RECEIVED
10-05-2009
CLERK OF SUPREME COURT
OF WISCONSIN

STATE OF WISCONSIN
SUPREME COURT
Appeal No. 2008AP00967

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.

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

NON-PARTY BRIEF OF THE WISCONSIN FREEDOM OF INFORMATION COUNCIL, THE WISCONSIN BROADCASTERS ASSOCIATION, THE WISCONSIN NEWSPAPER ASSOCIATION, THE *MILWAUKEE JOURNAL SENTINEL*, JOURNAL BROADCAST GROUP, INC., AND THE ASSOCIATED PRESS

Robert J. Dreps
State Bar No. 1006643
Godfrey & Kahn, S.C.
One East Main Street, Suite 500
Madison, WI 53703
(608) 257-3911

Jennifer L. Peterson
State Bar. No. 1033482
Journal Communications, Inc.
333 West State Street
PO Box 661
Milwaukee, WI 53201-0661
(414) 224-2374

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER AUTHORITIES

The issue the court of appeals certified in this case is of vital interest to record custodians, subjects and requesters alike, as the level of non-party participation demonstrates:

> Whether and to what extent personal emails of public employees are subject to the open records law is a question of first impression in Wisconsin. We believe the supreme court is the appropriate forum to decide this important question.

Certification, District IV, Appellants' Appendix ("A-App.") 106. The legislature has not amended the Open Records Law specifically to address email, and no state appellate court has considered the issue under existing law. But its resolution will have to await a proper case or legislative action.

Now, however, this appeal should be dismissed because the Wisconsin Rapids School District's decision to disclose the records at issue is not even subject to judicial review.

> Except as authorized in this section or as otherwise provided by statute, ... no person is entitled to judicial review of the decision of an authority to provide a requester with access to a record.

Wis. Stat. § 19.356(1) (2007-08). The plaintiffs' action—to enjoin the disclosure of their "personal" email—is not authorized in section 19.356 or any other statute. Accordingly, the circuit court lacked competence[1] to review the School District's disclosure decision and should have dismissed the action.

This Court should exercise its inherent authority to consider the circuit court's lack of competence, even though the School District did not raise the issue below or even in this appeal. The legislature adopted section 19.356 in 2003 specifically to narrow and codify the expansive notice and judicial review rights this Court created for record subjects beginning in *Woznicki v. Erickson*, 202 Wis. 2d 178, 549 N.W.2d 699 (1996). This Court arguably has the power to

[1] "In Wisconsin, a circuit court's jurisdiction is conferred by our state constitution and not by acts of the legislature. We have labeled the circuit court's inability to adjudicate the specific case before it because of a failure to comply with a statutory requirement as a loss of competence." *Miller Brewing Co. v. Labor and Industry Review Com'n*, 173 Wis. 2d 700, 705 n.1, 495 N.W.2d 660 (1993) (citations omitted).

decide the issue the court of appeals certified, despite the plain language of section 19.356, because the School District did not challenge the circuit court's competence to proceed. To do so, however, would be "to substitute [this court's] own judgment in legislative matters for the clearly expressed judgment of the legislators." *Milwaukee Teachers' Educ. Ass'n v. Milwaukee Bd. of Sch. Dirs.*, 227 Wis. 2d 779, 805, 596 N.W.2d 403 (1999) ("*MTEA*") (Abrahamson, C.J., dissenting).

If the Court elects to reach the merits, however, it should affirm the circuit court's decision. Email stored on government servers plainly satisfies the statute's definition of "record" and must be disclosed consistent with the "presumption of complete public access" to government records. Wis. Stat. § 19.31.

I. THE SCHOOL DISTRICT'S DISCLOSURE DECISION IS NOT SUBJECT TO JUDICIAL REVIEW.

The Open Records Law broadly presumes that all government records shall be open to public inspection, subject only to explicit statutory and common law exceptions or a judicial determination that the public interest in secrecy outweighs the presumed public interest in disclosure. *Id.*; *see also, Hathaway v. Joint School Dist.*, 116 Wis. 2d 388, 397, 342 N.W.2d 682 (1984). The Open Records Law created a statutory cause of action to *compel* access to government records, but not one to *prevent* disclosure.

Based upon the strong presumption of public access, custodians were long understood to have the unfettered discretion to disclose government records under the common law balancing test without judicial involvement. *See, e.g.*, *State ex rel. Bilder v. Township of Delavan*, 112 Wis. 2d 539, 558, 334 N.W.2d 252, 262 (1983) ("[I]t is the legal custodian

of the record, not the [record subject], who has the right to have the record closed if the custodian makes a specific demonstration that there is a need to restrict public access at the time the request to inspect is made.").

