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STATE OF WISCONSIN
SUPREME COURT
DISTRICT I
Case No. 2008AP000967-AC

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

Plaintiffs-Appellants,

Appeal No. 2008AP000967
Circuit Court No. 2007CV000304

v.

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

OFFICE OF THE MILWAUKEE CITY ATTORNEY AND THE OFFICE OF THE MADISON CITY ATTORNEY NON-PARTY *AMICUS* BRIEF ON THE MERITS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Wisconsin Cases

Page

Federal Cases

Cases From Other States

Wisconsin Statutes

United States Code

Other Authorities

INTRODUCTION

The Office of the Milwaukee City Attorney advises all City of Milwaukee departments and Milwaukee Public School personnel on matters relating to compliance with the Wisconsin Public Records Law. Wis. Stat. §§ 19.31-39. This includes advising of thousands of City and school district employees. A significant portion of these employees are provided with government-owned computers for use at their workplace. The Office of the Madison City Attorney advises the City of Madison Common Council, all City of Madison departments, boards, committees, commissions, and related quasi-governmental corporations on compliance with the Wisconsin Public Records Law. Both cities' e-mail policies allow incidental personal use of government computers.

In discharging their responsibilities, these City Attorneys offer formal and informal legal opinions interpreting the public records law. These City Attorneys have consistently advised that personal communications are not "records" as defined by Wis. Stat. § 19.32(2).

The issue in this case is whether personal e-mails, when sent and received by government employees on government-owned computer systems, on government time, are "records" as defined under the public records law. The decision by this court will impact every government entity in the State of Wisconsin.

ARGUMENT

I. PURELY PERSONAL E-MAILS, EVEN WHEN SENT OR RECEIVED ON A GOVERNMENT-OWNED COMPUTER SYSTEM, ON GOVERNMENT TIME, ARE NOT "RECORDS" AS DEFINED BY THE WISCONSIN PUBLIC RECORDS LAW

The Wisconsin Public Records Law policy provides, in relevant part:

> 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*. . . To that end, ss. 19.32 to 19.37 shall be construed in every instance with a presumption of complete public access, *consistent with the conduct of governmental business*. . .

Wis. Stat. § 19.31. (Emphasis added).

While the presumption of access to records is broad, it is not absolute. *Journal/Sentinel v. Aagerup*, 145 Wis. 2d 818, 822, 429 N.W.2d 772 (Ct. App. 1988).

No Wisconsin appellate court has ruled on whether the content of purely personal e-mails when sent or received on a government-owned computer system, on government time, are "records" as defined by the Wisconsin Public Records Law. Wis. Stat. § 19.32(2). If affirmed by this court, the circuit court decision would likely not be limited to e-mail use, but would apply to all recordable communications made on government equipment or resources, including all pieces of paper, instant messaging,

text messaging, and VOIP (voice over internet protocol) used incidentally to communicate on personal matters.

This court should clarify the law by ruling that personal e-mails are not records subject to disclosure. Under the public records law a "record" is defined to include "any material on which written, drawn, printed, spoken, visual or electromagnetic information is recorded or preserved . . ...." Wis. Stat. § 19.32(2). The definition of a "record" does not include materials "prepared for the originator's personal use" or "materials which are purely the personal property of the custodian and have no relation to his or her office." Id. We urge the court to rule that these personal e-mails fall within this exception to the definition of a record.

The Attorney General has opined that "records" must have some relation to the functions of the agency. To be considered a record, the information or document must be created or kept in connection with the official purpose or function of the agency. 72 Op. Att'y. Gen. 99, 101 (1983); see also, *State ex rel. Youmans v. Owens*, 28 Wis. 2d 672, 679, 137 N.W.2d 470 (1965). Not everything a public official or employee creates is a public record. *In re John Doe Proceeding*, 2004 WI 65, ¶ 45, 272 Wis. 2d 208, 680 N.W.2d 792. It is the content of the record, not the medium or format that determines whether a document is a "record." Wis. Dep't of Justice, *Wisconsin Public Records Law: Compliance Outline* 5 (2008) (*Compliance Outline)*; A-Ap. 193.

According to the record in this case, the e-mails in question are completely personal and have nothing to do with the business of the school district. The teachers do not object to disclosure of school related e-mails. A-Ap. 120. Statewide, many public employees engage in brief use of electronic communication on government equipment, on government time. This form of communication is necessary because government employees, like private sector employees, spend many hours in the workplace; use of electronic means of communication is usually more efficient and takes less time than use of the telephone for such purposes.

It is in the public interest to allow public employees to use these technologies to convey brief personal messages via electronic communication systems because it allows public employees to take care of family and personal business in the office, without significant interruption to the workday. *Denver Publ'g. Co. v. Board of County Com'rs*, 121 P.3d 190, 198 (Colo. 2005).

These private, electronic communications should not be subject to analysis under the public records law because they are not "records" and are therefore not subject to disclosure to the public any more than personal letters kept in an office desk drawer, or scribbled notes to pick up milk on the way home, are "records" subject to the law. A decision finding that purely personal communications by public employees on government-owned computer e-mail and other sources of electronic communication are

"records" would create a negative impact upon the morale of public employees, and may well undermine the ability of governmental bodies to recruit and retain highly qualified employees for important public positions.

