STATE OF WISCONSIN
COURT OF APPEALS
District II
Appeal No. 2022AP001941

MARK GIERL,

Petitioner-Respondent,

v.

MEQUON-THIENSVILLE SCHOOL DISTRICT,

Respondent-Appellant.

On Appeal from the Circuit Court of Ozaukee County
Honorable Steven M. Cain, Presiding
Case No. 22-CV-40

BRIEF OF RESPONDENT-APPELLANT, MEQUON-THIENSVILLE SCHOOL DISTRICT

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PREFACE

On November 16, 2021, Petitioner-Appellee, Mark Gierl ("Gierl") requested records from Respondent-Appellant, Mequon-Thiensville School District ("District") under Wisconsin's Public Records Law, Wis. Stats. § 19.31, *et. seq*. Gierl initially requested all emails sent over a two-year period to individuals on three separate email distribution lists, along with the personal email addresses of all individuals on said lists. The District properly objected to the overboard and unduly burdensome request. Acknowledging his request was, in fact, overbroad and unduly burdensome, Gierl withdrew his initial request and replaced it with a request for email messages limited to a six-month period (keeping in place his request for the personal email addresses of individuals on the three distribution lists). The District never saw this amended request and, as such, did not respond to same.

At the time, Gierl was in active litigation with the District and his counsel was in regular communication with the District's counsel. Rather than simply picking up the phone or sending an email to ask about the status of his amended request, Gierl and his counsel filed a second lawsuit against the District. The filing of this second lawsuit was the first notice the District received that Gierl had amended his original, overbroad request. It is undisputed that, shortly thereafter, the District produced all email messages responsive to the amended request in full compliance with the Public Records Law. Because of the new standard established by the Wisconsin Supreme Court in *Friends of Frame Park v. City of Waukesha*, 2022 WI 57, 403 Wis. 2d 1, 976 N.W.2d 263, Gierl was entitled to no relief regarding the email messages themselves, including attorney fees and costs, because the District fully provided the requested records in the amended complaint prior to any judicial order. Nevertheless, the Circuit Court erroneously found the District had denied Gierl's *original* request for two years' worth of emails, despite the fact that Gierl withdrew and amended the original request by reducing the request to six months' worth of emails, which The District provided. The Circuit Court

erroneously ordered compliance with this overbroad request and ordered attorney fees and costs, contrary to *Friends of Frame Park*.

As to the personal email addresses within the three distribution lists, Gierl's pursuit of such information is at odds with the letter, spirit, and intention of Wisconsin's Public Records Law. In this case, the privacy expectation of unsuspecting third-party citizens certainly outweighs Gierl's right to receive the information—information that does nothing to further Gierl's understanding of the "affairs of government" or "the official acts of those officers and employees." Wis. Stat. § 19.31.

By improperly granting Gierl's request for summary judgment and ordering the release of private citizens' personal email addresses, the Circuit Court misconstrued the specificity analysis and misapplied the balancing test under Wisconsin's Public Records Law. Accordingly, the Circuit Court engaged in "judicial creep" in this case and imposed a burden upon the District that does not exist under the law as written or interpreted. This expansion of Wisconsin's Public Records Law is unprecedented, illogical, and uncontemplated by the Legislature. The release of unsuspecting third parties' personal, private email addresses does not further the purpose or intent of the Public Records Law. The Circuit Court erred in giving weight to Gierl's arguments at the public's expense, diminishing the District's balancing test analysis to the point it carried no weight despite the significant privacy interests at stake. The Circuit Court's flawed reasoning must therefore be corrected to prevent an obfuscation of Wisconsin's Public Records Law.

INTRODUCTION

The Public Records Law "serves 'an informed electorate' and '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.'" *Schill v. Wisconsin Rapids School Dist*., 2010 WI 86, ¶ 80, 786 N.W.2d 177, 327 Wis. 2d 572 (lead op.) (quoting Wis. Stat. § 19.31) (emphasis in original). According to Wis. Stat. § 19.31, "in every instance" the law is to be construed "with a presumption of complete public access, consistent with the conduct of governmental business." The presumption of complete public access is thus not absolute; rather, such presumption is limited to access "consistent with the conduct of governmental business." *Schill*. 2010 WI 86, ¶ 81 (holding, "[d]isclosure of the contents of the Teachers' personal e-mails does not keep the electorate informed about the government and sheds no light on 'official acts' or 'the affairs of government.'").

In this case, Petitioner, Mark Gierl, seeks access to the personal email addresses of private citizens who passively received emails from the District. Importantly, Gierl initially sought both the contents of emails the District sent to these passive recipients, as well as the recipients' email addresses. The emails themselves were provided to Gierl.[1] Furthermore, Gierl never asked for the identity of individuals on the email distribution lists. He was not seeking the identity of individuals with whom the District was communicating. Instead, he demanded the personal email addresses of private citizens who were passive recipients of said distribution lists.

Disclosure of the personal email addresses of passive recipients of District emails does absolutely nothing to shed light on governmental affairs or the official acts of government workers. Furthermore, the email addresses themselves do not reveal the identity of the individuals with whom the District is communicating. In addition, that information—*i.e*., the identity of said individuals—could have been provided (if

[1] As indicated above, Gierl's initial request was for two years' worth of emails, which was overbroad and unduly burdensome. Gierl withdrew that request and replaced it with a request for six months' worth of emails, which the District provided.

actually requested) by listing the names of the individuals, rather than their personal email addresses.

The mere fact that these personal email addresses are in the District's possession does not make them "public records" the District is required to disclose. Indeed, the Wisconsin Supreme Court appears to agree, having rejected the claim that personal emails of school district employees were "records" required to be disclosed under the Public Records Law:

> For the reasons set forth, we too now conclude that while government business is to be kept open, the contents of employees' personal e-mails are not a part of government business. Personal e-mails are therefore not always records within the meaning of Wis. Stat. § 19.32(2) simply because they are sent and received on government e-mail and computer systems.

