexus to official duties or governmental business. *See In re John Doe Proceeding v. State of Wisconsin*, 2004 WI 65, ¶45, 272 Wis. 2d 208, 237, 680 N.W.2d 792, 805 (2004) ("not everything a

public official creates is a public record"); *see also State v. Panknin*, 217 Wis. 2d 200, 212-213, 579 N.W.2d 52 (Ct. App. 1998) (holding that the personal notes of a sentencing judge were not public records). Here, the content of the personal emails has nothing to do with the District, the Teachers' duties or the Teachers' employment. Emails from the Teachers to their spouses, partners and friends about personal business such as social plans or childcare responsibilities are not public records.

The circuit court's ruling to the contrary overturns administratively sanctioned practices regarding this issue. While no Wisconsin court has directly addressed this issue, at least several prominent legal authorities and record custodians apply a content-driven test based on the law and do not consider purely personal emails to be public records. The Wisconsin Attorney General's Office has opined in an internal memorandum that teachers' (and other public employees') purely personal emails are not public records because they were not created in connection with official business. *See Attorney General Memorandum,* Wisconsin Department of Justice, Office of the Attorney General. (R.7; A-Ap.152-156). The Office of the Milwaukee City Attorney, represented in this case by Melanie Swank, the editor of the Wisconsin Bar Association's *The Wisconsin*

Public Records and Open Meetings Handbook, filed an amicus brief in the court of appeals informing the court that the "City Attorney has consistently advised that personal communications are not 'records' as defined by Wis. Stat. § 19.32(2)." (Amicus Brief, p. 1). The City of Madison has filed a motion for permission to file a non-party brief in this action joining the City of Milwaukee's position.

The Department of Administration (DOA) has also adopted a content-driven test for its record retention obligations pursuant to Wis. Stat. § 16.61. Under Wis. Stat. § 16.61(2)(b)5, as under the Public Records Law, public records do not include "materials prepared for the originator's personal use." Wis. Stat. § 16.61(2)(b)5. The DOA has prepared an "E-mail Records Management Training" for state employees regarding their obligations under this statute.[2] (A-Ap.177-189). In that training, the DOA advises that emails "should be evaluated by content and function to determine whether the message is a record." (A-Ap.177). The DOA further states that personal material such as "non-work related mail" are not public records. (A-Ap.188). The circuit court's holding imprudently

[2] *See* http://www.doa.state.wi.us/docs_view2.asp?docid=6081 (last visited 7/15/09). (A-Ap.177-189). The court may take judicial notice of this fact as its accuracy can be readily verifiable by going to the DOA's website. Wis. Stat. § 902.01(2); *State v. Harvey*, 242 Wis. 2d 189, 197, 625 N.W.2d 892, 896 (Ct. App. 2001).

diverges from this sound analysis by these record custodians.

B. Other Jurisdictions Uniformly Exempt Personal Emails That Have No Substantial Nexus To Government Business From Public Records Laws

The circuit court's opinion also contradicts other state appellate courts' uniform holdings that personal emails are not disclosed as public records without a substantial nexus to government business. *State of Florida v. City of Clearwater*, 863 So. 2d 149 (Fla. 2003); *Griffis v. Pinal County*, 156 P.3d 418 (Ariz. 2007); *State ex rel. Wilson-Simmons v. Lake County Sheriff's Department*, 693 N.E.2d 789 (Ohio 1998); *Denver Publ'g Co. v. Board of County Comm'rs of the County of Arapahoe*, 121 P.3d 190 (Colo. 2005); *Pulaski County v. Arkansas Democrat-Gazette, Inc.*, 260 S.W.3d 718 (Ark. 2007); *Cowles Pub. Co. v. Kootenai County Bd. of County Comm'rs*, 159 P.3d 869 (Idaho 2007); *Tiberino v. Spokane County*, 13 P.3d 1104 (Wash. Ct. App. 2000); *Brennan v. Giles County Bd. Of Educ.*, No. M2004-00998-COA-R3-CV, 2005 WL 1996625 (Tenn. Ct. App. Aug. 18, 2005)(unpublished). Neither the District, nor Mr. Bubolz, nor the circuit court cited any authority diverging from this national consensus, and the Teachers are unaware of any contrary authority.

This case most closely resembles the *Clearwater* case where the newspaper sought a court order compelling the city to release all emails sent from or received by two city employees over the city's computer network during a certain time period. 863 So. 2d at 151. The city sorted the emails into two categories: personal and public. The city released the public emails, but did not release the personal emails.

