SUPREME COURT OF WISCONSIN

Appeal No. 2008AP00967-AC

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

Plaintiffs-Appellants,

vs.

Wood Co. Circuit Court
Case No. 2007-CV-000304

WISCONSIN RAPIDS SCHOOL DISTRICT and ROBERT CRIST,

Defendants-Respondents,

and

DON BUBOLZ,

Intervenor-Respondent.

ON CERTIFICATION FROM THE COURT OF APPEALS, DISTRICT IV, OF AN APPEAL FROM THE APRIL 7, 2008 FINAL ORDER OF THE WOOD COUNTY CIRCUIT COURT AND THE MAY 2, 2008 ORDER ON RECONSIDERATION THE HONORABLE CHARLES A. POLLEX, PRESIDING.

BRIEF OF *AMICUS CURIAE* MADISON TEACHERS, INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Other Authorities

I. INTRODUCTION.

At issue in this case are a handful of electronic mail messages ("e-mails") composed by employees of the Wisconsin Rapids School District using their District-assigned e-mail addresses and which were sent to non-employees of that District. It is uncontested that the content of those e-mails is personal and unrelated to the employees' work for the District or any other District business. The question before the Court is whether those e-mails are "records" for purposes of Wisconsin's Open Records law. If so, the Court is then asked to apply the balancing test governing the release of such records to the public.

Madison Teachers, Inc. ("MTI") is a labor organization that represents five bargaining units of employees of the Madison Metropolitan School District ("MMSD"), including teachers, substitute teachers, supportive educational employees, educational assistants and school security assistants. In all, MTI represents nearly 5,500 individual municipal governmental employees.

All of MTI's members are granted permission by their employer, the MMSD, to utilize the MMSD internet and e-mail systems for occasional personal use, including sending personal messages. While MMSD employees are informed that MMSD e-mail accounts are owned by the MMSD and, therefore, are "not private," the MMSD explains that such messages are "not private" because it, the employer, may access those messages. MMSD policies do not warn employees that personal messages sent from MMSD equipment or e-mail accounts will be released to the general public. That would equate to recording and releasing telephone calls conducted on MMSD telephones.

The Circuit Court erred when it found the personal e-mails to be public records, and again when it ordered that those e-mails be released to the public. The legislature did not intend to make personal correspondence of a governmental employee subject to the open records laws, absent some connection between that correspondence and the employee's job. Consistent with the legislature's intent, members of MTI bargaining units and other governmental employees should be

free to send personal e-mails from their employer-assigned e-mail account, subject to their employer's policies, without fear that such messages will be made public.

II. THE MESSAGES ARE NOT "RECORDS" BECAUSE THEY ARE NOT "BEING KEPT BY AN AUTHORITY."

Following a request from any person under the Wisconsin Open Records Law, Wis. Stat. §19.31 et seq., an authority such as a school district must allow that person access to any "record" requested. The statute defines "record" as "any material on which . . . information is recorded or preserved . . . which has been created **or is being kept** by an authority." *Wis. Stat. §19.32(2), emphasis added*. It is uncontested that the personal e-mails in this case, because they were not job-related, were not "created by" the school district. Thus, unless otherwise excepted, the messages are only "records" under the Open Records Law if they are "being kept by an authority."

Defendants-Respondents claim that "being kept" means "have," but offers this only as a half-page-long bald conclusion, with no legal authority or reasoning. *Defendants-Respondents' Brief at 6.* To the contrary, as shown below, the legislature

purposefully chose the language "being kept" to mean those materials that are required by law to be kept, as well as other materials relating to the authority's work, but not "fugitive papers" that have no relation to the function of the authority. The legislature never intended to subject a public employee's personal correspondence located on the employer's property to the Open Records Law.

III. THE PREDECESSOR STATUTE AND INTERPRETATIONS OF IT SHOW THAT THE LEGISLATURE DID NOT INTEND PERSONAL CORRESPONDENCE OF PUBLIC EMPLOYEES AND OTHER "FUGITIVE PAPERS" TO BE OPEN TO PUBLIC INSPECTION UNDER THE OPEN RECORDS LAW.

