STATE OF WISCONSIN
SUPREME COURT

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

Plaintiffs-Appellants,

v.

WISCONSIN RAPIDS SCHOOL DISTRICT AND ROBERT CRIST

Defendants-Respondents,

and

DON BUBOLZ,

Intervenor-Respondent.

Appeal No. 2008AP000967

Circuit Court Case No. 07CV304

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

DEFENDANTS-RESPONDENTS' BRIEF

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ISSUES PRESENTED

1) Are public employees' personal email communications that are created and/or stored on a government-owned system "records" under the Wisconsin public records law, and if not, what constitutes "purely personal" email communications?

2) If such communications are "records" does the public's interest in nondisclosure outweigh the public's interest in access and the presumption in favor of disclosure?

The Circuit Court for Wood County, Honorable Charles A. Pollex presiding, determined that such communications were records and that any public interest in nondisclosure was insufficient to outweigh the presumption in favor of public access. The Court of Appeals panel certified the case to the Supreme Court on April 30, 2009 and this Court accepted the case on June 16, 2009.

INTRODUCTION

Respondent, Wisconsin Rapids School District (hereinafter referred to as "District") is an authority under Wisconsin's public records law Wis. Stat. § 19.32(1). As such, it is charged with the responsibility of maintaining and granting access to records it maintains as

a public entity. Wis. Stat. § 19.35(1). The law in this area has developed over time and there are numerous statutory exclusions from the definition of record, as well as exemptions from disclosure of records. *See* Wis. Stat. § 19.31, *et. seq.* Likewise, a body of common law has developed that directs an authority to weigh competing interests in determining whether to withhold certain records, notwithstanding a lack of any statutory exemption from disclosure.

This body of law, however, often must catch up with modern day technological advances in communication that affect the daily conduct of business in Wisconsin's public sector, leaving records custodians with the difficult task of applying the law to individual requests. This case presents an example of just this conundrum for Wisconsin's public employers that receive, analyze and respond to requests to inspect public records. No Wisconsin court to date has answered the question of whether personal email communications (i.e. emails the content of which do not concern the public business of the entity) are "records" under Wisconsin's public records law, and if so, whether any public interest in nondisclosure overcomes Wisconsin's long history of presumptive access.

This Court should address this question and provide Wisconsin's record custodians with definitive guidance to analyze such requests under Wisconsin's public records law. Specifically, such guidance must include the answers to the questions presented above, as well as guidance on how to characterize a message as "personal".

ARGUMENT

I. THE WISONSIN RAPIDS SCHOOL DISTRICT, AS THE PUBLIC RECORDS "AUTHORITY" IN THIS CASE, FOLLOWED REQUIRED PROTOCOL IN ANALYZING THE RECORDS REQUEST AND IN DETERMINING THAT THE RECORDS SOUGHT WERE NOT EXEMPT FROM DISCLOSURE UNDER CURRENT WISCONSIN LAW.

Appellant and amicus, City of Milwaukee and City of Madison, both argue in this case about what the law ought to be.[1] However, the District in this case was required to analyze the request it received based on the law as it existed at the time of the request. The District followed established precedent as it existed and arrived at a conclusion that the requested emails, including those emails that arguably contained exclusively personal communications, were "records" under the public records statutory definition, and were not exempt from disclosure.

[1] At least one additional non-party brief motion has been granted by this Court, but at the time of submission of this brief, that party, the Wisconsin Counties' Association, had yet to submit it's brief. Additional motions from other parties to file non-party briefs with the court remain pending at the time of filing this brief.

It also conducted the common law balancing test and could not, given the strong presumption in favor of access to records, conclude that these records must be withheld. *See* Wis. Stat. § 19.31, which states, in pertinent part:

> [Wis. Stat. §§] 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. The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.

Wis. Stat. § 19.31.

It is against this backdrop that an authority must always conduct its analysis. *Hempel v. City of Baraboo*, 2005 WI 120, ¶ 27, 284 Wis.2d 162, 699 N.W.2d 551. The District makes no assertion one way or the other as to whether it is sound public policy to exclude certain classes of email communications stored on its servers and archiving systems. It is not the role of a local school district to do so, but rather such exercise is the province of the legislature in the first instance, subject to the interpretation of the law by the Courts.