The Florida Supreme Court held that personal emails did not fall within the definition of public records because they were not made or received in connection with the transaction of official business. *Id*. at 155. The court reasoned that "private documents cannot be deemed public records solely by the virtue of their placement on an agency-owned computer. The determining factor is the nature of the record, not its physical location." *Id.* at 154. The court stressed that a document subject to release must be in some way connected to "official business." *Id*. at 152. The court enjoined the release of the personal emails.

Similarly, in *Griffis*, 156 P.3d at 418, a public employee accused of misusing public funds filed an action to block the release of personal emails he had sent or received on the county's computer system. The Arizona

Supreme Court held that emails maintained on a government-owned computer system are not automatically public records. *Id*. at 421. The records must possess the requisite nexus to official duties in order to be public records. *Id*. at 422. The court reasoned that adopting a rule that the mere possession of a document by the government makes it a public record would lead to the "absurd" result such that "[e]very note made on government-owned paper, located in a government office, written with a government-owned pen, or composed on a government-owned computer would presumably be a public record." *Id.* at 421.

The Teachers urge this Court to likewise avoid such absurd results and confirm that purely personal emails are not public records under Wisconsin's Public Records Law. *See Watton v. Hegerty*, 2008 WI 74, ¶26, 311 Wis. 2d 52, 751 N.W.2d 369 (Wisconsin courts "avoid statutory interpretation that lead to absurd results.") Here, as in the *Clearwater* case, the Teachers' emails have no connection to governmental business. The emails sent and received were intended to be personal correspondence not for public view.[3] Like the emails in *Clearwater* and

[3] If there is any question regarding whether the email contains purely personal content, the Court can order the circuit court to conduct an *in camera* review of the personal emails. *See Pulaski County*, 260 S.W.3d at 724.

Griffis, they were not sent as part of any "official" act related to their occupation as teachers. As the court noted in *Clearwater*, "there is little to distinguish such e-mail from personal letters delivered to government workers via a government post office box and stored in a government-owned desk." 863 So. 2d at 153.

If the Court affirms the circuit court's holding, then the Legislature's bright line between personal and public records is hopelessly blurred. The Teachers surmise that a variety of personal documents are maintained on government computers or in government offices. For example, a city clerk might save personal recipes on her break; a county attorney might compose a holiday shopping list at lunch; a state worker might edit his resume after hours; a nurse might have photos of his children as his screen saver; or a police officer might email her physician to refill a prescription after her shift. Without a content-driven or business nexus test, record custodians would need to maintain, store and retrieve those records just as they would any other public record. The Legislature never intended the Public Records Law to demand such a result. The Court should find that personal emails are not public records under the law.

II. EVEN IF THE EMAILS ARE PUBLIC RECORDS, THEY SHOULD NOT BE RELEASED BECAUSE THE PUBLIC INTEREST IN PROTECTING INDIVIDUAL PRIVACY AND REPUTATIONAL RIGHTS OUTWEIGHS ANY INTEREST IN DISCLOSURE

However, if the Court determines that the personal emails are "records", they are still not subject to disclosure under the Public Records Law. Under the second prong of the test, the Court determines if public policies favoring limited access or nondisclosure outweigh the presumption of access. *Hempel*, 2005 WI 120 at ¶28. In this case, as the personal emails provide no insight into the affairs of government, the public interest in protecting Wisconsin citizens' privacy and reputational rights must overcome any public interest in disclosure. As the United States Court of Appeals for the District of Columbia observed, when there is no demonstrated public interest in disclosure, then disclosure is not appropriate because "'something, even a modest privacy interest, outweighs nothing every time.'" *Reliant Energy Power Generation, Inc. v. Federal Energy Regulatory Comm'n*, 520 F. Supp. 2d 194, 207 (D.C. Cir. 2007) (citations omitted).

Wisconsin has a strong tradition of protecting the privacy and reputational rights of its citizens. *State ex rel. Youmans v. Owens*, 28 Wis. 2d 672, 685, 137 N.W.2d 470 (1965); *see also Newspapers, Inc. v. Breier,* 89 Wis. 2d

417, 432, 279 N.W.2d 179, 186 (1979) ("[t]he extent of harm to individual reputations by release of certain records should be considered"); *Armada Broadcasting, Inc. v. Stirn,* 183 Wis. 2d 463, 475, 516 N.W.2d 357, 361 (1994) ("Protection of a citizen's good name is a proper concern of the state.") Those privacy interests are even more compelling when, as here, misconduct is not an issue. *Hempel*, 2005 WI 120 at ¶78.