This Court dramatically altered that understanding in *Woznicki* where the majority held that the Open Records Law provided record subjects the "implicit" rights to notice and *de novo* judicial review before records concerning them were disclosed. *Woznicki*, 202 Wis. 2d at 185. The lower courts quickly extended this judicial cause of action beyond the narrow facts addressed in *Woznicki*—personnel and telephone records a district attorney had obtained by subpoena—"to any records which pertain to an individual," no matter how they came into the government's possession. *Klein v. Wisconsin Resource Center*, 218 Wis. 2d 487, 494, 582 N.W.2d 44 (Ct. App. 1998). This Court affirmed the expansion of *Woznicki*

rights in a sharply divided decision. *MTEA*, 227 Wis. 2d at 790.

In response, the legislature twice acted to curtail the rights created in *Woznicki*. Its first attempt to reverse the decision outright in the 1997 biennial budget bill was vetoed. *Id*. at 808. The legislature returned to the issue in 2003, adopting a Legislative Study Committee's recommendation to enact section 19.356. The legislature superseded *Woznicki* with a statutory procedure that requires notice and authorizes judicial review under strict time limits *only* before disclosing a narrow category of specified records: disciplinary records, records obtained by subpoena or search warrant, or records concerning private sector employees. The legislature mandated that, other than the subjects of records in these specific categories, no person has a right to notice or "judicial review of the decision of an authority to provide a requester with access to a record." Wis. Stat. § 19.356(1).

This case presents the Court's first opportunity to apply section 19.356. It should do so, even though the plaintiffs' failure to satisfy its threshold terms was not raised in the circuit court. *See Clean Wisconsin, Inc. v. Public Service Comm'n*, 2005 WI 93, ¶ 271, 282 Wis. 2d 250, 700 N.W.2d 768 ("Given the public importance of the legal issues and ultimate result in this case, it is more important in this instance to settle the legal issues raised correctly, rather than hold parties to any waiver."). Dismissal is the correct result in this case, despite the importance of the legal issues presented, because to enforce the School District's procedural waiver would defy the legislature's plain intent.

The plaintiffs expressly based their claim for relief on the procedural rights created in *Woznicki*.

> Ms. Schill, Ms. Pronga, Mr. Larsen, Mr. Dresser, and Ms. Martin now seeks [sic] to exercise their rights under *Woznicki* and request *de novo* judicial review of the Defendants' decision to release their personal emails.

Amended Complaint, A-App. 155, ¶ 23. This claim flatly contradicts section 19.356, which was enacted specifically to codify and narrow those judicially created rights. The plaintiffs have no right to judicial review under that or any other statute and, accordingly, this action should have been dismissed.

The School District's failure to challenge the circuit court's competence to decide this case under section 19.356 should not prevent this Court from reaching the correct result in the interests of justice. *See Village of Trempealeau v. Mikrut*, 2004 WI 79, ¶ 3, 273 Wis. 2d 76, 681 N.W.2d 190 ("The waiver rule is a rule of judicial administration, and therefore a reviewing court has the inherent authority to disregard a waiver and address the merits of an unpreserved argument."). The principal reason the MTEA majority gave for reaffirming and expanding *Woznicki* in 1999 was that the decision had "not been overturned by statute." 227 Wis. 2d

at 790 n.6. Now that *Woznicki* has been "overturned" and superseded by section 19.356, this Court should respect the legislature's primacy over the public policies governing public access to government records.

II. PUBLIC EMPLOYEE EMAILS ARE "RECORDS" SUBJECT TO PUBLIC ACCESS UNDER THE OPEN RECORDS LAW.

The plaintiffs' argument—that the Open Records Law forbids disclosure of any document excluded from the definition of "record" in section 19.32(2)—is fundamentally flawed.[2] The Open Records Law is an access statute, not a privacy statute. The state's official public policy encourages

[2] Contrast section 19.32(2), which does not forbid the disclosure of documents excluded from the definition of record, with section 19.36(10), which expressly forbids the disclosure of certain information concerning public employees under the Open Records Law. The cases from other jurisdictions do establish one principle: the policy and practical debates over the use of office computers for "personal" versus "business" emails are inherently subjective and inherently contentious. Whether those debates take place in a law office, a corporate management suite, or state or local government offices, the distinction between the two is often in the eye of the beholder (or, more precisely, the requester). A decision by this Court to decide this case in favor of the plaintiffs will invite a cascade of litigation that not only is unnecessary but collides with the very purpose of the Open Records Law.

authorities and record custodians to respond precisely as the School District did to Mr. Bubolz's request in this case:

> [O]n any close question of law with regard to disclosure, I think the law is clear that we are to err on the side of disclosure and that is why the District initially took the position that the … emails should be disclosed.