Schill, 2010 WI 86, ¶ 89 (lead op.) ("The lesson learned from examining the prior statute and the case law is that documents with no connection to government functions are not records within the Public Records Law.").

That same rationale applies to the case at hand. The Wisconsin Public Records Law does not require absolute disclosure. Common sense must be applied in exempting certain personal information. *See, e.g., Schill*, 2010 WI 86, ¶ 86 (lead op.) ("Excluding the content of the Teachers personal e-mails from 'records' is the kind of common-sense, functional limit on 'complete public access' expressly endorsed by the legislative statement of policy in Wis. Stat. § 19.31."). The Circuit Court did not apply this clearly defined rationale to its holding in this case, therefore warranting reversal.

BASIS FOR APPEAL

There is no case law or other legal authority that requires the District to release the private email addresses Gierl requested. Likewise, there is no case law or other legal authority that prohibits the District from releasing the private email addresses Gierl requested. Accordingly, this matter presents an issue of first impression: whether the Public Records Law compels government entities to release private, third-party contact information.[2] Therefore, this case concerns fundamental issues of statutory interpretation.

The Judiciary's guiding aim is to "faithfully give effect to the laws enacted by the legislature, and to do so requires a determination of statutory meaning." *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. Therefore, "[i]n construing or interpreting a statute the court is not at liberty to disregard the plain, clear words of the statute." *State v. Pratt*, 36 Wis. 2d 312, 317, 153 N.W.2d 18 (1967). For, as Wisconsin courts have repeatedly emphasized, "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Kalal*, 2004 WI 58, ¶ 39 (quoting *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)).

Statutory interpretation begins with the plain language of the statute, with effect given to the common, ordinary, and accepted meaning of terms contained therein. *See Bruno v. Milwaukee County*, 2003 WI 28, ¶¶ 8, 20, 260 Wis. 2d 633, 660 N.W.2d 656. A statute's scope, context, and purpose are relevant to its plain meaning, provided they are ascertainable from the text and structure of the statute itself. *Kalal*, 2004 WI 58, ¶ 48. Further, a court's plain-meaning interpretation

[2] Gierl and the District are parties to a recent decision by the Wisconsin Court of Appeals regarding the disclosure of the email addresses of parents with children in the District. *Gierl v. Mequon-Thiensville School District*, 2023 WI App 5, 405 Wis. 2d 757, 985 N.W.2d 116. While similar to this case, the specific facts behind and legal basis for withholding parent email addresses distinguish that case from the current case. In addition, the prior case, hereafter referred to as *Gierl I*, has been appealed to the Wisconsin Supreme Court. The parties are awaiting decision by the Supreme Court regarding whether it will accept said appeal.

cannot contravene a textually or contextually manifest statutory purpose. *Id*. at ¶ 49.

At the heart of the foregoing guidance is the principle that courts are meant to interpret and apply the laws *as intended by the Legislature*. Courts may not expand the law's application beyond the bounds expressed in the statute itself; rather, courts must interpret and apply the law as expressed through the statutory language "so that it may be given its full, proper, and intended effect." *Kalal*, 2004 WI 58, ¶ 44. When the Legislature expressly states the purpose and intent of a particular statute in the statutory language itself, courts must therefore apply the law in the manner stated therein.

In this case, the Legislature expressed the purpose and intent of the Public Records Law through the following unambiguous language:

> In recognition of the fact that a representative government is dependent upon an informed electorate, it 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**. Further, providing persons with such information is declared to be an essential function of a representative government and an integral part of the routine duties of officers and employees whose responsibility it is to provide such information.

Wis. Stat. § 19.31 (emphasis added).

This language is written into the statute itself, representing a clear articulation of the purpose and intent behind the law. Therefore, courts must bear the aforementioned purpose in mind whenever reviewing a case that has arisen under the Public Records Law; any plain-meaning interpretation of a legal provision thereunder cannot contravene this textually manifest statutory purpose. *See Kalal*, 2004 WI 58, ¶ 49. Here, however, the Circuit Court completely disregarded the statute's express purpose, reading nonexistent rights and obligations into the law despite their conflict with the overarching legislative purpose.

The Public Records Law directs reviewing courts to ask whether the requested records further the objectives of showing government affairs and/or the official acts of those who represent the public. Here, the requested material includes

personal email addresses of private citizens who opted to receive one-way email communications from the District. In applying the requisite analysis, the Court was therefore required to ask how the personal email addresses of unsuspecting private citizens further the aforementioned objective. Had the Court acted accordingly, it would have determined the information Gierl requested—*i.e.*, the personal email addresses of private citizens—does nothing to expose government affairs and/or the official acts of those who represent the public. Instead, the Circuit Court looked at other, unrelated cases and, under the auspices of "judicial precedent," took a half-step from the half-step taken by the prior court to expand the provisions of Wisconsin's Public Records Law far beyond their intent. This "judicial creep" must stop. Otherwise, the purpose and intent of the law will be lost.

STATEMENT OF THE ISSUES

Issue #1: Whether the District could have unlawfully denied Gierl's public records request for email messages going back two years when Gierl explicitly amended his request to instead ask for email messages going back six months, thereby withdrawing his original request.

Circuit Court's Decision: The Circuit Court incorrectly answered YES.

Issue #2: Whether the District's denial of Gierl's initial public records request for the contents of responsive emails was rendered moot by the District's subsequent disclosure of same.

Circuit Court's Decision: The Circuit Court correctly answered YES, but incorrectly determined an exception to the mootness doctrine applied to enable adjudication.

Issue #3: Whether, in applying the balancing test as required by Wisconsin's Public Records Law, the District correctly determined the public policy interest in disclosing private personal email addresses of private citizens outweighed the public policy interest in non-disclosure.