This is not to suggest that the District is disinterested in this matter. To the contrary, the District finds itself embroiled in litigation that, to it, highlights the deficiency of the current statutory and

interpretive structure of the public records law when applied to today's modern technology and the reality of communication in the workplace, including the public sector workplace. The District maintains, as it has from the commencement of this matter, that it stands poised to comply with a final ruling, but that it requires guidance to appropriately act. All parties to this matter have acknowledged that it is a matter of first impression in Wisconsin. The Circuit Court Judge, Honorable Charles Pollex likewise acknowledged that fact, (A-App. 133) as did the court of appeals panel in its certification to this Court ("a valuable aspect of the decision in this case, if [the Court] were to recognize a public records exemptions for personal emails in the first instances, would be to provide a workable set of guidelines for record custodians to apply.) (Ct. App. Cert., 2008AP967-AC, 4 (April 30, 2009), A-App. 104).

The District therefore joins all parties to this matter in requesting that the Court provide it and other public records authorities with a framework from which to review similar requests in the future.

A. The District Determined that the Requested Email Communications were "Records" as That Term is Defined by the Public Records Law.

To analyze a request for access to public records, an authority must first determine that it has the items requested. Wis. Stat. § 19.32(2)("Record" applies only to items created *or kept* by an authority)(emphasis added). The request in this matter sought emails "in their entirety" contained on the District email accounts of five separate teachers for a period of about one and one half months in 2007. (R.4; A-Ap. 157). The requested email communications clearly were items that were "kept" by the District and were therefore "Records." Wis. Stat. § 19.32(2).

A determination that the District is keeping a form of written communication that fits the request is only half the analysis as to the definition of record. The statute contains numerous items that the definition of "Record" excludes, including: (1) "drafts, notes, preliminary computations and like materials prepared for the originator's personal use"; (2) "materials which are purely the personal property of the custodian and have no relation to his or her office"; (3) "materials to which access is

limited by copyright, patent or bequest"; and (4)"published materials…that are available for sale". *Id.* Only items (1) and (2) apply to this analysis.

The District could not conclude that the emails in question were "prepared for the originator's use" as those emails were communicated to other persons in their final form. They could not reasonably be said to be drafts, notes, or preliminary computations. The emails had been transmitted, some of them to recipients external to the District. Once a draft or preliminary computation is circulated and reviewed or used by others, it becomes a record. *See Fox v. Bock*, 149 Wis.2d 403, 438 N.W.2d 589 (1989).

Appellant argues that the plain language in Wis. Stat. § 19.32(2) excludes personal emails. (App. Br. at 8). However, this interpretation is not mandated by the language. The statute excludes material "for personal use" of the originator. Wis. Stat. § 19.32(2). There is no reason to believe that "personal" refers to the content of the material, rather than to the intended use of it. In fact, it is apparent that denoting something as "personal" in this context refers to its intended use. *State v. Panknin*, 217 Wis. 2d. 200, 210-211, 579 N.W.2d 52 (Ct. App.

1998) (notes maintained by a judge in a criminal matter before that judge are not public records); *Bock*, 149 Wis.2d at 417 (draft risk management consultant report commissioned by Corporation Counsel was a record once provided to other county departments). These cases involve an analysis of the exception to the definition of record based on a material's status as a draft used for the originators personal use. The materials at issue pertain to the business of the public entity.

The plain meaning of the language in s. 19.32(2) is that the term "personal" simply modifies the word "use". As such, it is not content driven, but rather purpose driven. When an email is sent out to another individual for the purpose of communicating something, whether it is business strategy or what to have for dinner that evening, the communication is intended for the "use" of more than just its originator. The legislature could have modified the language further to make it clear that the content must relate to the originator's public position. It did do so with respect to personal property of a custodian, noting that such property was not a record, provided that it also has "no relation to his or her office". *Id.* It did not

likewise modify the "personal use" exclusion found earlier in the statute.

Both Appellant and Amicus cite a number of foreign decisions purportedly addressing the question now before this Court. (App. Br. at 13; Br. of. Milwaukee at 6-8). The Court of Appeals noted as to such citations that the courts were interpreting very different state law statutory language. (Ct. App. Cert.,2008AP967-AC, 4-5, A-App. 105). For example, in the Florida case cited in both Appellant's and the City of Milwaukee's briefs, the court was interpreting statutory language that was more tightly crafted than the language found in Wisconsin's statutes. *See State of Florida v. City of Clearwater*, 863 So.2d 149, 152 (Fla. 2003). Florida's public records law defines records to include "all documents...made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency." Fla. Stat. §119.011(1)(2002). This language more precisely limits the scope of a "record" to the parameters urged by appellant and the City of Milwaukee in this case. Wisconsin's statutory language, as mentioned, only requires such a business nexus as to the "personal property" of a custodian. Wis. Stat. § 19.32(2).

