STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2018AP0431

BILL LUEDERS,

Plaintiff-Respondent,

v.

SCOTT KRUG,

Defendant-Appellant.

ON APPEAL FROM A JANUARY 19, 2018, DECISION AND ORDER OF THE DANE COUNTY CIRCUIT COURT, THE HONORABLE RHONDA L. LANFORD, PRESIDING

REPLY BRIEF OF APPELLANT SCOTT KRUG

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Lueders and the Amici Curiae[1] (the "Amici") think a records custodian should produce a record in whatever format the requester prefers. But that is not the law in Wisconsin, and their view would place an unreasonable burden on records custodians across the state. Krug fully complied with Wisconsin's public records law when he promptly provided Lueders with a readable copy of the records Lueders requested. The circuit court's Decision and Order should be reversed.

ARGUMENT

I. Lueders misunderstands the proper legal framework.

Lueders argues that Krug has the burden to defend his reasons for non-disclosure, and only those reasons that were articulated in his "denial." Lueders cites the legal framework in *Osborn v. Bd. of Regents of Univ. of Wis. Sys.*, 2002 WI 83, 254 Wis. 2d 266, 647 N.W.2d 158. (Resp't Br. 15.) But that legal standard is not applicable here; rather, it only applies where an authority decides to withhold records.

When an authority denies access to records, the authority bears the burden of showing it provided specific and sufficient reasons for the denial. *Osborn*, 254 Wis. 2d 266, ¶¶ 14–16. Here, Krug did not deny Lueders access to records. To the contrary, he fully complied with Lueders' request by providing readable copies of the citizen correspondence and other records—just not in the format Lueders preferred.

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[1] This reply addresses the arguments in the Brief of Plaintiff-Respondent Bill Lueders as well as the arguments in the Brief of Amici Curiae, filed with this Court on July 12, 2018.

Lueders cites *State ex rel. Milwaukee Police Ass'n v. Jones*, 2000 WI App 146, 237 Wis. 2d 840, 615 N.W.2d 190, to argue that when an authority withholds versions of records because he believes he complied with the public records law, that claim is construed as a "denial." (Resp't Br. 31.) But that is a distinction without a difference, because the *Jones* court does not address the parties' relative burdens or the sufficiency of the response letter at all. *Jones* does not support Lueders' position.

Lueders cites a number of balancing test cases to argue that Krug has the burden to show why the requested records should not be produced. (*Id.* at 16.) But the balancing test applies only where the authority decides not to disclose records. *See Democratic Party of Wis. v. Wis. Dep't of Justice*, 2016 WI 100, ¶ 9, 372 Wis. 2d 460, 888 N.W.2d 584. Here, Krug did not withhold disclosure of records, so the balancing test is inapplicable.

There is a "lack of clarity" in the case law as to who bears the initial burden of persuasion when the authority has not denied access to records. *Watton v. Hegerty*, 2008 WI 74, ¶ 8 n.9, 311 Wis. 2d 52, 751 N.W.2d 369. In these situations, Krug submits that the statute for mandamus relief controls, and the typical "denial" framework is not applicable. *Id.* ¶ 8 (citing the four statutory factors that the *petitioner* must establish to be entitled to mandamus relief). To be entitled to mandamus relief, Lueders had to show that he has a clear statutory right to the electronic copies, and that Krug had a plain legal duty to disclose the records in electronic format. *Id.* Lueders failed to make this showing.

II. Lueders ignores the plain language of Wis. Stat. § 19.35(1)(b) and this Court's longstanding interpretation.

Lueders cannot show he has a clear statutory right to electronic copies of emails. The operative statute, Wis. Stat. § 19.35(1)(b), requires nothing more than a copy "substantially as readable" as the original.

A. The authority has discretion to choose the format, as long as it is substantially as readable.

Lueders contends that that the "substantially as readable" language only applies when a requester appears personally to request a copy of a record. (Resp't Br. 27–29.) This Court has already rejected that argument.

This Court interprets Wis. Stat. § 19.35(1)(b) as allowing "the custodian . . . the option to either allow the requester to make a copy of the record or for the custodian to make a copy of the record. *Importantly, the statute gives the custodian, not the requester, the option to choose how a record will be copied.*" *Grebner v. Schiebel*, 2001 WI App 17, ¶ 12, 240 Wis. 2d 551, 624 N.W.2d 892 (emphasis added). The *Grebner* court's interpretation is not limited to scenarios where the requester appears in person. And for good reason: it makes no sense to interpret the statute as holding authorities to a "substantially as readable" standard if the requester appears in person, but to a different standard when the requester does not.