Circuit Court's Decision: The Circuit Court never specifically addressed this issue; however, by its ruling, the Circuit Court incorrectly answered NO.

Issue #4: Whether the disclosure of personal email addresses of private citizens furthers the objectives of showing the affairs of government and/or the official acts of those officers and employees who represented the public, as required by Wisconsin's Public Records Law.

Circuit Court's Decision: The Circuit Court never specifically addressed this issue; however, by its ruling, the Circuit Court incorrectly answered YES.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case involves critical questions arising under Wisconsin's Public Records law, and it qualifies as a case of first impression. Further, the issues raised on appeal have significant implications for public entities throughout the State of Wisconsin, who will therefore benefit from clear and decisive guidance from the Court.

Due to the importance of this case in providing guidance to Wisconsin courts and public entities, the aforementioned issues merit comprehensive presentation. For these reasons, the Mequon-Thiensville School District respectfully requests oral argument be provided under Wis. Stat. § 809.22 and that the Court's opinion be published in accordance with Wis. Stat. § 809.23.

STATEMENT OF THE CASE

This is a writ of mandamus case concerning the interpretation, application, and unfounded expansion of Wisconsin's Public Records Law. While this case presents an issue of first impression, a similar issue of statutory interpretation involving the same parties is on petition for review by the Wisconsin Supreme Court. Gierl filed the case at bar separately from a related writ of mandamus case he filed against the District on August 14, 2020, whose decision the District appealed on December 21, 2021 ("*Gierl I*"). *Gierl v. Mequon-Thiensville Sch. Dist.*, 2023 WI App 5, 985 N.W.2d 116. In that case, Gierl alleged the District violated Wisconsin's Public Records Law by withholding parent email addresses from an email distribution list and requested the court compel the disclosure thereof. The lower court found for Gierl, the Court of Appeals affirmed, and the District appealed to the Wisconsin Supreme Court.

In this case, Gierl filed a Petition for Writ of Mandamus on February 2, 2022, asserting the District violated Wisconsin's Public Records Law by withholding third-party citizens' personal email addresses from three other email distribution lists and requesting the court compel the disclosure thereof ("*Gierl II*"). [R. doc#2]. On March 15, 2022, the District filed its Answer and Affirmative Defenses to Petitioner's Petition for Writ of Mandamus. [R. doc#6]. On May 27, 2022, the District filed a Motion to Stay Proceedings Pending Appeal alongside a Brief in Support thereof. [R. doc#11, 12]. Gierl then filed a Brief in Opposition to the District's Motion to Stay. [R. doc#13]. A hearing was subsequently held and an Order Denying the District's Motion to Stay Proceedings Pending Appeal was entered. [R. doc#16].

Thereafter, the parties ultimately cross-filed for summary judgment. [R. doc#19, 23]. Following oral argument, the Circuit Court found for Gierl on October 19, 2022, entering an Order granting his Motion for Summary Judgment and denying that of the District. [R. doc#34]. Consequently, the District now urges the Court of Appeals to reverse the lower court's decision, as the Circuit Court erroneously ordered the release of records from a withdrawn request; misconstrued

the specificity requirement attached to request denials; misapplied the statutorily required balancing test; and failed to adhere to the purpose and intent of Wisconsin's Public Records Law.

STATEMENT OF FACTS

The facts of this case are simple, straightforward, and undisputed as to material facts. As both parties previously moved for summary judgment, neither has asserted genuine issues of material fact such that a trial is necessary. [R. doc#20, p. 2; doc#24, p. 5]. Accordingly, this Statement of Facts only includes facts relevant to the issues on appeal before this Honorable Court.

The case at bar concerns three email distribution lists the District maintains:

1. Alumni: Contains the personal email addresses of District graduates, who provided said email addresses to the District in order to receive certain relevant communications therefrom.
2. Momentum Newsletter: Contains the personal email addresses of District parents/guardians and community members who signed up to receive the District's newsletter.
3. Mequon-Thiensville Recreation: Contains the personal email addresses of individuals who enrolled in Mequon-Thiensville School District Recreation Department activities.

[R. doc# 2, pp. 4-5].

These email distribution lists are used for one-way communication—*i.e.*, emails from the District to the individuals included within the list. In other words, these individuals are passive recipients of public information they requested from the District. Such individuals are unable to communicate with the District through the distribution lists themselves or emails received therefrom; any attempt to respond to distributed emails or otherwise communicate with the District through the listserv would merely be "bounced back" to the sender.

On November 16, 2021, Gierl submitted a written records request for the aforementioned distribution lists and all emails sent to individuals on said distribution lists between January 1, 2019 and November 16, 2021. [R. doc# 2, p. 5]. Gierl made this request shortly after receiving 197 pages responsive to his prior request. [R. doc# 2, p. 5]. The District denied Gierl's unreasonable request for two years of emails and, in response, Gierl purportedly shortened the timeframe from two years to six months. [R. doc# 2, pp. 5-6].

However, the District never received, or otherwise inadvertently missed, Gierl's amended request. [R. doc#27, p. 1]. Importantly, Gierl was actively engaged in related litigation against the District and was represented by an attorney who was in regular contact with the District's counsel when he submitted his revised records request. Rather than picking up the phone or sending an email to inquire into the status of the District's response to Gierl's amended request, he filed a second lawsuit. [R. doc#2].

Since then, the District has provided all emails sent to the above-indicated distribution lists during the relevant six month time period. On March 10, 2022, the District sent Gierl responsive records for the Momentum Newsletter and confirmed no responsive records existed for his request regarding the Alumni distribution list. [R. doc#25, ¶¶ 4 – 5]. On May 4, 2022, the District tendered the remaining email communications Gierl had requested from the Recreation Department. [R. doc#25, ¶¶ 4, 6]. After applying the balancing test required under the law, however, the District did not disclose the personal email addresses of private citizens on these distribution lists. Gierl agrees the District has provided the contents all responsive emails identified in his amended request. [R. doc#20, p. 4]. Consequently, the sole issue remaining for the Circuit Court's determination was whether the District violated the Public Records Law by withholding third-party citizens' personal email addresses.

