STATE OF WISCONSIN
SUPREME COURT

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

Plaintiffs-Appellants,

v.

Appeal No. 2008AP967
Circuit Court No. 07-CV-304

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

BRIEF OF *AMICUS CURIAE* WISCONSIN COUNTIES ASSOCIATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

INTRODUCTION

The Court is asked to decide whether public employees' personal emails maintained on a government-owned computer are "records" as defined by the Wisconsin Public Records Law, Wis. Stat. § 19.31, et seq. If the personal emails are considered "records" under public records law, the Court must decide whether the presumption favoring disclosure of public records is overcome by the public interest in protecting the privacy and reputational rights of citizens.

The Wisconsin Counties Association frequently serves as a resource to county government on public records and personnel policy issues. Most, if not all, counties allow limited incidental personal use of government computers for the convenience of employees so long as the personal use does not interfere with county business. County policies typically limit personal use to a reasonable duration and frequency and personal use cannot interfere with the employee's work duties. County personnel policies usually notify employees that all use of government computers is monitored and employees have no expectation of privacy, even for allowable personal use of the computer. Abuse of the privilege of limited personal use of government computers almost always gives rise to discipline.

It is possible, under certain limited circumstances, that personal emails not intended for a governmental purpose could become "records" under the public records law. For example, if the emails were used as evidence in a disciplinary investigation for misuse of government resources then there would be a sufficient

nexus to government business to transform the emails into "records" under the public records law. However, under the circumstances presented in this case, because there is no nexus between the purely personal emails and government business, the personal emails should not be considered "records" under the public record law.

ARGUMENT

I. PUBLIC EMPLOYEES' PERSONAL EMAILS MAINTAINED ON A GOVERNMENT COMPUTER ARE NOT "RECORDS" AS DEFINED BY THE WISCONSIN PUBLIC RECORDS LAW IF THE EMAILS HAVE NO NEXUS TO GOVERNMENT BUSINESS.

Section 19.32(2), Wis. Stat., defines the term "record" under the Wisconsin Public Records law:

> "Record" means 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" does not include drafts, notes, preliminary computations and like 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**; …

Wis. Stat. § 19.32(2) (emphasis added). The parties agree that the emails at issue in this case were purely personal and had no governmental purpose. (R. 4, 5; A-Ap. 154, 159). Therefore, the issue is whether the definition of a "record" in Wis. Stat. § 19.32(2) includes personal email that has no governmental purpose.

When courts construe the meaning of a statute, the purpose is to give effect to the intent of the legislature. *Ball v. District No. 4, Area Bd. of Vocational, Technical and Adult Educ.* 117 Wis. 2d 529, 537-538, 345 N.W.2d 389 (1984)

(citation omitted). In determining legislative intent, courts look first to the language of the statute itself. *Id*. at 538.

A record is defined essentially as material "created" or "kept" by an authority. *See* Wis. Stat. § 19.32(2). Arguably, personal emails that serve no governmental purpose fall outside of this definition on its face. However, to the extent the definition is ambiguous as to whether personal emails with no governmental purpose are considered material "created or kept by an authority," the Court will endeavor to ascertain the intent of the legislature as disclosed by the scope, history, context, subject matter and object of the statute. *See id*.

Turning to the scope of Wis. Stat. § 19.32(2), the definition of a "record" not only includes what is a record, but also defines what is not considered a record. The relevant exclusions in the definition of a "record" are:

> 1. Drafts, notes, preliminary computations and like materials prepared for the originator's personal use; and
>
> 2. Materials which are purely the personal property of the custodian and have no relation to his or her office.

See Wis. Stat § 19.32(2).

A. Personal Emails Are Excluded Because Emails Are Notes Intended for the Originator's Personal Use.

The first exclusion for drafts, notes and like materials prepared for the originator's personal use may apply to personal emails depending on how the exclusion is interpreted. One reasonable interpretation of the plain language of the exclusion is that personal emails are notes prepared for the originators personal use. The word "notes" is not defined in the statute. In the absence of a statutory

definition, courts may consult a dictionary to ascertain the common and ordinary meaning of a word. *Noffke ex rel. Swenson v. Bakke*, 2009 WI 10, ¶ 18, 315 Wis. 2d 350, 760 N.W.2d 156. *The American Heritage Dictionary* is frequently relied upon by courts. *Id*. at ¶ 19. It defines a "note" as "a brief informal letter."[1] An email can be reasonably described as a brief informal letter. Therefore, under one reasonable interpretation, the exclusion for "notes prepared for the originator's personal use" encompasses personal emails not intended for a governmental purpose.

Another reasonable interpretation of the exclusion for personal drafts and notes is that it applies to preliminary materials created for the personal use of the originator in the process of conducting government business. For example, handwritten corrections on a draft of a letter to a state agency are not records, but the final draft of the letter is a record.

