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' REPLY BRIEF

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INTRODUCTION

The District's central argument is that it decided to release the personal emails because of the strong presumption in favor of disclosure under the law. The District, however, vacillates as to whether personal emails actually are subject to release as public records. It seeks guidance from this Court for record custodians analyzing public records requests for personal emails.

The legislature has already provided such guidance; it excluded personal materials from the legal definition of "records" subject to release. Contrary to the District's contention, the Teachers are not arguing about what the law ought to be, but rather are asking this Court to find that personal emails are not public records based on the Public Records Law's statutory language, the legislative purpose behind the law, Wisconsin administrative practice, and national precedent. If this Court holds that personal materials lacking a substantial nexus to government business are not public records, it will provide the workable "framework" for analyzing public record requests that the District seeks. The Court should reverse the circuit court and find that personal emails are not public records.

ARGUMENT

I. PERSONAL MATERIALS ARE NOT PUBLIC RECORDS AS DEFINDED BY THE PUBLIC RECORDS LAW

Materials prepared for the originator's personal use are not public records as defined by the Public Records Law. The District argues, based on its analysis of *Fox v. Bock*, 149 Wis. 2d 403, 438 N.W.2d 589 (1989), that the emails were not prepared for the Teachers' personal use because they were communicated to other persons in their final form. (Dist. Br. at 7). The District misconstrues the holding in *Fox*. In *Fox*, the Court found that a liability study prepared for the corporate counsel's office was a public record, not a draft, even though it need minor corrections, largely because the county relied upon it in taking official action; the sheriff's department attended a seminar, and implemented policy and procedural changes recommended by the study. *Id.* at 144. There was no question that the study had a substantial nexus to governmental affairs.

In this case, unlike *Fox*, the District has not used the emails for any business purpose, nor has it taken any official action based on the emails' contents. While the Teachers may have sent the emails to others, that does not transform the emails into business records. The District's argument that materials cannot be for personal use if they are sent to others is illogical. The legislature created the law to provide information to the public regarding governmental affairs and official acts. Wis. Stat.

§ 19.31.[1] Under the District's interpretation, if a public employee used materials for her job, but did not share those materials with anyone, those materials would be for personal use, regardless of their content or nexus to governmental affairs, but a teacher's personal email to her spouse to buy groceries would be a public record because the spouse viewed the email. The legislature did not intend such a result.

The District argues that the law only requires a business nexus to the custodian's personal property (Dist. Br. at 9), but that again disregards the law's fundamental purpose of access to governmental affairs. As this Court has previously held, the key to determining the status of records under the Public Records Law is the nature of the records, not their location. *Nichols v. Bennett,* 199 Wis. 2d 268, 274, 544 N.W.2d 428, 431 (1996). "To conclude otherwise would elevate form over substance." *Id.* at 275. Thus, materials must have a substantial nexus to governmental business to be public records under the law. To hold otherwise would lead to the absurd result 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." *Griffis v. Pinal County*, 156 P.3d 418, 421 (Ariz. 2007).

The District argues that emails are different than other personal materials because they are "kept" on the

[1] All statutory references are to the 2007-08 statutes unless otherwise noted.

District's server. (Dist. Br. at 17). There, however, is nothing unique about emails "kept" by the District, versus any other documents held in government offices, that exempts the emails from the substantial nexus requirement. The District, as it concedes, is not required to keep the emails under Wis. Stat. § 16.61(2)(b), which defines public records as those "made, or received by any state agency or its officers or employees in connection with the transaction of public business. . . ." (Dist. Br. at 10).[2] The District cites to *State ex rel. Gehl v. Connors*, 2007 WI App 238, 306 Wis. 2d 247, 742 N.W.2d 530, to support its argument that the records retention statute is irrelevant to the Court's analysis. However, *Gehl* held that the Public Records Law does not provide a cause of action for an agency's failure to retain records. *Gehl* does not support the District's contradictory proposition that a email needs no nexus to public business to be a record under the Public Records Law, but such nexus is required to mandate the email's retention. The two statutes should be read in harmony; in order to be a public "record" under either law, there must be a connection to government business. *See State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110.

[2] A finding that these emails are public records may also subject them to Wis. Stat. § 19.21, which would prohibit the destruction of personal emails for a period of 2-7 years, and require certain authorities to notify the historical society prior to doing so.