Although the District's denial of Gierl's initial request (i.e., all emails sent over a two year period) was rendered moot by Gierl's subsequent amendment thereto (i.e. all emails sent over a six month period), the Circuit Court nevertheless decided to rule

on the legality of the District's initial denial, ultimately determining the rationale given for withholding the requested two years' worth of emails was legally insufficient under the law. [R. doc#49, p. 6]. Regarding personal email addresses from the three distribution lists, the lower court also sided with Gierl, albeit indirectly; rather than performing the balancing test, as is required under the law, the Circuit Court appears to have stopped its analysis after assessing the denial letter's sufficiency. [R. doc#49, p. 8]. Now, the District urges this Court to apply the law according to its textually manifest purpose and intent by reversing the decision of the lower court and finding in the District's favor.

STANDARD OF REVIEW

The Court of Appeals reviews motions for summary judgment *de novo*, analyzing the legal issues independently and without deference to the Circuit Court. *See, e.g*., *Nierengarten v. Lutheran Soc. Servs*., 219 Wis. 2d 686, 694, 580 N.W.2d 320 (1998). A reviewing court benefits from the record and analysis established below, however, and it employs the same legal methodology as the lower court. *Nierengarten*, 219 Wis. 2d at 694.

Summary judgement is appropriate when there are no genuine issues of material fact such that the moving party is entitled to judgement as a matter of law. Wis. Stat. § 802.08(2); *AccuWeb, Inc. v. Foley & Lardner*, 2008 WI 24, ¶ 16, 308 Wis. 2d 258, 746 N.W.2d 447. When determining whether there are genuine factual issues, the court must view the evidence—and all inferences arising therefrom—in the light most favorable the nonmoving party. *Kraemer Bros v. United States Fire Ins. Co*., 89 Wis. 2d 555, 567, 278 N.W.2d 857 (1979). Cross motions for summary judgment generally act as a stipulation of facts, thereby permitting the reviewing court to decide the case on its stated legal issues. *See Millen v. Thomas*, 201 Wis. 2d 675, 682, 550 N.W.2d 134 (Ct. App. 1996). However, a court is not absolved of its duty to determine whether material facts are actually in dispute so as to preclude the granting of summary judgment to either party, despite the parties' cross-motions

for summary judgment. *See Stone v. Seeber*, 155 Wis. 2d 275, 278, 455 N.W.2d 627 (Ct. App. 1990).

Where the relevant facts are undisputed, courts likewise review a records custodian's decision to withhold public records *de novo*. *John K. MacIver Inst. for Pub. Policy, Inc. v. Erpenbach*, 2014 WI App 49, ¶ 14, 354 Wis. 2d 61, 848 N.W.2d 862. On appeal, the court must first determine whether the trial court correctly assessed the specificity of the custodian's refusal to disclose the requested records. *See Journal/Sentinel, Inc. v. Aagerup*, 145 Wis. 2d 818, 821, 429 N.W.2d 772 (Ct. App. 1988). Then, the court must evaluate whether the stated reasons were sufficient to support withholding such records by asking the following two questions:

1. Did the trial court make a factual determination supported by the record of whether the records in question implicate the asserted public interests in nondisclosure?
2. If so, do the public interests in nondisclosure outweigh the public interests in disclosure?

Aagerup, 145 Wis. 2d at 825-826. Importantly, when the trial court's findings of fact are clearly erroneous, the appellate court must reverse. Wis. Stat. § 805.17(2); *see Milwaukee Journal v. Call*, 153 Wis. 2d 313, 319, 450 N.W.2d 515 (Ct. App. 1989). When the trial court's factual findings are insufficient for review, the appellate court may supplement such findings if the evidence is clear, or remand for further findings if it is not. *Milwaukee Journal*, 153 Wis. 2d at 319 (citing *State v. Williams*, 104 Wis. 2d 15, 22, 310 N.W.2d 601 (1981)).

SUMMARY STATEMENT OF POSITION

There are four main issues on appeal. First, and contrary to the Circuit Court's findings, the District lawfully denied Gierl's initial public records request

of November 16, 2021.[3] Not only was the District's initial denial on November 24, 2021 sufficiently specific at law, but in subsequently amending such request Gierl also effectively withdrew his initial ask, [4] thereby rendering the District's initial response irrelevant.

Second, the District's initial refusal to disclose the contents of emails responsive to Gierl's amended request was rendered moot by the District's subsequent disclosure of same. Notwithstanding the Circuit Court's determination the District's denial was moot, the court nevertheless assessed the specificity of the District's denial and erred in so doing.

Third, the public interest in the nondisclosure of private, third-party email addresses outweighs the public interest in their disclosure. The Circuit Court misapplied the balancing test and misconstrued the record by finding in Gierl's favor.

Finally, the District's determination to withhold the private, third-party email addresses aligns with the purpose and intent of Wisconsin's Public Records Law. By granting Gierl's Motion for Summary Judgment and compelling the disclosure of such email addresses, the Circuit Court failed to account for the law's textually manifest purpose and intent, as required under the statute.

ARGUMENT

In the simplest terms, this case requires the Court to determine whether the lower court's ruling adhered to the Public Records Law's legislative purpose and intent. The Circuit Court's ruling represents a broad, unprecedented expansion of Wisconsin's Public Records Law far beyond fundamental goals of effecting transparency and preventing corruption. Wisconsin's Public Records Law is

[3] The initial request, dated November 16, 2021, requested all emails sent to individuals on the three distribution lists over a two year period.