Grebner answers the question here. The authority has discretion to choose the format, and a copy "substantially as readable" is all the law requires.

B. Lueders and the Amici's interpretation of "readable" and "copy" is wrong.

Lueders and the Amici argue that "substantially as readable," even if applicable, should be interpreted to mean "the electronic metadata and information that is ordinarily unprinted, as well as the readability of the record through search and analysis functions." (Resp't Br. 30; *see also* Amicus Br. 9–10.) They further argue that a "copy" means one that has identical content to the original, including content that could not be seen with the naked eye. (Resp't Br. 18–19; Amicus Br. 6.) This is not a proper interpretation of the statute.

"Readable" is defined as "[e]asily read; legible: *a readable typeface.*"[2] All Wis. Stat. § 19.35(1)(b) requires is the copy to be as easily read or legible as the original. The surrounding subsections, Wis. Stat. § 19.35(1)(c) and (d), support this reading: they require the authority to provide copies of audio recordings "substantially as audible as the original," and video recordings "substantially as good as the original," respectively. This command to provide what can be plainly seen with the eye or heard with the ear facilitates the "obvious purpose" of the open records law, "to provide access to the recorded *information* in records." *Stone v. Bd. of Regents of Univ. of Wis. Sys.*, 2007 WI App 223, ¶ 20, 305 Wis. 2d 679, 741 N.W.2d 774.

Lueders' and the Amici's interpretation of "copy" is also flawed. The Wisconsin Supreme Court does not require a "copy," electronic or otherwise, to contain all of the attributes of the original record. Interpreting a different section of the public records law, the supreme court noted

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[2] *Readable*, The American Heritage Dictionary (5th ed. 2016).

that an appropriate method of reproducing an electronic record is for the authority to print out a hard copy. *See Milwaukee Journal Sentinel v. City of Milwaukee*, 2012 WI 65, ¶ 31, 341 Wis. 2d 607, 815 N.W.2d 367. And even assuming that an authority is required to produce an "electronic" copy when the requester asks for it (which Krug does not concede), the Wisconsin Supreme Court has stated that "PDF" files, which "did not have all of the characteristics that [the requester] wished (that is, [the requester] could not easily manipulate the data) . . . did fulfill [the] initial requests as worded." *WIREdata, Inc. v. Vill. of Sussex*, 2008 WI 69, ¶ 96, 310 Wis. 2d 397, 751 N.W.2d 736. A "copy" of an electronic record does not have to be identical in content and format to the original.

C. "Substantially as good" is not the proper standard.

Lueders argues that the circuit court's "substantially as good" test is the proper legal standard. (Resp't Br. 22–27.) He is incorrect. The circuit court's new legal test is not grounded in law, and creates an unclear standard that is impossible for authorities to consistently apply.

"Substantially as good" is not found in Wis. Stat. § 19.35(1)(b). It is found in the statute for producing video recordings, meaning that the Legislature declined to use that phrase with respect to written records.

Lueders points to the Wisconsin Attorney General's Compliance Guide and an Executive Order by Governor Scott Walker as evidence that the "as good" standard is correct. Those sources do not state that the law requires written records (electronic or otherwise) to be produced in a format "substantially as good"; they merely offer guidance on

recommended practices, when practicable. (Compliance Guide 56;[3] Executive Order #189[4] (indicating electronic records are desirable "whenever practicable").) Complying with Lueders' request was neither required by law nor practicable for Krug's office.

Lueders says the circuit court's new test will be easy to apply because the test permits authorities to provide records in the most "useable" format, and if that format is unclear, the authority "can ask the requester for clarification." (Resp't Br. 26.)

But as "useable" is just as vague as "as good" in the context of written records, and it is impossible to know what would be as "useable" without inquiring about the requester's purpose in obtaining the documents. Inquiring as to purpose is generally prohibited under the public records law. (Appellant Br. 18, 23–24.) Case law makes clear that an authority does not bear the burden of trying to guess at what the requester is truly asking for, and then risk being found to violate the law if the authority guessed incorrectly. An authority is only obligated to fulfill a request for records as written; authorities do not have an obligation to guess at what the requester wants. *Seifert v. Sch. Dist. of Sheboygan Falls*, 2007 WI App 207, ¶ 42, 305 Wis. 2d 582, 740 N.W.2d 177.