The District, failing to cite any cases to support its position, discounts the nationwide precedent finding that personal emails are not public records unless they have a substantial nexus to government business by arguing that the cases were interpreting different states' statutory language. (Dist. Br. at 9). While the various state laws do not contain statutory language identical to Wisconsin law, these state courts are in accord with Wisconsin courts that the analysis of a public records law starts with a strong presumption of access to governmental information. *Griffis,* 156 P.3d at 421; *Denver Publ'g Co. v. Board of County Comm'rs of the County of Arapahoe*, 121 P.3d 190, 195 (Colo. 2005); *Pulaski County v. Arkansas Democrat-Gazette, Inc.*, 260 S.W.3d 718, 721 (Ark. 2007); *Cowles Pub. Co. v. Kootenai County Bd. of County Comm'rs*, 159 P.3d 869, 899 (Idaho 2007); *Tiberino v. Spokane County*, 13 P.3d 1104, 1108 (Wash. Ct. App. 2000); *Brennan v. Giles County Bd. Of Educ.*, No. M2004-00998-COA-R3-CV, 2005 WL 1996625 at *2 (Tenn. Ct. App. Aug. 18, 2005)(unpublished). Despite the strong presumption and the differences in each of the states' statutes, the courts in these cases agree that something more than an email's physical location on a government-owned computer is needed to render an email a public record; there must be a substantial nexus to government business. *State of Florida v. City of Clearwater*, 863 So. 2d 149, 154 (Fla. 2003); *Griffis*, 156 P.3d at 422; *State ex rel. Wilson-Simmons v. Lake County Sheriff's Dep't*, 693 N.E.2d 789, 793

(Ohio 1998); *Denver Publ'g*, 121 P.3d at 199; *Pulaski,* 260 S.W.3d at 725; *Cowles*, 159 P.3d at 900; *Tiberino*, 13 P.3d at 1108; *Brennan*, 2005 WL 1996625 at *4. The Court should reach the same result here, and find that personal emails are not public records.

II. SAFEGUARDING WISCONSIN CITIZENS' PRIVACY INTERESTS, AND OTHER COMPELLING PUBLIC POLICY INTERESTS, OUTWEIGH ANY PUBLIC INTEREST IN DISCLOSING PERSONAL EMAILS

The personal emails are not "records" as defined by the Public Records Law. However, if the Court disagrees, and finds that purely personal emails are public records, then the Court should still enjoin their release pursuant to the balancing test. The District argues the presumption in favor of release automatically obligates them to disclose the personal emails. (Dist. Br. at 14). However, nondisclosure is required where other compelling public policy reasons trump the presumption of disclosure. *Hempel v. City of Baraboo*, 2005 WI 120, ¶21, 284 Wis. 2d 162, 699 N.W.2d 551. Here, the public policy reasons of safeguarding Wisconsin citizens' privacy in purely personal affairs, increasing employee efficiency, maintaining employee morale, and avoiding a significant burden on governmental bodies must outweigh the little public interest, if any, in releasing emails regarding a teacher's dinner arrangements, child care responsibilities, off-duty social plans or other personal matters.

Wisconsin has long safeguarded individual privacy rights. *Woznicki v. Erickson*, 202 Wis. 2d 178, 185, 549

N.W.2d 699, 702 (1996). Wisconsin citizens have a reasonable expectation of privacy in their personal affairs, even while at work. They have a right to privacy in personal phone calls made at work. *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). They have a right to privacy in their regular mail. *United States v. Jacobsen,* 466 U.S. 109, 114, 104 S. Ct. 1652, 80 L.Ed.2d 85 (1984). They have a right to privacy in their personal medical information. *Marino v. Arandell Corp.,* 1 F. Supp. 2d 947 (E.D. Wis. 1998). They have a right to privacy in their personal text messages made on an employer-owned phone. *Quon v. Arch Wireless Operating Co., Inc.*, 529 F.3d 892 (9th Cir. 2008). Their right to privacy in the content of their personal emails should be no different.

The District argues that the Teachers waived any expectation of privacy in their email because of its computer policy (Dist. Br. at 16), but the computer policy says nothing about releasing personal email to the public. (R.10; A-Ap.141). While the District has access to the email, that does not mean the Teachers anticipated public disclosure.[3] Employers keep numerous personal documents

[3] The Teachers agree that the District's policy could not shield the emails from disclosure if required by law (Dist. Br. at 16), but neither could the District's policy change the statutory definition of "record" nor mandate disclosure when prohibited by the law. *Florida*, 863 So. 2d at 154.

regarding their employees such as social security numbers, bank account numbers, credit scores, and medical information. Just because employees know their employers keep this personal information should not mean they waive all rights of privacy regarding public disclosure.

The District argues that the right to privacy cannot outweigh the public's right to access. This is not, however, a case of protecting materials regarding one employee's alleged misconduct as in *Zellner v. Cedarburg Sch. Dist.*, 2007 WI 53, 300 Wis. 2d 290, 731 N.W.2d 240 (2007), or preventing the release of information embarrassing to a particular employee as in *Linzmeyer v. Forcey,* 2002 WI 84, 254 Wis. 2d 306, 646 N.W.2d 811. This case is about the privacy rights of all Wisconsin public employees and citizens who receive and send emails to government email addresses.