[4] Gierl did not file a second records request. Instead, he expressly amended his original request revising the period in question from two years to six months, thus withdrawing his original requesting and substituting the amended request in its place. [R. doc#27, p. 1].

intended to shine light on government and public entity operations; the law was never meant to provide a commercial advantage for a particular political or financial agenda. Accordingly, the Circuit Court's error resulted in a perversion of the intent and purpose of Wisconsin's "Sunshine Laws." Along the way, the Circuit Court misconstrued legal analyses required of courts reviewing public records cases and held the District to standards nonexistent under the law.

I. THE DISTRICT LAWFULLY DENIED GIERL'S ORIGINAL PUBLIC RECORDS REQUEST, WHICH GIERL LATER WITHDREW BY SUBMITTING HIS AMENDED REQUEST.

The Circuit Court erred in determining the District unlawfully denied Gierl's original public records request because such denial was not only legally sufficient, but also irrelevant given Gierl's subsequent amendment to his request. Gierl's original request was for *all* emails to well *over 13,600 recipients* on three email distribution lists, sent over a *two-year* period. The request contained no limitation as to subject matter or any other criteria to narrow the field of possibly responsive documents. After the original request was denied, Gierl reduced the time period to six months. The District had no knowledge of this amendment until the second mandamus action was filed against the District. Thereafter, counsel for Gierl and the District immediately began working together to ascertain the information sought. This involved multiple phone calls and/or email exchanges ultimately resulting in the District fully providing all emails requested under the amended request, and in short order.

Despite receiving all this information, the Circuit Court wholly ignored these facts in determining (1) whether the District's denial of the original request was lawful, and (2) whether through the filing of the amended request, Gierl withdrew his original request and substituted it for the amended request. In properly considering this information, the Circuit Court's erroneous decision becomes even more glaring.

A. The Circuit Court Failed to Consider all Relevant Facts and Applied an Improper Standard by Determining the District's Denial of the Original Request was Unlawful.

In *Journal/Sentinel, Inc. v. Aagerup*, the Wisconsin Supreme Court established the three-step process in which an appellate court must engage when reviewing public records cases. *Aagerup*, 145 Wis. 2d 818, 429 N.W.2d 772 (Ct. App. 1988). First, the court must determine whether the lower court correctly assessed the specificity of the custodian's refusal to disclose the requested records. *Aagerup*, 145 Wis. 2d at 821. To meet the specificity requirement, the custodian must provide a specific policy reason the record warrants confidentiality. *Newspapers, Inc. v. Breier*, 89 Wis. 2d 417, 427, 279 N.W.2d 179 (1979). Although the specificity requirement is not met by one's mere citation to an exemption statute, nor by a bald assertion that the public interest favors non-disclosure, a records custodian need not provide a detailed analysis of the record or why public policy directs it must be withheld to fulfill his or her legal obligations. *See Oshkosh N.W. Co. v. Oshkosh Library Bd.*, 125 Wis. 2d 480, 485, 373 N.W.2d (Ct. App. 1985); *Beckon v. Emery*, 36 Wis. 2d 510, 517, 153 N.W.2d 501 (1967); *Breier*, 89 Wis. 2d at 427.

After assessing specificity, the court must evaluate whether the stated reasons were sufficient to support withholding such records by asking the following two questions:

1. Did the trial court make a factual determination supported by the record of whether the records in question implicate the asserted public interests in nondisclosure?
2. If so, do the public interests in nondisclosure outweigh the public interests in disclosure?

Aagerup, 145 Wis. 2d at 825-826.

Importantly, and as indicated above, the appellate court must reverse when the lower court's factual findings are clearly erroneous. Wis. Stat. § 805.17(2); *see*

Milwaukee Journal v. Call, 153 Wis. 2d 313, 319, 450 N.W.2d 515 (Ct. App. 1989). When the trial court's factual findings are insufficient for review, the appellate court may supplement such findings if the evidence is clear, or remand for further findings if it is not. *Milwaukee Journal*, 153 Wis. 2d at 319 (citing *State v. Williams*, 104 Wis. 2d 15, 22, 310 N.W.2d 601, 605 (1981)).

Here, the Circuit Court neglected its threshold responsibility to assess specificity. Instead of evaluating whether the District provided specific reasons for denying access to the requested records in its correspondence of November 24, 2021, the court proceeded directly to the sufficiency inquiries comprising the second step of the *Aagerup* review process. For example, the lower court stated the following in its oral ruling:

> And the Court finds that the denial of that content of the emails initially was illegal. No question in the Court's mind there. The request that was outlined was not burdensome. They produced a very limited number of pages. Digital in nature. Easy for the government to provide. The timeframe, the Court also finds that the initial timeframe requested was not an unreasonable request in light of the nature of the records. And certainly as amended even a smaller number of records, the six months.

[R. doc#49, pp. 6-7].

Likewise, the lower court misapplied the second phase of the analysis. Not only did the Circuit Court completely disregard public policy reasons the District cited—*e.g.*, the request included no reasonable limitation as to subject matter under Wis. Stat. § 19.35(1)(h); was unduly burdensome given production of a large volume of records; and requested information that was the subject of ongoing litigation—in its denial letter, but the court's factual conclusions are also clearly erroneous based on uncontradicted information in the record. [R. doc#22, Ex. B]. For instance, the fact that Gierl's attorney and the District's legal counsel corresponded extensively to clarify the information Gierl sought confirms the District's initial denial was reasonable. [R. doc#25, Ex. C]. Further, and as the Court indicated in its oral ruling, "the rec department list of emails was upwards of 13 and a half thousand"; therefore, two years' worth of emails between the District

and 13,600 recipients would certainly produce a large volume of records, consistent with the District's statement in the denial letter of November 24, 2021. [R. doc#49, p. 4]. In fact, Gierl agreed to narrow his request even further as it concerned the Recreation Department distribution list given this high number of recipients—and this was *after* Gierl had shortened the relevant time period from two years to six months. [R. doc#25, Ex. C, pp. 6-15]. Despite having these facts before it, the Circuit Court completely ignored them, thus failing to properly evaluate the District's denial of the original request.