The record in this case establishes that the school district has a written computer use policy that allows employees to use the district's e-mail accounts for occasional personal use. A-Ap. 148. Similarly, both the City of Madison and the City of Milwaukee allow incidental personal use of e-mail and other means of electronic communication.

While we have found no Wisconsin cases that interpret this issue, courts in other states, with public records laws similar to Wisconsin's law, have ruled that personal e-mails sent or received on a government computer are not records subject to disclosure under their public records laws. All of these cases have a similar theme, one that this court should adopt: these personal notes are not records because they have no relationship to the public duties of the employees.

For example, the Florida Supreme Court ruled that while e-mail records may be subject to Florida's public records law, all e-mails that are "private" fall outside the definition of a public record because they are not made in connection with the City's official business. "Although digital in nature, 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." *State of Florida v. City of Clearwater*, 863 So. 2d 149, 153 (Fla. 2003) (citation omitted.)

Florida's constitution allows access to any public records "made or received in connection with the official business of any public body, officer, or employee . . .." Id. at 151-152, *citing* Article 1, Section 24 of the Florida Constitution. Florida's public records law allows access to records made "in connection with the transaction of official business by any agency." Id., *citing* § 119.011(1), Fla. Stat. (2002). The Wisconsin Public Records Law allows access to records "regarding the affairs of government and the official acts of those officers and employees who represent them. . .." Wis. Stat. § 19.31.

The Florida Supreme Court rejected the media's argument that placement of the e-mails on the City's computer network automatically made them subject to Florida's Public Records Law. The court wrote that ". . . private documents cannot be deemed public records solely by 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 e-mails must have some connection to the government agency's official business. Quoting the trial court decision, the Florida Supreme Court agreed that "[c]ommon sense . . . opposes a mere possession rule," noting that disclosure of personal communications would create absurd consequences. Id.

Florida's provision for access to public records is similar to Wisconsin's declaration of policy, which is to provide access to records that are consistent with the conduct of governmental business. The purpose of the Wisconsin Public Records Law is to shed light on the workings of the government and the acts of public officers and employees. *Building and Constr. Trades Council of South Cent. Wisconsin v. Waunakee, Cmty. Sch. Dist.*, 221 Wis. 2d 575, 582, 585 N.W.2d 726 (Ct. App. 1998). Private e-mails created or received on a government computer e-mail system have nothing to do with the conduct of governmental business. A decision that personal e-mails included on a government e-mail computer system are "records" subject to disclosure under the public records law would lead to an absurd interpretation of the law since personal e-mails have nothing to do with the conduct of governmental business. Wis. Stat. § 19.31. Wisconsin courts avoid statutory interpretation that leads to absurd results. *Watton v. Hegerty*, 2008 WI 74, ¶¶ 14, 26, 311 Wis. 2d 52, 751 N.W.2d 369.

Similarly, the Arizona Supreme Court has ruled that purely personal e-mails generated and maintained on a government-owned e-mail system are not public records under Arizona's Public Records Law. *Griffis v. Pinal County*, 215 Ariz. 1, 156 P.3d 418, ¶ 11 (Ariz. 2007). The court ruled that the definition of a public record does not include documents "of a purely private or personal nature. Instead, only those documents having a

"substantial nexus" with a government agency's business activities qualify as a public record." *Id.* at ¶ 10. The Arizona Supreme Court ruled that the analysis must include the "nature and purpose of the document to determine its status, mere possession of a document by a public office or agency does not by itself make that document a public record, . . ." The court added that to hold otherwise would create an absurd result. *Id.* at ¶ 11.

The court noted that the purpose of the public records law is to "open government activity to public scrutiny, not to disclose information about private citizens." *Id.* Disclosure of personal private documents does nothing to advance the purpose of the public records law and sheds no light on how the government is conducting its business. *Id.* at ¶ 12.

If the circuit court's decision in this case is confirmed, a wedding invitation list created by a public employee on a government computer during his or her lunch hour would be a public record. An e-mail sent to a spouse, asking them pick up bread and milk would be a public record. This would be an absurd interpretation of the law. There is no reason that government employees should be stripped of their right to engage in periodic, brief personal communications, quickly and efficiently, without having to leave the office. The determining factor is the nature of the record, not its physical location. *Clearwater*, 863 So. 2d at 154; *Watton,* 2008 WI 74, ¶ 25; *Compliance Outline* 5 (2008); A-Ap. 193.

This is not to say that personal e-mails may not become records under some circumstances. If, for example, a public employer investigates an employee for abuse of personal e-mail use, the closed investigation, including e-mail gathered as part of the investigation, may be subject to disclosure under the public records balancing test. In such cases, the appropriate balance would allow disclosure of the number of messages and the amount of time spent on personal e-mail use, but not the content of the personal messages. The content of the emails could be subject to release, under the balancing test if, for example, the employee was disciplined because the e-mail content violated some government policy.