The District argues that *Zellner* established a significant public interest in monitoring how a public employee conducts himself on the job, but it misconstrues the holding in that case. In *Zellner*, the Court found a public interest in receiving information regarding allegations of teacher misconduct and how the government handled disciplinary actions. *Id.* at ¶53. *Zellner* does not apply in this case. There are no allegations of misconduct, nor has the District taken disciplinary action against the Teachers. This Court has instructed that where misconduct

is not an issue, privacy interests are more compelling. *Hempel*, 2005 WI 120 at ¶78.

The District argues that the emails should be released because the Public Records Law contemplates a "watchdog" public, but it offers no authority to support that position. (Dist. Br. at 12). Even assuming that were true, there must be a distinction between allowing public oversight of government function and allowing citizens to use the Public Records Law to invade into personal matters and scrutinize every minute and detail of an employee's workday. If not, once allowed, where does the monitoring end? Can the public monitor the contents of a personal phone call made at work? Can it receive tapes of personal voicemails that are often now stored electronically by public employers? Should it be provided videotapes from security cameras that record employees in the break room? It would severely affect employee moral and discourage highly qualified employees from seeking public employment if all personal affairs are subject to public scrutiny. *See Hempel*, 2005 WI 120 at ¶¶74,75.

Mr. Bubolz argued to the court of appeals that he is entitled to scrutinize the Teachers' personal email use because if the Teachers were not performing official duties, then they should not have been paid.[4] (Bubolz Br. at 4). Mr. Bubolz's argument ignores the District's computer policy

[4] Mr. Bubolz did not file a response brief with this Court. The Teachers fully responded to his court of appeals brief in that forum, but briefly reply to his central arguments here for the Court's convenience.

allowing for personal use, which recognizes the reality of the modern day workplace. It is sound business practice to allow employees to use email for limited personal use. Email is often a simpler, quicker way to take care of personal business that must be accomplished during the work day. Not only are employees more efficient by using email, but they can be more productive when important concerns, such as child-care responsibilities, have been alleviated. *See Denver Publ'g,* 121 P.3d at 198 ("e-mail gave employees and employers the ability to take care of personal and family matters quickly and efficiently without having to leave the office . . . this limited personal use served the best interests of business and government. . .").

Mr. Bubolz claims that a WEAC publication he provided to the circuit court contradicts WEAC's position here, (Bubolz Br. at 3, 6) but that article offered general suggestions to WEAC's members regarding appropriate email use. (R.21; A-Ap.208). It did not analyze the Public Records Law or the specific legal issues in this case. It also did not distinguish between personal and business emails. Just as courts do not rely on or admit evidence regarding subsequent remedial measures, the WEAC article's contents are not relevant here, and should not be relied upon by this Court. *See* Wis. Stat. § 904.07.

Mr. Bubolz demonstrates no legitimate public interest in obtaining the Teachers' personal emails. In comparison, there is a significant public interest in safeguarding

Wisconsin citizens' privacy in purely personal affairs, increasing employee efficiency, maintaining employee morale, and avoiding a significant burden on governmental bodies. 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 PRIOR TO RELEASE

If 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. Mr. Bubolz does not need the text of the personal emails or personal email addresses in order to see if the Teachers followed school policy. He only needs the times and dates that the Teachers sent the emails. *See Tiberino*, 13 P.3d at 1110; *see also Pulaski County,* 260 S.W.3d at 721 *quoting* Watkins & Peltz, *The Arkansas Freedom of Information Act*, 91 and 93 (m&m Press, 4th ed., 2004) ("a FOIA request for such extracurricular e-mail might be satisfied by providing only e-mail statistics--such as the size and number of personal messages"). The text is irrelevant if it does not relate to school business.

CONCLUSION

While there is a presumption favoring disclosure under the Public Records Law, disclosure is not absolute. The legislature's intent to exclude purely personal information from release is evident from not only from the statutory definition of a record, but also from the legislative purpose behind enacting the law. Courts in other jurisdictions that have addressed this issue have agreed that personal emails are not public records where there is no substantial nexus to government business. Neither the District nor Mr. Bubolz have cited one case to the contrary. This Court should follow the lead of the Wisconsin legislature and the courts in other jurisdictions and find that the personal emails are not public records under the law.

However, even if the Court determines that the personal emails are public records, the policy objectives of the Public Records Law would not be served by release here. Purely personal materials shed no light on governmental affairs or official government acts. Releasing these emails will only erode Wisconsin citizens' privacy in purely personal affairs, impact employee efficiency, decrease employee morale, and a place a significant burden on authorities that will now need to retain, store and retrieve these emails. The legislature could not have intended such a result. The Court should enjoin the District from releasing the personal emails or, in the alternative, order

the District to redact all personal text before they are released.

Respectfully submitted this 19th day of August, 2009.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this reply 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 thirteen (13) pages.

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

Respectfully submitted this 19th day of August, 2009.

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CERTIFICATE OF SERVICE

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