Therefore, the lower court misapplied the specificity and sufficiency tests when evaluating the District's initial denial against factual information in the record. As the Public Records Law and courts interpreting it make plain, overly broad requests can be sufficiently excessive to warrant rejection under Wis. Stat. § 19.35(1)(h). *See, e.g., State ex rel. Gehl v. Connors*, 2007 WI App 238, 306 Wis. 2d 247, 742 N.W.2d 530; *Schopper v. Gehring*, 210 Wis. 2d 208, 565 N.W.2d 187 (Ct. App. 1997) (where a request for 180 hours of 911 calls, together with a transcription of the tape and log of each transmission received, was not reasonably limited). Here, clear evidence within the record demonstrates Gierl's unamended request was excessively broad such that the District's specific reasons for denial were legally sufficient, pending further clarification of the information sought. Accordingly, the Circuit Court's findings were clearly erroneous.

Having improperly determined (and/or not addressed) the legal specificity and sufficiency of the District's denial letter, the Circuit Court forwent the balancing test comprising the third portion of the *Aagerup* test. As such, the District shall address the balancing test analysis as it relates to the amended request in Section III, *infra*.

B. The Circuit Court Failed to Recognize by Amending His Original Request, Gierl Withdrew the Original Request and Substituted the Amended Request in its Place.

Alternatively, and notwithstanding the legal sufficiency of the District's November 24, 2021 denial letter, Gierl's subsequent amendment of his records request rendered the District's initial response irrelevant to the mandamus action. In other words, the Circuit Court need not have assessed the legal sufficiency of the District's initial denial letter given Gierl's amendment to his November 16, 2021 records request. Although the District initially did not receive or otherwise inadvertently missed this amendment, the fact remains that through such amendment, Gierl effectively withdrew his initial records request prior to initiating his mandamus action against the District. [R. doc#25, Ex. C, p. 13]. As indicated in extensive correspondence between the parties' legal counsel, Gierl dropped his request for distribution list communications (and recipient emails) during the identified two-year period after receiving the District's denial letter. Gierl then initiated the mandamus action because he did not hear from the District after having submitted his amended request. [R. doc#25, Ex. C].

Also telling is the fact that, after learning of the amended request only through the filing of the mandamus action, counsel for both Gierl and the District worked diligently to determine the information actually sought by Gierl, which the District then provided. Counsel continued to work with one another to ensure the District provided the actual information sought in the amended request, and there is no dispute the information responsive to the amended requests was provided to Gierl's full satisfaction. At no point during those discussions was any mention made of the additional emails sought in the *original* request. To the contrary, the field was further narrowed, even after the time period had been reduced from two years to six months. The District had no idea the original request was even still at play until Gierl filed his Motion for Summary Judgment. The District's response to Gierl's Motion for Summary Judgment makes this clear. [R. doc#24, p. 4].

In *Friends of Frame Park,* the Wisconsin Supreme Court emphasized that the Wisconsin Public Records Law is not a "gotcha statute" to be used to impose monetary penalties upon public officials who have attempted to balance the

competing public interests favoring disclosure and nondisclosure of public records. *Friends of Frame Park*, 2022 WI 57, ¶ 43 (Grassl Bradley, J., concurring). However, that is precisely how the law was used in this case, fand the Circuit Court allowed it to happen. Following receipt of the denial of his original request, Gierl sent an email, attached to the Complaint as Exhibit A, that read as follows:

> In response to your letter dated 11/24/2021 denying my open records request ***please amend my request*** to data going back just six months from today 12/14/2021.

[Dkt. #2, p. 10 (emphasis added)]. Gierl did *not* make a second request for the email messages; rather, Gierl *amended* his prior request and, in doing so, withdrew his original request and replaced it with the amended request. While Gierl *could have* maintained his initial request, preserving the denial for subsequent legal action, *he did not do so*. Gierl withdrew and replaced his original request. This is clearly shown in email correspondence between the District's counsel, Jennifer Williams, and Gierl's counsel, Tom Kamenick, attached to Attorney Kamenick's affidavit. [Dkt. #21, p. 29]. The email states, in relevant part, the following:

> This email is to memorialize our phone conversation yesterday. Mequon-Thiensville School District originally received an updated records request for directory data for three separate recipient lists, and the communications sent to those lists from 6/14/21 – 12/14/21.
>
> The original request was phrased as follows: "*Email lists and any electronic communications with Alumni, Momentum Newsletter recipients, and any and all Recreation Department Participants between 6/14/2021 - 12/14/2021 ~~1/1/2019-11/16/2021~~*."

[Dkt. #21, p. 29 (emphasis in original)]. As Attorney Kamenick did not object to Attorney Williams' summary of their prior discussion, and because Attorney Kamenick produced the above email in support of Gierl's case, Gierl cannot now assert he did not withdraw and replace the original request regarding email messages with the revised version. As such, Gierl cannot obtain relief based on the denial of a request he withdrew. Consequently, the Circuit Court should have focused only on Gierl's amended request—indeed, and as explained in more detail below, only on the requested email addresses—in reviewing this mandamus action.

II. THE DISTRICT'S INITIAL REFUSAL TO DISCLOSE THE CONTENTS OF EMAILS RESPONSIVE TO GIERL'S AMENDED REQUEST WAS MOOT.

Next, the Circuit Court erred by assessing the District's initial refusal to disclose the contents of requested emails because the District's subsequent production of such records rendered its initial refusal moot.