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[3] (*See* R. 20.) A copy of the entire Compliance Guide is available at: https://www.doj.state.wi.us/sites/default/files/dls/2015-PRL-Guide.pdf

[4] Executive Order #189, available at: https://walker.wi.gov/sites/default/files/executive-orders/EO_2016_189.pdf. Obviously, executive orders are not binding on the Legislature.

Lueders cites no authority for the proposition that custodians have the burden to seek clarification when a request is not specific; in fact, the circuit court's Decision and Order does not even go that far. (R. 55, A-App. 101–10.)

This Court should reject the circuit court's "substantially as good" test as contrary to the plain language of Wis. Stat. § 19.35(1)(b), and as an impractical and unworkable standard.

III. Lueders and the Amici improperly raise an unappealed and undeveloped argument that the public records law requires authorities to provide records in their original format.

Lueders and the Amici argue that because emails contain metadata, they are distinct records that must be produced in native format. (Resp't Br. 17–20; Amicus Br. 3–8.) The undisputed facts show that Lueders did not request documents in electronic native format, and no record was developed before the circuit court as to this issue. The circuit court did not hold that authorities must produce native format emails in its Decision and Order, and Lueders did not appeal that. This Court should not reach the question of whether native emails are separate records that must be produced under the public records law.

A. This issue was not developed in circuit court because Lueders did not request native copies of emails.

Krug's evidence and argument at summary judgment focused on what Lueders actually requested. Lueders did not ask for emails in native format. Lueders' written request was for copies of citizen correspondence "in electronic form, as an email folder, or on a flash drive or CD." (R. 1:11, A-App. 125.)

The evidence Krug submitted regarding electronic records was to show that Lueders' request for electronic documents was ambiguous. (R. 17:43–46.) At summary judgment, the parties agreed that emails and other documents can be produced "electronically" in numerous ways, including printing and scanning (which can remove metadata), by directly converting from an email file to a PDF or another type of file, or by cutting text from the body of an email and pasting it into a Microsoft (MS) Word document, or other type of text file. (R. 36:13.) The Wisconsin Supreme Court agrees that when a requester asks for documents in "electronic/digital" form, he is not conclusively asking for those documents in native format. *WIREdata, Inc.*, 310 Wis. 2d 397, ¶ 96 (PDF files are "electronic/digital" files). Lueders cannot credibly argue that he requested native copies of emails.

Because Krug's evidence at summary judgment focused on the language of Lueders' request, the record was not developed as to the issue Lueders and the Amici now attempt to raise. The native email question raises a host of important issues that are not resolved in Wisconsin, including: whether metadata makes email a separate record that must be produced (or whether metadata qualifies as a draft and is therefore not part of the public record);[5] what technological, labor, and security issues exist with requiring an authority to produce metadata (and whether sensitive information can be reviewed and removed in a timely manner), *id.* ¶ 97; the relative costs associated with requiring local custodians to obtain the technological support

[5] At least one circuit court has held that metadata is not part of the public record because it includes drafts, notes, preliminary computations, and editing information. *McKellar v. Prijic*, No. 09-CV-0061 (Wis. Cir. Ct. Outagamie Cty. July 29, 2009).

necessary to retrieve and produce native emails;[6] whether native emails are "material used as input for a computer program or the material produced as a product of the computer program," and if so, whether they are subject to the right of examination and copying under Wis. Stat. § 19.36(4); and whether it is even possible to produce emails in native format when the emails are in need of redaction.

In addition, the question of whether an email must be produced in native format is very different from whether all types of electronic records should be produced in native format. All of these issues will require expert evidence and fully developed legal analysis, which is not present here because those facts were not present in this case.

While Lueders argued in litigation that he was entitled to native emails, the circuit court rejected Lueders' argument and instead adopted the "substantially as good" test. If Lueders wanted to contest the circuit court's ruling on the native email issue, he needed to appeal. He did not. The Amici cannot revive this issue in a non-party brief, especially one devoid of properly cited evidence.

Even if this Court were to affirm the circuit court, it should not extend the circuit court's holding to require an authority to produce native copies of emails or other documents. That important question should be decided in a case where it was properly raised and the record fully developed.