The fact that this case involves emails should not alter Wisconsin's strong tradition of preserving personal privacy rights. If a teacher makes a personal phone call at lunch time on the school phone, she does not waive all expectation of privacy in her phone conversation. *See Fischer v. Mt. Olive Lutheran Church*, 207 F. Supp. 2d 914 (W.D. Wis. 2002) *citing Watkins v. L.M. Berry & Co.*, 704 F.2d 577, 582 (11th Cir. 1983) (finding that an employee had an expectation of privacy in personal calls and an employer had to cease monitoring them). If a teacher receives a personal letter in his school mailbox, he does not waive all expectation of privacy in his "snail mail."

The emails in this case are no different than personal phone calls or personal mail. They were private communications not intended for public consumption. As the Teachers indicated to the circuit court, some of the emails

contain highly sensitive information such as bank account numbers and personal health information. (R.13; A-Ap.133). It is doubtful that either the Teachers or the citizens who communicated with them would have revealed such personal information if they had anticipated that their emails would be released to the public.

Mr. Bubolz argued to the court of appeals that the Teachers waived their expectation of privacy by using a government-owned computer to send emails, but the Teachers sent the emails knowing that the Computer Policy allowed for personal use. (R.13; A-Ap.113). The Computer Policy states generally that the District will monitor network activity, but specifically regarding email, it says "the Network manager will not routinely inspect the contents of e-mail sent by district employees." (R.10; A-Ap.141)(emphasis added). In addition, while the Computer Policy indicates that users should not assume the information transmitted is confidential, the Computer Policy says nothing about the Public Records Law. It contains no warning that personal emails will be disclosed to the public. It is one thing to email with the understanding that the employer's computer tech might monitor your emails; it is quite another to imagine a private citizen obtaining your personal emails and your

loved-ones' personal email addresses for potentially unlimited public disclosure.

The Legislature did not intend for the Public Records Law to be used in such a manner. The Legislature crafted the Public Records Law in 1981. Wis. Stat. § 19.32(2)(1981-82); 1981 Wisconsin Act 335. When the law was originally introduced as Senate Bill 250, the Legislative Reference Bureau ("LRB") analyzed the bill. (A-Ap.196-200). As part of its analysis, the LRB found that "authorities must withhold any record containing information concerning the private life of an individual which would be of no legitimate public concern, except from the subject of the record." (A-Ap.198).

There is no legitimate public concern served by disclosing these purely personal emails. As argued above, the Public Records Law's fundamental purpose is to inform the public regarding the acts of government. Wis. Stat. § 19.31. The emails have nothing to do with any governmental business. This Court has declined to release records when doing so would offer little information regarding the official acts of government. *State ex rel. Morke v. Record Custodian, Department of Health & Social Services*, 159 Wis. 2d 722, 465 N.W.2d 235 (1990). Absent

any job nexus, the public has no legitimate interests in employees' private lives.

Any alleged public interest in these emails is nothing more than Mr. Bubolz's personal vendetta against these Teachers, as evidenced by the evolution of his arguments. First, Mr. Bubolz argued that he had the right as a taxpayer to see the Teachers' personal emails because the taxpayers "paid for the equipment, facility and salary of the person." (R.21; A-Ap.204). Then he argued that the Teachers' emails were official acts because they were emailing on taxpayer time, on taxpayer equipment, in a taxpayer built building (R.10; A-Ap.139). Then he argued that he needed to see the personal content of the emails to determine if the Teachers violated school policy, even though the Teachers had a right to use the school email for personal use. (R.16; A-Ap.201-202). It was not until the case reached the court of appeals that he revealed his true motivations for seeking these emails. Mr. Bubolz is on a self-admitted fishing expedition to see if the Teachers violated alleged school policies by using their school email to discuss school board candidates or organizations supporting or opposing school board candidates. (Bubolz Court of Appeals' Brief at 2-3).

The Court should not allow Mr. Bubolz to manipulate the Public Records Law in this fashion, especially when releasing the personal emails will not satisfy his crusade.[4] Emails regarding school board candidates are not at issue here. The Teachers have not objected to the release of any of emails relating to school business.

This case is similar to the situation the Court faced in *Hempel* where the Court declined to disclose the requested records. 2005 WI 120. As in *Hempel*, this is not a case where the Teachers seek to protect evidence of alleged misconduct. The District has confirmed that the Teachers complied with its Computer Policy. (R.13; A-Ap.130). Like *Hempel*, Mr. Bubolz claims he seeks the personal emails to conduct his own investigation of the Teachers' compliance with the Computer Policy. There is no evidence, however, of any "cover-up" on the part of the District as record custodian, and there is no reason for the District to find the Teachers complied with the Computer Policy if they had not. Indeed, Mr. Bubolz admitted to the circuit court that he is engaged in a "fishing mission." (R.13; A-Ap.125).