In a case that demonstrates this point, the Colorado Supreme Court held that romantic e-mails between two government employees were "personal" and were not subject to disclosure under Colorado's equivalent to Wisconsin's Public Records Law, even though the e-mails were exchanged on government time and on government-owned computers. *Denver Publ'g. Co. v. Board of County Com'rs*, 121 P.3d 190, 191 (Colo. 2005). Colorado's Open Records Act defines "records" to include only records that address the performance of public functions or the receipt or expenditure of public funds. *Id.* at 202.

The e-mails in the Denver case were denied even though they were gathered by the government entity as part of an investigation of the record subjects. The government released records relating to the investigation, but

redacted the personal content of the e-mail or text messages gathered during the investigation. *Id.* at 192. "The fact that a public employee or public official sent or received a message while compensated by public funds or using publicly-owned computer equipment is insufficient to make the message a 'public record'." *Id.* at 199.

Although Wisconsin's Public Records Law definition of a "record" is not as limited as Colorado's, the same analysis applied by the Colorado court should be applied to personal e-mails sent or received by Wisconsin public employees on government computers while being compensated by public funds. E-mail allows employees, including public employees, the ability to take care of personal and family matters quickly and efficiently, in much less time than do traditional telephone conversations or trips home to take care of personal and private matters. Allowing limited personal use of government controlled e-mail, as is the case here, serves the best interests of the public by keeping employees in the office as long as possible without significantly interrupting the work day. *Id.* at 198. See also, *Tiberino v. Spokane County*, 13 P.3d 1104 (Wash. Ct. App. 2000) (Volume, but not content of employee e-mail is subject to disclosure when excess e-mail use is the basis of employee discipline.)

The Supreme Court of Idaho ruled that personal e-mail records are public records if they also include information relating to the conduct or administration of the public business. The court ruled that e-mails that

included information relating to a personal relationship were subject to disclosure because the messages also included job performance of a county employee, the spending policies of a county program, issues surrounding a county program's demise, and other employment-related claims. *Cowles Publ'g Co. v. Kootenai County Bd. of County Com'rs*, 144 Idaho 259, 159 P.3d 896, 899-900 (Idaho, 2007). There is nothing in the record in this case to indicate that the personal e-mails at issue related to school business.

In a case of first impression, the Wisconsin Court of Appeals ruled that the personal notes of a trial judge, even when work-related, are not subject to disclosure. The court ruled that such notes are a "voluntary piece of work completed by the trial court for its own convenience and to facilitate the performance of its duties." *State v. Panknin*, 217 Wis. 2d 200, 212, 579 N.W. 2d 52 (Ct. App. 1998). Personal notes, whether those of a judge or any other public employee, and whether kept in electronic format or handwritten format, are not "records" as defined by the public records law. Wis. Stat. § 19.32(2).

There is no evidence in the record that the subject personal e-mails included information relating to the conduct and administration of the government's business. They are purely personal in content. It is not necessary to resort to the balancing test in this case because the e-mails at issue are not "records" and are therefore not subject to disclosure under the public records law.

While we do not make the argument in this case that there is a right to privacy of a public employee's personal e-mail created or received on a government computer, we do note that some jurisdictions have indicated that there may be privacy concerns related to disclosure of employee personal e-mail. Most government e-mail use policies make clear that employees have no right to privacy in their e-mails. There is a substantial difference, however, between a government employer's right to review employee personal e-mail, and the public's right (or lack of right) to access to the content of personal e-mail where privacy interests should be considered.

The Ninth Circuit Court of Appeals held that absent specific consent, government employees have a reasonable expectation of privacy in the text messages they send and receive on their government issued pagers that are administered by a third-party text-messaging service. The court also ruled that disclosure of the content of the text messages by the third-party text-messaging service could, under certain circumstances, violate the Stored Communication Act. 18 U.S.C. § 2702(a)(1). *Quon v. Arch Wireless Operating Co., Inc.*, 529 F.3d 892, 903-04, 906 (9th Cir. 2008). *See also, Denver Publ'g. Co.*, 121 P.3d at 194 (acknowledging that a constitutional right to privacy may bar access to public records otherwise accessible under the pubic records law.)

On the other hand, the Seventh Circuit Court of Appeals has ruled that employees of a private employer have no reasonable expectation of privacy in information stored on employer issued laptops, because of the employer's announced policy that it could inspect the laptops it furnished for employee use. *Muick v. Glenayre Elecs.*, 280 F.3d 741, 743 (7th Cir. 2002).

Record custodians should not be placed in the impossible position of risking violation of either the public records laws, the right to privacy, or even the Stored Communication Act.

CONCLUSION

The circuit court decision in this case should be reversed because the e-mails at issue are not "records" and are therefore not subject to analysis or disclosure under the Wisconsin Public Records Law.

Dated at Milwaukee, Wisconsin, this ____ day of July, 2009.

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I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c), Wis. Stats., for a brief and appendix produced with a proportional serif font. The length of this brief is 2, 961 words.

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I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.12(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

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