The Open Records Law, Wis. Stat. §§19.31 through 19.39, first appeared in the 1981-1982 Statutes, with an effective date of January 1, 1983. The definition of "record" has not changed to this day.[1]

[1] Except for the addition of "optical disks" to the list of media on which a "record" may exist.

Before 1983, the public's right to review public records appeared within Subchapter II of Chapter 19, Wis. Stat. §§19.21 through 19.25, titled "Custody of Official Property."[2] Specifically, Wis. Stat. §19.21(2) (1979-1980) provided:

> Except as expressly provided otherwise, any person may . . . examine or copy any of the property or things mentioned in sub. (1). Any person may . . . copy or duplicate any materials . . . .

Wis. Stat. §19.21(1) (1979-1980) provided:

> 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 . . . required by law to be filed, deposited, or kept in his office, or which are in the lawful possession or control of himself or his deputies . . .[3]

The meaning of this language, "required by law to be filed, deposited, or kept in his office, or which are in the lawful possession or control of himself or his deputies . . .," which was

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[2] Prior to appearing in Subchapter II of Chapter 19, these provisions were found at Wis. Stat. §18.01 since it was enacted in 1917 by the adoption of a revisor's bill, intended to condense and make uniform a number of similar existing provisions in the statutes relating to particular officers. *See International Union, et al. v. Gooding*, 251 Wis. 362, 366-67, 29 N.W.2d 730 (1947).

[3] When the new Open Records Law, Wis. Stat. §19.31 et seq. was adopted in 1981, the Legislature also removed subsection (2) of Wis. Stat. §19.21. It retained, and still retains, subsection (1) of that statute, and Wis. Stat. §19.21 now serves largely to set the record retention framework for public entities.

the predecessor to the current definition of "record" found in Wis. Stat. §19.32(2), has been the subject of extensive debate over the years between the Attorney General, various public officials, and the Wisconsin Supreme Court.

In 1922, the Wisconsin Attorney General interpreted that language to refer to only those documents an agency was under a legal obligation to preserve :

> [I]t does not embrace every document or memorandum that may be found in a public office at any time. In other words, any document or memorandum or report that a public officer has a right to destroy is not embraced within the terms of the statute, notwithstanding that it could be said to be in his lawful possession if he did in fact preserve it. I distinguish such from those required to be kept, on the ground that the phrase "lawful possession or control of himself or his deputies" means a possession or control resulting from a legal duty rather than from a mere lawful desire to retain such possession or control for future reference of himself or his assistants.

11 Op. Atty. Gen. 7 (1922); *see also, in accord, State ex rel. Spencer v. Freedy*, 198 Wis. 388, 223 N.W. 861 (1929).

In 1947, however, the Wisconsin Supreme Court disagreed with the Attorney General's and its own 1929 narrow interpretation of the statutory language. *International Union, et al. v. Gooding,* 251 Wis. 362, 29 N.W.2d 730 (1947) (overruling *sub silentio State ex rel. Spencer, supra).* In *International Union*, the

Court first noted that the language, "required by law to be filed, deposited, or kept in his office, or which are in the lawful possession or control of himself or his deputies . . .," included two categories of papers relevant to that dispute: "(1) Such books, papers, records, etc., as are required by law to be filed, deposited, or kept in his office," and (2) such materials "in his possession as such officer." That is, it found that the "possession" language encompassed more than what was legally required to be kept in an officer's office, thus rejecting the earlier interpretations of that language:

> This phrase was inserted because it was recognized that the portion of the section dealing with papers specifically required to be kept, deposited or filed would not cover all of the situations in which it was desirable that papers should be kept and delivered to a successor and the more ambiguous phrase 'in the lawful possession or control of himself or his deputies * * * as such officer' was added.

International Union, 251 Wis. at 370.