At the summary judgment stage, Gierl argued *Friends of Frame Park* expressly left open the question of whether a court can decide the merits of a public records mandamus action after the requested records have been produced. The Circuit Court agreed with Gierl, stating, in pertinent part:

> Perhaps the most interesting issue in this case is the implication of the Frame Park case to whether the Court can rule on the issue or not. And the Court believes it can. Certain issues, as Justice Hagedorn noted in that—in his opinion was that certain issues were reserved for another day. While the case eliminated the causation test, the Portage case, the ECO case, the State ex rel. Young case were not causation tests and allows [sic] this Court to rule on whether or not the denial of the content was improper.
>
> As it relates to the mootness issue, I agree with Mr. Kamenick's assertion as to the mootness test. He highlights or believes three through five on the mootness test are implicated here. Looking at those, the court can overlook mootness if the issue falls within one of five exceptions. Three, the issue arises often and a decision from the court's essential. That applies for the issue's likely to reoccur and must be resolved to avoid uncertainty. Certainly that could be the case here. Five, the issue is likely repetition [sic] and evades review. Also implicated here. So although the records were disclosed after the fact, the Court can disregard the mootness issue for those reasons.

[R. doc#49, pp. 7-8]. However, Gierl and the lower court misconstrue the purpose and intent of mandamus actions, particularly as they relate to public records lawsuits.

Writs of mandamus under Wis. Stat. § 19.37(1) serve a singular purpose: "to compel performance of a particular act by . . . a governmental officer, usu. to correct a prior action or failure to act." *Friends of Frame Park*, 2022 WI 57, ¶ 29 (Grassl Bradley, J., concurring) (citing *Mandamus*, Black's Law Dictionary). Thus, "a case is moot, obviating any need to address the merits, when records are given to the requester before the circuit court renders a decision." *Frame Park*, 2022 WI 57, ¶ 43 (Grassl Bradley, J., concurring) (citing *Racine Educ. Ass'n v. Bd. of Educ. for*

Racine Unified Sch. Dist., 129 Wis. 2d 319, 322, 385 N.W.2d 510 (Ct. App. 1986) (*abrogated on other grounds by Friends of Frame Park*, 2022 WI 57). In this case, the District performed the "act" whose compulsion Gierl requested via writ by providing the content of emails responsive to his records request; accordingly, and contrary to the lower court's contentions, this Court need not address the merits of the mandamus petition as to such records. *Id*. [R. doc#22, Ex. B-D].

In support of their arguments on mootness, Gierl and the Circuit Court also referenced *State ex rel. Young v. Shaw*, *Portage Daily Reg. v. Columbia County Sheriff's Department*, and *ECO, Inc. v. City of Elkhorn*. 165 Wis. 2d 276, 477 N.W.2d 340 (Ct. App. 1991); 2008 WI App 30, 308 Wis. 2d 357, 746 N.W.2d 525; 2002 WI App 302, 259 Wis. 2d 276, 655 N.W.2d 510. [R. doc#48, pp.9-10; doc#49, p. 7]. According to Gierl and the lower court, these cases stand for the proposition that the provision of requested records does not necessarily render a mandamus action moot. [R. doc#48, p. 10; doc#49, p. 7]. Absent, "anything contrary from the Supreme Court," they assert, such cases represent "binding Court of Appeals' precedent." [R. doc#48, pp. 9-10].

What Gierl and the Circuit Court neglect to mention, however, is that appellate case law—which was not explicitly abrogated in *Friends of Frame Park*—also exists to refute their assertions. *See, e.g., Journal Times v. Police & Fire Com'rs Bd*., 2015 WI 56, 362 Wis. 2d 577, 866 N.W.2d 563. In short, the mootness issue has not been conclusively decided, and the concurring opinion in *Friends of Frame Park* clearly evinces how at least three of the seven Wisconsin Supreme Court Justices view the matter. Therefore, the District urges this Court to find that assessing the merits of Gierl's case as to the responsive email contents obfuscates the fundamental purposes underlying mandamus actions.

III. THE DISTRICT PROPERLY DETERMINED THE PUBLIC INTEREST IN NONDISCLOSURE OF PRIVATE EMAIL ADDRESSES OUTWEIGHED THE PUBLIC INTEREST IN THEIR DISCLOSURE.

In this case, the Circuit Court not only misconstrued the specificity and sufficiency requirements under the Public Records Law, but it also misapplied the balancing test as to the distribution list email addresses Gierl requested.

As summarized in Section I, *supra*, a court must engage in a three-step process when reviewing public records cases on appeal. The court must first determine whether the trial court correctly assessed the specificity of the custodian's refusal to disclose the requested records. *See Aagerup*, 145 Wis. 2d at 821. Then, the court must evaluate whether the stated reasons were sufficient to support withholding such records by asking: (1) whether the trial court made a factual determination supported by the record of whether the records in question implicate the asserted public interests in nondisclosure; and (2) whether the public interests in nondisclosure outweigh the public interests in disclosure. *Id.* at 825-826.

Here, the Circuit Court conflated the specificity and sufficiency requirements when assessing the District's refusal to disclose private, third-party email addresses from the identified distribution lists. Specifically, the court stated the following:

> When determining whether the sufficiency of the reasons are outlined in the denial, the threshold question is whether the custodians stated legally specific reasons for denying requests. And there's some language in there citing the Brier [sic] case.
>
> [. . .]
>
> [T]he denial itself is inadequate. And when the denial's inadequate the case law is clear that the mandamus must issue. Even if the Court were to consider this broad statement about prior litigation as implicating the balancing test, or privacy issues, then the Court looks into the nature of the content and who's being contacted. And the privacy issues that were discussed in the other case. Other case.

[R. doc#49, pp. 8-10].