Based upon the use of the words "personal use" as a qualifier in the exclusion, it follows that preliminary materials become a record when the material is no longer intended to serve the originator's personal use but also serve a governmental purpose. Therefore, under this interpretation, a personal email is considered preliminary material not subject to disclosure under public records law until it serves a governmental purpose.

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[1] "note." *The American Heritage® Dictionary of the English Language, Fourth Edition*. Houghton Mifflin Company, 2004. 06 Aug. 2009. <Dictionary.com http://dictionary.reference.com/browse/note>.

It is undisputed that the personal emails at issue do not serve a governmental purpose. Therefore, under either interpretation, the exclusion for notes and preliminary materials applies to the personal emails here.

B. The Exclusion For Personal Property Demonstrates the Legislature Intended To Exclude Personal Emails with No Nexus to Governmental Business from the Definition of a "Record."

The second exclusion to a record cited above applies to materials which are purely the personal property of the custodian and have no relation to his or her office. This exclusion does not apply on its face to personal emails because personal emails drafted, received or maintained on a government computer are not the personal property of the user. However, courts must look not at a single, isolated sentence or portion of a statute, but at the role of the relevant language in the entire statute to ascertain its meaning. *Alberte v. Anew Health Care Services, Inc.*, 2000 WI 7, ¶ 10, 232 Wis. 2d 587, 605 N.W.2d 515 (citations omitted).

Although the second exclusion does not directly apply to personal emails maintained on a government computer, it is instructive of what is not considered a record. Significantly, the word "personal" is repeated in reference to what is not considered a record. In addition, the exclusion refers to material that has no relation to a government office. Therefore, the language used in both exclusions indicates that personal materials are not "records" as defined by Wis. Stat. § 19.32(2) if they have no governmental purpose or relation to government business.

II. THE PUBLIC POLICY OF THE WISCONSIN PUBLIC RECORDS LAW SUPPORTS THE EXCLUSION OF PERSONAL EMAILS WITH NO NEXUS TO GOVERNMENT BUSINESS FROM THE DEFINITION OF A "RECORD."

The conclusion that personal emails are not records absent a relationship to government business is bolstered by the public policy behind the Wisconsin Public Records Law. As set forth in Wis. Stat. § 19.31:

> [I]t 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.

Wis. Stat. § 19.31 (emphasis added). It is "to that end," *i.e.*, shining the light on the affairs of government, that the Wisconsin Public Records Law was created. *See id*. This Court interprets statutory language in the context in which those words are used: "not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110. It is absurd to suggest that public disclosure of a personal email that has no relationship to government business somehow furthers the purpose of open government. The only reasonable interpretation of Wis. Stat. § 19.32(2), read within the context of Wis. Stat. § 19.31, is that personal emails are not records without a relationship to government business.

III. THE WISCONSIN ATTORNEY GENERAL AND COURTS IN OTHER JURISDICTIONS HAVE CONCLUDED THAT PUBLIC RECORDS MUST BE RELATED TO GOVERNMENT BUSINESS.

The Wisconsin Attorney General has opined that records are not subject to disclosure under the public records law unless there is a sufficient connection with the function of a government office. *See* 72 Op. Att'y Gen. 99 (1983). The Attorney General looked to three statutes that supported his opinion. First, he reviewed Wis. Stat. § 19.32(2) which defines a "record," in part, as material "retained by an authority." Second, he looked to Wis. Stat § 16.61 which governs state offices and other public records. It defines "public records" as:

> [A]ll books, papers, maps, photographs, films, recordings, optical disks, electronically formatted documents or other documentary materials, regardless of physical form or characteristics, **made, or received by any state agency or its officers or employees in connection with the transaction of public business**, and documents of any insurer that is liquidated or in the process of liquidation under ch. 645. "Public records" does not include:
>
> …
>
> 5. 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.

Wis. Stat. § 16.61(2)(b) (emphasis added). Finally, he analyzed Wis. Stat. § 19.21 which governs the custody and delivery of official property and records. It provides:

> Each and every officer of the state, or of any county, town, city, village, school district, or other municipality or district, is the legal custodian of and shall safely keep and preserve all property and things received from the officer's predecessor or other persons and required by law to be filed, deposited, or kept in the officer's office, or which are in the lawful possession or control of the officer or the officer's deputies, or to the possession or control of which the officer or the officer's deputies may be lawfully entitled, as such officers.

Wis. Stat. § 19.21.

The Attorney General found that these three statutes, read together, indicate that a legal custodian has a duty under the Wisconsin Public Records Law to preserve those records "that have some relation to the function of his or her office." *Id*. (*also citing* Wis. Stat. § 19.31 as authority). Therefore, the Attorney General opined that a custodian would not have to preserve or disclose copies of documents received from other agencies purely for informational purposes not affecting a department's functions because "they do not have a sufficient connection with the function of [the legal custodian's] office to qualify as public records." *Id*.