It is true that the District probably was not required to maintain many of the emails at issue in this case, as Appellant points out. Wis. Stat. § 16.61(2)(b), App. Br. at 10. That does not resolve the issue, however, as authorities in this state have been advised that whether a record must be maintained and whether, once maintained, it is subject to release are two entirely different issues. *See State ex rel. Gehl v. Connors,* 2007 WI App 238, ¶ 13, 306 Wis. 2d 247, 742 N.W.2d 530. As a practical matter, the emails are "being kept" by the district and are likely to continue that way as it is not feasible to separate the "purely" personal from the business-related as to every email transmitted prior to its storage.[2]

It is likewise not apparent from current Wisconsin law that emails sent by public employees on public resources during public time are not of public interest. One might contend that an email from a teacher to a friend about the events of the previous weekend cannot possibly be of any public interest, while another may contend that the mere fact of an existence of such communication sent from a

[2] Appellant raised this issue in its brief to the Court of Appeals, suggesting that a ruling consistent with the District's analysis in the first instance would result in excessive burden on authorities. Such a concern is unwarranted because of the reality that the Court's decision is unlikely to change the way an authority retains records only how it analyzes records for disclosure following a request.

district computer during the work day is a matter of public interest. This Court in *Zellner v. Cedarburg School District*, 2007 WI 53, ¶¶ 45-58, 300 Wis.2d. 290, 731 N.W.2d 240 had occasion to address an argument made by the requestor in that case, that a significant public interest exists in monitoring how a public employee (a teacher in that case as well) conducts him or herself on the job and while using publicly provided resources. *Id.* at ¶ 46. This Court granted disclosure of the records sought in the *Zellner* case, finding that there was no public interest in non-disclosure that outweighed the interest in disclosure. *Id.* at ¶ 52-55.

The discussion in *Zellner* leads to the question implicitly before the court in this case, namely, whether the strong policy in favor of disclosure serves to foster openness not only as to those actions that constitute formulation of public policy, but also openness as to the quality of usage of publicly provided resources, such as computers and email systems, by public employees.

Zellner involved a disciplinary matter and this case does not. However, the contents of the records sought - pornographic images accessed on Zellner's district computer - are most decidedly not related to the function of a

school teacher. Likewise, a public employee's email to a spouse concerning arrangements for that evening's child transportation is not by itself of much public interest, but if taken with other such personal emails may be illustrative of excessive personal usage and the public's interest may then be implicated. Whether engaged in a fishing expedition or not, the public records law contemplates the facilitation of a 'watchdog public' with access to the "affairs" of government. Wis. Stat. § 19.31. ("all persona are entitled to the greatest possible information regarding the affairs of government"). The question is whether that watchdog function extends to monitoring compliance with reasonable personal email use policies or just to communications purely related to completing the functions associated with employment. It also begs the question of whether the "affairs" of government include the public's capacity to evaluate the quality of public employees' use of public resources. Faced with uncertainty as to how the public records law answers these questions, the District had to follow the law's established presumption of disclosure.

The District also could not rely on the fact that the contents of certain of the emails could be described as

fitting the exclusion for records that are "purely personal property", because the teachers were only originators not records custodians. The plain language of the exclusion relates only to records custodians. Further, the email records are not the property of the teachers once sent and maintained on the District's server.

The District and the Circuit Court were left to conclude that under current Wisconsin law, the personal email communications of public employees that are not related to the functions of their position are nonetheless "records" if kept by the authority.

II. CONSIDERATION OF THE PUBLIC'S INTEREST IN NONDISCLOSURE DID NOT OUTWIEGH THE PUBLIC'S INTEREST IN DISCLOSURE AND THE PRESUMPTION IN FAVOR OF ACCESS.

Having completed a statutory review and determining that the requestor sought "records" and that no exemption from disclosure applied, the District conducted the required balancing test. *Linzmeyer v. Forcey*, 2002 WI 84, ¶¶ 10-20, 254 Wis.2d. 306, 646 N.W. 2d 811.

In conducting this test, the District was required to remain cognizant of the standard applicable to the balancing test. At the time of the request in the instant matter, this Court had recently reminded custodians that

the presumption in favor of disclosure of records is "one of the strongest declarations of policy to be found in the Wisconsin statutes." *Zellner*, 2007 WI 53, ¶ 49. To overcome this presumption, there must be compelling public interest in maintaining the confidentiality of the requested materials. *Local 2489, AFSCME, AFL-CIO v. Rock County*, 2004 WI App 210, ¶ 21, 277 Wis.2d. 208, 689 N.W.2d 644. The individual record subject's personal embarrassment is not sufficient to overcome the presumption of disclosure. *Linzmeyer*, 2002 WI 84, ¶¶ 34-35. The court must look at the public detriment arising out of the failure to protect the individual employee's personal privacy interests. *Id.*