[4] Mr. Bubolz's motivations are relevant here, as this Court has instructed that when a record custodian performs a balancing test, it must evaluate context to some degree. *Hempel*, 2005 WI 120 at ¶28.

The Washington Court of Appeals rejected arguments similar to Mr. Bubolz's assertions in *Tiberino*, 13 P.3d 1104. In *Tiberino*, the county terminated an employee based on her unsatisfactory performance, including her use of the email for personal matters. *Id*. The court found that while the public had a legitimate interest in the statistical information that she sent 467 emails over a 40-day time frame, "what she said in those emails is of no public significance." *Id*. at 1110. The court reasoned that "[a]ny reasonable person would find disclosure of [the personal] emails to be highly offensive. *Id*. at 1109.

As in *Tiberino*, this Court should not allow a disgruntled citizen to use the Public Records Law to snoop into public employees' personal lives. Although public employees understand they must check some privacy rights at the door, releasing personal emails and personal addresses offends the public conscience. Most employers, like the District here, allow employees limited rights to use work computers for personal use. This is sound business practice. Many public employees work longer than regular business hours, they often cannot leave work to attend to personal business, and it can be difficult to make personal calls at work because of work related demands. Using the employer-owned email is often a simple, quick way to take

care of personal business that must be accomplished during the work day. Employees can email during breaks or free-time, without taking anything away from their assigned duties. It would severely affect morale to allow the public access to those emails, and it might discourage highly qualified citizens from seeking public employment. Accordingly, after applying the balancing test, the Court should enjoin the release of the personal emails.

III. IF THE COURT FINDS THE EMAILS ARE SUBJECT TO DISCLOSURE, IT SHOULD ORDER THE DISTRICT TO REDACT THE PERSONAL TEXT AND PERSONAL EMAIL ADDRESSES

If, however, the Court finds that the emails are subject to release, then the Teachers ask this Court to order the District to redact the text of the personal emails, as well as any personal email addresses, pursuant to the balancing test. The circuit court refused to do so because it hypothesized that the District "should have a concern about the extent of [the Teachers' email] use." (R.13; A-Ap.132). The District had no such concern in this case, but if it had a concern, it could certainly monitor the email use without releasing the emails as public records. If the public has a concern, it would not need the text of the personal emails or personal email addresses in order to see if the Teachers followed school policy. The public only needs the times and dates that the Teachers

sent the emails. *See Tiberino*, 13 P.3d at 1110. The content and recipients of the emails are irrelevant.

Certainly Wisconsin citizens should not be subjected to the public disclosure of their personal email addresses without their consent. The Public Records Law exempts employees' home email addresses from disclosure. Wis. Stat. § 19.36(10)(a). Citizens' personal email addresses should be exempted as well. As other courts have found, the disclosure of personal email addresses is an unwarranted invasion of personal property. *Nulankeyutmonen Nkihtaqmikon v. Bureau of Indian Affairs*, 493 F. Supp. 2d 91, 108 (D. Me. 2007) (the government properly redacted the personal email addresses under the Freedom of Information Act); *Center for Public Integrity v. FCC*, 505 F. Supp. 2d 106 (D.C. Cir. 2007) (personal email addresses may be withheld under the Freedom of Information Act).

There is no public interest in releasing either the personal content or the personal email addresses. If the Court finds the personal emails subject to release, any personal content, including personal email addresses, should be redacted prior to any release.

CONCLUSION

The Public Records Law is not limitless. While there is a presumption of access, the Legislature created an

express definition of the "records" that are subject to public disclosure. Personal emails do not come within that definition. This Court should affirm Wisconsin's current administrative practice and uniform national precedent by confirming that personal emails are not records under the law.

However, even if the personal emails are records, the policy objectives of the Public Records Law are not served by release here. The Legislature designed the law to allow citizens to evaluate the actions of government, not employees' shopping lists or dinner plans. The public has little to gain from reading public employees' personal emails while Wisconsin citizens' privacy rights have much to lose. The Court should enjoin the District from releasing the personal emails or, in the alternative, order the District to redact all personal text and personal email addresses before they are released.

Respectfully submitted this 16th day of July, 2009.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a monospaced font. The length of this brief is 26 (twenty-six) pages.

I further certify that the text of the e-brief is identical to the text of the paper brief.

Respectfully submitted this 16th day of July, 2009.

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APPENDIX
TABLE OF CONTENTS

CERTIFICATION FOR APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

I further certified that the content of the e-appendix is identical to text of the paper appendix.

Dated this 16th day of July, 2009

By: _____
Jina L. Jonen
State Bar No. 1030543

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that she has caused three (3) true and correct copies of the foregoing Brief and Appendix to be served upon all counsel of record via first class mail as follows:

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