The Court further explained, however, that the "possession" language was limited to those items possessed in the officer's official capacity:

> The contention is here made that [this language] requires every letter, paper and communication, varying from the immaterial and irrelevant to the scurrilous and libelous, to be kept, filed and ultimately delivered to a successor in

> office without respect to the relation of such papers to the functions of office. . . . It is clear enough that it was supposed by the legislature that numerous papers other than those required by specific statute or rule to be kept should remain in the files as part of the records of an office. **It is also clear that the words of limitation give some power to officers to dispose of what this court has called purely fugitive papers having no relation to the function of the office.**

Id. at 370-71, *emphasis added*.

In 1966, in *State ex rel. Youmans v. Owens*, 28 Wis. 2d 672, 677-80, 137 N.W.2d 471 (1965), *modified on denial of reh'g*, 28 Wis. 2d 672, 139 N.W.2d 241 (1966), the Court affirmed that interpretation.

In 1974, the Wisconsin Attorney General opined again on what documents in an officer's possession are subject to public inspection under the predecessor language. *63 Op. Atty. Gen. 400 (1974).* In that instance, Governor Patrick Lucey sought advice as to whether certain types of correspondence were open to the public. The Attorney General stated that:

> all of the correspondence, documents and memoranda referred to above, **with the exception of truly personal correspondence or truly fugitive papers having no relation to the function of your office,** are public records within the meaning of secs. 16.80(2)(a), 19.21(1), Stats., and are by reason of sec. 19.21(2), Stats., available to any citizen for purposes of inspection and copying.

Id., emphasis added.

The Attorney General outlined the analysis that would be appropriate for determining whether to release those documents listed by the Governor, other than his truly personal correspondence and fugitive papers with no bearing on the function of his office.

In 1984, three years after the enactment of the Open Records Law, Wis. Stat. §19.31 et seq., the Supreme Court affirmed the *International Union* interpretation of the predecessor language in its last interpretation of that language as applied in a public access case. Quoting *International Union*, the Court explained:

> The term, "public record," included not only those documents specifically required to be filed by the custodian of records, but all written papers made by an officer within his authority.

Hathaway v. Joint School District No. 1, 116 Wis. 2d 388, 393, 342 N.W.2d 682 (1984), *emphasis added*.

IV. THE LEGISLATURE INTENDED TO CONTINUE THE LONGSTANDING, EXPANSIVE BUT NOT LIMITLESS DEFINITION OF "RECORD" WHEN IT ENACTED WIS. STAT. §19.31 et seq.

The legislature is presumed to be aware of the existing laws when it enacts a statute. *Heritage Farms, Inc. v. Markel Ins.,*

2009 WI 27, ¶40, 316 Wis. 2d 47, 71, 762 N.W.2d 652. It is also presumed to be aware of the courts' interpretations of those laws. *State v. Rosenberg*, 208 Wis. 2d 191, 198, 560 N.W.2d 266 (1997); *Dept. of Revenue v. Johnson Welding & Mfg. Co., Inc.*, 2000 WI App 179, ¶16, 238 Wis. 2d 243, 256, 617 N.W.2d 193. When it enacted the current Open Records Law, it replaced this language defining records open for public inspection to be those: "required by law to be filed, deposited, or kept in his office, or which are in the lawful possession or control of himself or his deputies," with this language: "material . . . which has been created or is being kept by an authority." From 1947 until even after the Open Records Law was enacted in 1981, under the predecessor statute, the law was clear that "purely fugitive papers having no relation to the function of the office," including the personal correspondence of officers, were not open to public inspection. *International Union*, 251 Wis. at 370-71; *63 Op. Atty. Gen. 400 (1974)*.

There is absolutely no indication from the legislature that it intended to modify this longstanding public policy, to make

private correspondence of public employees that is physically located on employer property suddenly subject to public scrutiny. To the contrary, its decision to use "strikingly similar language" to that used in the predecessor statute signals that the legislature "contemplated that the courts would construe the new language" consistent with the old. *See State v. Grady*, 2006 WI App 188, ¶9, 296 Wis. 2d 295, 300, 722 N.W.2d 760. By defining "records" to include materials "being kept by an authority," the legislature most certainly intended, as under the old statute, to include those materials "other than those required by specific statute or rule to be kept" but that nevertheless "should remain in the files as part of the records of an office." *International Union*, 251 Wis. at 370.