A-App. at 123. That decision is not subject to judicial review, as explained above, but if the Court nonetheless reaches the merits, it should find that the School District's decision was correct.

Public access to the emails of public employees is addressed on a regular basis by custodians across Wisconsin. In this case, the Court has heard from several custodians (as parties and amici) on how they respond to requests for "personal" email. Based on Wisconsin's historical commitment to open government, the strong presumption of public access and the current language of the Open Records Law, however, only the School District is providing the

public with "the greatest possible information regarding the affairs of government" as it relates to email. Wis. Stat. § 19.31.

The other custodians are making a value judgment about the content of the emails, concluding they are "private" and, therefore, may not be disclosed. That conclusion is not supported by the Open Records Law.

With email especially, there is not always a bright line between public and "private." Reasonable people might disagree about whether emails with certain content are work-related: emails between government employees about recreational activities; emails between a government employee and an independent contractor about dinner reservations and a baseball game; emails between a government employee and his family member about a family event that includes a comment about governmental business. Whether the email content is strictly work-related or not,

however, is not dispositive under the statutory definition of "record" in Wisconsin.[3]

A. Email Stored On Government Servers Is Within The Statutory Definition of "Record."

The definition of "record" in Wis. Stat. § 19.32(2) was last amended in 1991. *See* 1991 Wis. Act 39, § 208. The statute does not explicitly address email, though it does include as "records" all "electromagnetic information … recordings, tapes (including computer tapes), computer printouts and optical disks." Here, the parties dispute not that definition *per se* but whether certain emails sent by public employees fall within any exclusions from the definition of "record," specifically, those for (1) "drafts, notes, preliminary computations and like materials prepared for the originator's

[3] Plaintiff's reliance on a "national consensus" of other court decisions fails to consider the varying definitions of "record" in other states' open records laws. Plaintiff's Brief, p. 13. For example, in *State v. City of Clearwater*, 863 So. 2d 149 (Fla. 2003), the Florida Supreme Court was interpreting a definition of "record" that is very different from Wis. Stat. § 19.32(2).

personal use" or (2) "materials which are purely the personal property of the custodian and have no relation to his or her office." Wis. Stat. § 19.32(2). Neither exclusion applies to public employee email stored on the authority's servers.

First, under any reasonable interpretation, emails are not "drafts, notes, preliminary computations and like materials prepared for the originator's personal use." Wis. Stat. § 19.32(2). Wisconsin courts have consistently interpreted that exclusion based on whether the document was used "for the purpose for which it was commissioned." *Journal/Sentinel v. School Bd.*, 186 Wis. 2d 443, 455-56, 521 N.W.2d 165 (Ct. App. 1994) (discussing *Fox v. Bock*, 149 Wis. 2d 403, 438 N.W.2d 589 (1989)).

"Personal use" relates to the employee's "own convenience." *State v. Panknin*, 217 Wis. 2d 200, 212, 579 N.W.2d 52 (Ct. App. 1998). No Wisconsin court has ever

interpreted the "personal use" exclusion to mean "private content."[4]

Second, emails stored on government servers are not "materials which are purely the personal property of the custodian and have no relation to his or her office." Wis. Stat. § 19.32(2). As an initial matter, the emails at issue are not the teachers' "personal property" because the teachers are not the legal custodians of their emails. The maintenance, preservation and storage of email on government servers distinguish email from thank-you notes, grocery lists, and family photos kept exclusively in an employee's desk. Even telephone calls from government phones are different because the content is not preserved by the governmental body. Due to the "nature" of email, *see Nichols v. Bennett*, 199 Wis. 2d

[4] Plaintiffs argue that private content excludes email from public access because "not everything a public official creates is a public record." *Custodian of Records v. State (In re John Doe)*, 2004 WI 65, ¶ 45, 272 Wis. 2d 208, 680 N.W.2d 792. The statement in *Doe*, however, was based solely on the holding in *Panknin* that a judge's notes were created for his own convenience and were not public records.

268, 274, 544 N.W.2d 428 (1996), a government employee's email is not that employee's "personal property."