Although this issue is a matter of first impression in Wisconsin, other jurisdictions that have addressed this issue uniformly found that personal emails are not public records unless there is a connection to government business. *See 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 896 (Idaho 2007); *Tiberino v. Spokane County*, 13 P.3d 1104 (Wash. Ct. App. 2000).

In *State of Florida v. City of Clearwater*, 863 So. 2d 149 (Fla. 2003), the Florida Supreme Court addressed the same issue presented here: whether personal emails are considered public records by virtue of their placement on a government-owned computer system. *Id*. at 151. Florida's public records law defined "public records" as material "made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency."[2] *Id*. at 152. Based upon the plain language of the definition, the court found that personal emails are not public records because they are not made or received pursuant to law or ordinance or in connection with the transaction of official business. *Id*. at 153.

The Florida Supreme Court rejected the argument that placement of emails on a government computer automatically makes them public records. The court reaffirmed its reasoning in a prior case that "the definition of the term 'public records' limited public information to those materials which constitute *records*- that is, materials that have been prepared *with the intent* of perpetuating or formalizing knowledge." *Id*. at 154 (emphasis added). The court concluded that, in order to constitute a public record, the emails must have been prepared in connection with official agency business and be "intended to perpetuate, communicate, or formalize knowledge of some type." *Id*.

[2] Although the language of Florida's public records law more directly links records with a connection to government business, the language and context of Wis. Stat. § 19.32(2) implies that records under the Wisconsin Public Records Law must also have a connection to government business, as set forth above.

The court also reasoned that "common sense opposes a mere possession rule" because of the absurd results that could occur. *Id*. For example:

> If the Attorney General brings his household bills to the office to work on during lunch, do they become a public record if he temporarily puts them in his desk drawer? If a Senator writes a note to herself while speaking on the phone with her husband on the phone does it become a public record because she used a state note pad and pen? The Sheriff's secretary, proud of her children, brings her Mother's Day cards to the office to show her friends. Do they become public records if she keeps them in the filing cabinet?

Id.

The Florida Supreme Court's reasoning is persuasive. In order to constitute a public record, personal email must be intended to perpetuate, communicate, or formalize knowledge of some type in connection with government business. To conclude otherwise would lead to absurd results such as the examples cited by the court in *City of Clearwater*. Just as an authority cannot circumvent the Wisconsin Public Records Law by putting public records in the possession of a private entity, *see WIREdata Inc. v. Village of Sussex*, 2008 WI 69, ¶ 82, 310 Wis. 2d. 387, 751 N.W.2d 736, private documents cannot be deemed public records solely by virtue of their placement on a government computer. "It is the nature of the documents and not their location that determines their status under [the Wisconsin Public Records Law]. To conclude otherwise would elevate form over substance." *Nichols v. Bennett*, 199 Wis. 2d 268, 274-275, 544 N.W.2d 428 (1996).

In this case, the Wisconsin Rapids School District, like many local governments, has a written computer use policy that allows employees to use the District's email accounts for occasional personal use. (A-Ap. 148). The District

agrees that none of the teachers used the District's email inappropriately or violated the computer use policy by sending personal emails. (R. 13; A-Ap. 130). Therefore, there is no connection between the personal emails and government business.

If a teacher had used the computers improperly, there may be a government purpose behind maintaining the records. If the personal emails were used as part of an investigation that resulted in discipline to the teacher, there is a sufficient nexus between the emails and government business to transform the emails into records subject to the public records law. In that instance, the personal emails serve the governmental purpose of maintaining the integrity of personnel policies and holding public employees accountable for improper use of government resources.

However, when the privilege of sending and receiving personal emails is exercised by public employees in accordance with established personnel policies, there is no nexus to government business. Both the language used to define a "record" under Wis. Stat. § 19.32(2) and the public policy set forth in Wis. Stat § 19.31 lead to the conclusion personal emails maintained on a government computer are not records subject to public records law unless there is some connection to government business. In this case, the parties agree that the teachers did not violate the District's computer policy by sending the personal emails and that the emails had no relationship to government business. Therefore, the emails are not "records" subject to disclosure under the Wisconsin Public Records Law.

CONCLUSION

Based on the foregoing, the Wisconsin Counties Association respectfully requests that the Court reverse the circuit court decision in this case because the emails at issue are not "records" as defined by the Wisconsin Public Records Law and, therefore, are not subject to disclosure under the law.

Respectfully submitted this 11th day of August, 2009.

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CERTIFICATION

I certify that this Brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. This brief contains 13 point font size for body text and 11 point font size for footnotes. The length of this brief is 2,995 words. This certification is made in reliance on the word count feature of the word processing system used to prepare this brief.

I further certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(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 certification has been served with the paper copies of this brief filed with the Court and served on all opposing parties.

Dated this 11th day of August, 2009.

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