Furthermore, by using the word "authority" in the "kept by" phrase, (defined at Wis. Stat. §19.32(1) to include various state and local bodies of government having "custody" of a "record") rather than, for instance, the word "employee" (also defined in Wis. Stat. §19.32 at subsection (1bg)), "person employed by an authority," or some other qualifier, the

legislature expressed its intent to limit the definition of "record" to those materials having some relation to the function of that authority, just as under the predecessor statute the materials subject to public inspection were those in the possession of the officer in his official capacity only, and not "purely fugitive papers having no relation to the function of the office." *International Union*, 251 Wis. at 370-71.

V. ATTORNEY GENERAL ADVICE, ENDORSED BY THE LEGISLATURE, CONFIRMS THAT PERSONAL CORRESPONDENCE IS NOT A RECORD OPEN TO PUBLIC INSPECTION.

This interpretation is consistent with the Attorney General's advice that public employers and employees alike have relied on for decades. In August 1983, only nine months following the effective date of Wis. Stat. §19.31 et seq., the Attorney General advised the Secretary of the Department of Health and Human Services that documents without content demonstrating sufficient connection with the function of an authority do not qualify as public records under the new law and therefore do not have to be disclosed to the public. *72 Op. Atty. Gen. 99 (1983).* Rather, citing both Wis. Stat. §19.21(1)

(discussed above) and the definition of "record" found in Wis. Stat. §16.61(2)(b), he advised that materials subject to public disclosure under the Open Records Law are "materials that the officer is under a legal duty or obligation to preserve and that have some relation to the function of his or her office." *Id.* This is precisely the rule that had existed in Wisconsin since at least 1947. *See International Union*, 251 Wis. at 370-71.

As outlined in the Attorney General's *Wisconsin Public Records Law Compliance Outline*, *A-Ap. 172-176*, the Attorney General has also specifically and repeatedly advised that "purely personal emails of public employees are not public records according to state statute" and that it "is the content, not the medium or format, which determines whether a document is a record or not." (emphasis in original). In reaching this conclusion, the Attorney General cited the above-discussed 1983 Attorney General Opinion.

While the Open Records Law has been amended numerous times since first enacted in 1981, the legislature chose to not amend the definition of "record" following the Attorney

General's issuance of the 1983 opinion. Wisconsin courts generally afford "great weight" to longstanding Attorney General interpretation of statutes. The interpretation "is accorded even greater weight, and is regarded as presumptively correct, when the legislature later amends the statute but makes no changes in response to the attorney general's opinion." *Staples for Staples v. Glienke*, 142 Wis. 2d 19, 28, 416 N.W.2d 920 (Ct. App. 1987); *see also Village of DeForest v. County of Dane*, 211 Wis. 2d 804, 812-813, 565 N.W.2d 296 (Ct. App. 1997). Furthermore, unlike most statutory enactments, when the legislature enacted the Open Records Law, Wis. Stat. §19.31 et seq., it explicitly invited the Attorney General to provide advice to "any person," employers, employees, and citizens alike, as to the applicability of the Open Records Law. *Wis. Stat. §19.39.* The Attorney General's advice that the Open Records Law does not subject employee personal correspondence to public inspection should also be considered presumptively correct due to the legislature's endorsement of such advice, contained in Wis. Stat. §19.39.

VI. CONCLUSION.

For the reasons state in this Brief, the Supreme Court should reverse the Circuit Court's decision and order that the personal correspondence at issue not be released to the public.

Dated this 24th day of August, 2009.

Respectfully Submitted,

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Certification of Brief

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 proportional serif font. The length of this brief is 2,793 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 §809.19(12).

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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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