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[6] Without citing to any credible evidence in the record, the Amici contend that "[s]ending an electronic file is quicker, simpler, and cheaper than printing it out." (Amicus Br. 11.) The Amici fail to consider the cost local records custodians would incur in hiring an information technology expert to assist with retrieving and appropriately producing records in native format. (R. 36:11 ¶ 32.)

IV. The circuit court erroneously exercised its discretion when it ruled that depositions are prohibited in public records cases.

The circuit court failed to exercise its discretion appropriately when it granted Lueders' motion for a protective order (R. 61:9–11, A-App. 119–21), a ruling whose reasoning suggests a prohibition against depositions in public records cases.

Defendants in civil actions have the right to engage in discovery. At the discovery stage, relevancy is not an evidentiary trial standard governing admissibility; rather, it defines the scope of discovery as including matters related to the subject matter of the complaint. *See* 8 Charles Alan Wright et al., Federal Practice and Procedure § 2008 (3d ed. 2010). Civil discovery provides "each party opportunity to fully inform himself of the facts of the case and the evidence which may come out at trial." *Shibilski v. St. Joseph's Hosp. of Marshfield, Inc.*, 83 Wis. 2d 459, 464, 266 N.W.2d 264 (1978) (citation omitted).

Lueders argues that public records actions are like judicial review actions under Wis. Stat. ch. 227; as such, "the government will typically possess all the relevant evidence, and discovery of the plaintiff must be carefully limited." (Resp't Br. 40.) Lueders ignores the fact that, whereas Wis. Stat. § 227.57(1) specifically limits review to the administrative record, with limited exceptions, no such restrictions apply under Wis. Stat. ch. 19. If the Legislature had wanted to impose restrictions on discovery in public records mandamus cases, it would have done so. It did not.

Krug was prevented from deposing Lueders and developing the record on some of the very issues that underpinned the circuit court's final decision. (Appellant Br. 24.) As one example, Lueders refused to answer an interrogatory that asked the plaintiff to identify "each and every one of Plaintiff's intended use of the records which was precluded by only being offered the records in paper format." (R. 9:12.) The circuit court's protective order prevented Krug from developing the record as to this issue, which turned out to be highly relevant given the reasoning in the final Decision and Order.

This Court should reverse the protective order to the extent it denies defendants the general right to depose plaintiffs in a public records case.

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Wisconsin's open government laws promote democracy by ensuring that all state, regional, and local governments conduct their business with transparency. Wis. Stat. § 19.31. Consistent with this purpose and in full compliance with the law, Krug made thousands of pages of citizen correspondence available for Lueders to inspect or copy, within weeks of Lueders' request. Lueders cannot show that Krug violated the law.

CONCLUSION

For these reasons, Krug respectfully requests that this Court reverse the circuit court's January 19, 2018, Decision and Order, as well as the circuit court's March 2, 2017, Order Granting Protective Order to the extent it denies defendants the right to depose plaintiffs in a public records case.

Dated this 18th day of July, 2018.

Respectfully submitted,

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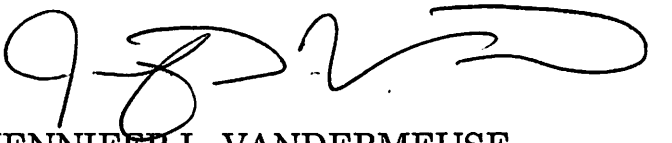
Attorney General of Wisconsin



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CERTIFICATION

I hereby certify that this reply brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a reply brief produced with a proportional serif font. The length of this reply brief is 2944 words.

Dated this 18th day of July, 2018.

JENNIFER L. VANDERMEUSE
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

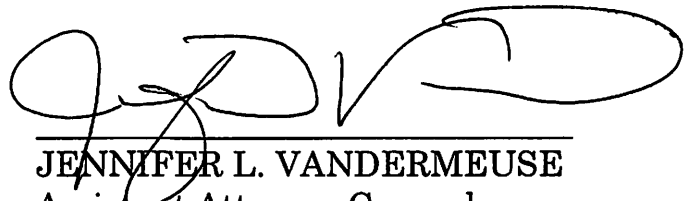
I have submitted an electronic copy of this reply brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

This electronic reply brief is identical in content and format to the printed form of the reply brief filed as of this date.

A copy of this certificate has been served with the paper copies of this reply brief filed with the court and served on all opposing parties.

Dated this 18th day of July, 2018.



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