In this case, the public interest in non-disclosure rises out of the concern over the individual teachers' privacy interests. (App. Br. at 18) Wisconsin has a history of protecting individual privacy. *See* Wis. Stat. § 995.50; *Zellner*, 2007 WI 53, ¶ 58. The right of privacy, however, does not inherently outweigh the public's right to access. If it did, anything embarrassing to a record subject would be exempt from disclosure. That is not the case. *See Id.* (requiring disclosure of records pertaining to pornographic images viewed by a school employee on a

work computer); and *Linzmeyer*, 2002 WI 84, ¶ 34-35 (ordering release of an investigatory file alleging a sexual relationship between a high school teacher and a female student despite the fact that no charges where brought against the teacher). This Court recently stated that the balancing test does not lend itself to "blanket exceptions from release." *Milwaukee Journal Sentinel v. Wisconsin Dept. of Admin.*, No. 2007AP1160, 2009 WI 79, ¶ 56. Wisconsin's privacy law itself contemplates an interaction between privacy and public records. See Wis. Stats. § 995.50(2)(c). The type of categorical exclusion urged by Appellant appears inconsistent with this Court's precedent and with evidence of public policy found in the Wisconsin statutes.

In the case of the use of the District email system, users knew that communications were not private. (A-App. 148)("All district assigned email accounts are owned by the district and, therefore, are not private.") Whatever privacy right may exist as to personal communications is conceivably waived as to the use of the email system as a medium. This is a common policy provision that allows the district to monitor usage, but also complicates any suggestion that there exists a public interest in

preserving the privacy of communications that the user never had a reasonable expectation of privacy in sending in the first place. This is part of the authority's conundrum. It would be inappropriate to provide, at public expense, a completely private mode of communication for employees, yet there is merit to the Appellant's concern about disclosing communications of a truly personal nature, still consistent with notions of "reasonable" usage. The District, however could not conclude, as Appellant suggests, that the contents of its policy had any capacity to shield materials from disclosure under the public records law. Such a result would empower records authorities to circumvent the public records law by adoption of local policy - a result likely not endorsed by the legislature.

Appellant finally suggests that the conclusion the District reached to release certain emails would lead to the absurd result that any communication written on government-owned paper or by government-owned pen would become subject to disclosure (App. Br. at 15). This discussion, however, ignores the primary issue that distinguishes email communications from virtually any other type. Once sent, the email is transmitted through and an

electronic copy made by the government-owned computer system server. At that point, unlike the handwritten note that never leaves the possession of the teacher, the emails are "being kept by an authority" and therefore implicates the definition of "record". Wis. Stat. § 19.32(2).

III. THE DISTRICT HAS ALWAYS MAINTAINED THAT IT WOULD REDACT PORTIONS OF ANY RECORD THAT WERE SUBJECT TO REDACTION OR WITHHOLDING FROM RELEASE.

The District has at all times in this matter maintained that regardless of the status of the email communications at issue in this case, certain materials contained within those and other communications subject to release may be subject to redaction. This relates specifically to student records, personally identifiable information, bank account numbers, etc., included in the communications at issue. To the extent such items are contained within a record, the District, as any authority, is required to disclose a redacted record, thus disclosing publicly accessible material while withholding protected or exempt material. Wis. Stat. § 19.36(6). The decision of the Circuit Court also preserved the District's position that it would redact such information (A-App. at 133, 136). There has never been an issue over redaction in this matter.

The ability to redact, however, provides no assistance to the District in assessing the answers to the questions presented in this matter.

CONCLUSION

The District in this case serves the role of public records authority and Dr. Crist as records custodian. Respondent has taken no position with respect to the preferred public policy related to the salient issues. It has only asserted, along with the Circuit Court and Court of Appeals, that current Wisconsin law does not adequately address the "record" nature of the types of email communications at issue. With that in mind, the overwhelming guidance from the legislature and from Wisconsin Courts is that only exceptional cases can overcome the presumption of access once material is established as a record. The District could not conclude on its own that there was any public interest that created such an exceptional case.

Likewise, Wisconsin's definition of "record" is broad. It does not limit its application to records kept by an authority that only apply to business-related subject matters. Unlike public record laws in other states, many

of which are cited in briefs in this case, Wisconsin's law is extremely broad.

It is this state of the current law, and the ever-increasing usage and reliance on varied modes of communication not adequately contemplated by the public records law that brings this controversy before the Court. The District and all custodians across the state would be aided in the discharge of their important duties as records custodians if this Court provides much needed guidance in this matter.

Dated this 4th day of August, 2009

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced with a monospaced font.

The length of this brief is nineteen (19) pages.

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

Respectfully submitted this 4th day of August, 2009.

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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that he 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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