Stated another way, a public employee's email in his or her government account always has a "relation to his or her office." Wis. Stat. § 19.32(2). The plaintiffs argue that only when "abuse" of the email system is alleged or substantiated is there a public interest in the employees' emails to friends and family. That argument should be rejected. The public interest is legislatively "presumed," *Milwaukee Journal v. Call*, 153 Wis. 2d 313, 321, 450 N.W.2d 515 (Ct. App. 1989), and there is always a significant public interest in the quality of use of public resources.

More than forty years ago, this Court rejected the plaintiff's policy argument when it concluded that there is a public interest in access to a report that did not lead to any disciplinary proceedings. *State ex rel. Youmans v. Owens*, 28 Wis. 2d 672, 685, 137 N.W.2d 470 (1965). "[T]he public

interest to be served by permitting inspection is to inform the public whether [the] defendant mayor has been derelict in his duty in not instigating disciplinary proceedings against policemen because of wrongful conduct disclosed in the report." *Id.*

Here, the public interest in access—just to cite one—is to inform the public of whether the governmental body is "derelict in [its] duty" of regulating the use of email. No public employee is required to use governmental resources to send or receive email with private content. When they do, the public has a significant interest in both the quantity and quality of that use, as well as the government employer's oversight of email usage.

The public is entitled to access to make its own judgment about the quality of use of public resources and the governmental body's regulation of that resource. "[A]ll officers and employees of government are, ultimately,

responsible to the citizens, and those citizens have a right to hold their employees accountable for the job they do." *Linzmeyer v. Forcey*, 2002 WI 84, ¶ 28, 254 Wis. 2d 306, 646 N.W.2d 811.

B. The Legislature Must Establish Public Policy On Access To Public Employees' Email.

The Open Records Law does not exclude from public access the email records requested by Mr. Bubolz. While the plaintiffs and some amicus parties argue it is good public policy to exclude from public access the emails of public employees to their friends and family, that argument is appropriately directed to the legislature, not the judiciary.

The Open Records Law already strikes "the balance between privacy and open government." *MTEA*, 227 Wis. 2d at 804 (Abrahamson, C.J., dissenting). Indeed, concluding that public employee email stored on government servers are "records" as defined in section 19.32(2) does not mean that all emails will always be disclosed in response to an open

records request. The rest of the Open Records Law—including the statutory exceptions and the common law balancing test—still applies. In fact, that's precisely the analysis the circuit court employed here: first holding the emails are "records" and then concluding, under the balancing test, that no public interest in nondisclosure outweighs the presumption of public access. A-App.126-133.

This Court should not second guess the legislature's definition of "record" by reading in an exclusion for "personal" email. If the plaintiffs, or anyone else, want such an exclusion in the Open Records Law, the proper path is through the legislature, not the courts.

CONCLUSION

This Court's decision on how the Open Records Law applies to email stored on government servers should await another day. By enacting Wis. Stat. § 19.356, the legislature foreclosed judicial review of the School District's disclosure

decision. This Court should exercise its inherent authority to consider the circuit court's lack of competence to hear this matter and dismiss the case.

If the Court elects to reach the merits, however, it should affirm the circuit court's decision to disclose the requested emails. The evolution of technology should enhance, not hinder, public oversight and government accountability. Even "personal" emails stored on government servers satisfy the definition of "record" in Wis. Stat. § 19.32(2) and must be disclosed consistent with the strong presumption of complete public access to government records.

Dated: October 5, 2009.

GODFREY & KAHN, S.C.

By: *s/Robert J. Dreps*
Robert J. Dreps
State Bar No. 1006643
Attorneys for the Wisconsin Freedom of Information Council, the Wisconsin Broadcasters Association, the Wisconsin Newspaper Association, the *Milwaukee Journal Sentinel*, Journal Broadcast Group, Inc., and The Associated Press

ADDRESS:
One East Main Street, Suite 500
Madison, WI 53703
Phone: 608-257-3911
Fax: 608-257-0609
rdreps@gklaw.com

Jennifer L. Peterson
State Bar. No. 1033482
Journal Communications, Inc.
333 West State Street
PO Box 661
Milwaukee, WI 53201-0661
Phone: 414-224-2374
Fax: 414-224-2469
jpeterson@journalcommunications.com

CERTIFICATION

I hereby certify that this brief conforms to the requirements of Wis. Stat. §§ 809.19(8)(b) and (c), for a brief produced with a proportional font. The length of this brief is 2,980 words.

Dated: October 5, 2009.

s/Robert J. Dreps
Robert J. Dreps

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

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. 809.19(1). 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.

Dated: October 5, 2009.

s/Robert J. Dreps
Robert J. Dreps

4221218_1