Although the court at least acknowledged the specificity requirement in its analysis of the email addresses, it totally misconstrued the nature of this threshold inquiry. To meet the specificity requirement, the custodian need only state specific public policy reasons for denial. *See Breier*, 89 Wis. 2d at 472. At this point, the custodian has no obligation to spell out his or her complete analysis. Indeed, a "custodian may wrongly put greater emphasis on secrecy than on the right to know,

or balance publicity against more of the record than is strictly relevant to [his or] her public policy concerns, all without abrogating [the] duty to be specific." *Aagerup*, 145 Wis. 2d at 824-825. For example, the custodian police chief in *Newspapers, Inc. v. Breier* declined to release records showing the charges on which individuals had been arrested. 89 Wis. 2d at 428. The *Breier* custodian's stated ground for refusal was that releasing the reason for an arrest was contrary to individuals' privacy and reputational interests, which the court deemed to have met the specificity requirement. *Id*. at 428, 433.

Here, the District carried its specificity burden by stating specific reasons for withholding the email addresses at issue: in its November 24, 2021 letter, the District reasoned the request was unreasonably broad in violation of Wis. Stat. § 19.35(1)(h); unduly burdensome given the large volume of records it was likely to produce; and requested information that was the subject of ongoing litigation. [R. doc#22, Ex. B]. Importantly, the District was under no obligation to reference and/or perform the balancing test at this juncture because the "requested information [was] covered by an exempting statute that does not require a balancing of public interests" and the District cited this exempting statutory provision in its denial letter. *State ex rel. Savinski v. Kimble*, 221 Wis. 2d 833, 840, 586 N.W.2d 36 (Ct App. 1998). This is because "the legislature has presumably already weighed the competing public interests and the custodian may or may not be aware of the legislature's rationale for the exempting statute." *Kimble*, 221 Wis. 2d at 840. Therefore, the District's initial denial was sufficiently specific.

As discussed in Section I, *supra*, Gierl's initial request generated some 13,600 email addresses for the Recreational Department distribution list alone. To fulfill its obligations under the law, the records custodian must review *all responsive records* and determine whether any such records must be withheld. *See Schill*, 2010 WI 86, ¶ 133 (lead op.). In essence, this would involve combing through all identified email addresses to ascertain whether any contain non-disclosable information. Accordingly, and as the District reasoned in its denial letter, the

request was unreasonably broad and unduly burdensome given the large volume of records produced.

Further, it is important to note that the parties and their legal counsel were already well-acquainted given Gierl's prior mandamus action. Therefore, and as both Gierl and the Circuit Court implied, public policy reasons the District asserted throughout *Gierl I* were incorporated by reference to "ongoing litigation" in the denial letter. [R. doc#22, Ex. B]. Consequently, and notwithstanding the fact that the District cited a specific statutory exemption, the District carried its burden as to specificity.

Next, the record does not support the Circuit Court's factual findings regarding the allegedly insufficient public policy reasons favoring nondisclosure. As to the email addresses themselves, the lower court stated the following:

> Then we have to look at who the information is being sent to. Recreation department participants is not just school district, parents of students, guardians of students. Momentum is being sent to former students. Not just existing students.[5] So this is not necessarily core function to existing students, parents, guardians. It's broader than that. The intrusion of emails as we discussed as it relates to Hathaway, and as the court ruled in the prior case, spam or unwanted emails are a common occurrence easily dealt with with technology in today's day and age. And it's not substantial intrusion.

[R. doc#49, p. 10].

The Circuit Court cited no evidence in support of the above contentions. The court did not perform an *in camera* review of the 13,600 rec department email addresses (nor those responsive to the other two distribution lists) to determine whether the public interest favored their nondisclosure. Although the District has described the types of recipients within each distribution list (*e.g.*, "community members," "alumni"), neither Gierl nor the lower court has any concept of what personally identifiable information these email addresses contain. For all they know, there may be email addresses within the list that contain a recipient's home

[5] Contrary to the lower court's assertions, the Momentum newsletter is a family newsletter, and at the time of the request it was also available to community members who signed up to receive it. The Momentum newsletter is not sent to current or former students.

mailing address or reveal information about District students. Accordingly, the Circuit Court had no factual basis upon which to conclude the District's stated reasons for denial were legally insufficient. And, as discussed above, the appellate court may supplement a trial court's insufficient factual findings or otherwise remand. *Milwaukee Journal*, 153 Wis. 2d at 319 (citing *State v. Williams*, 104 Wis. 2d 15, 22, 310 N.W.2d 601, 605 (1981)).

Finally, the lower court misapplied the balancing test under the Public Records Law. As both Gierl and the Circuit Court have recognized, the right to public records is not absolute. [R. doc#48, pp. 4; R. doc#49, p. 5]. One exception to this right arises when the public interest in nondisclosure outweighs the public's right to inspection. *See State ex rel. Youmans v. Owens*, 28 Wis. 2d 672, 681, 137 N.W.2d 470 (1965). If the custodian proffers specific, sufficient reasons for nondisclosure that outweigh the presumption of disclosure, the court may not issue a writ of mandamus. *See Hathaway v. Green Bay Sch. Dist*., 116 Wis. 2d 388, 403-04, 342 N.W.2d (1982).

Here, the Circuit Court's balancing analysis is threadbare, at best. In fact, the following represents the only substantive assessment the court provides as to the email addresses:

> Just taking a step back, the 240 case, the 20-CV-240 case, sought email distribution lists of parents and guardians who received communications from the school district in particular. The records at issue there included communications from the superintendent. Specifically was advocating for social change. And that played a large factor in the Court ordering those records disclosed. And again, that presented a situation where the public's interest in who the Mequon-Thiensville School District was contacting for its advocacy for social change was of particular interest. And that weighed heavily on Mr. Gierl's behavior when applying the balancing test in that case.
>
> [. . .]
>
> This is not, as Mr. Kamenick suggests, this is not the school district dealing with court [sic] functions. I would agree that generally some of the information in the emails that were obtained are practical, mundane, have more bearing on core school district functions than did the overt requests or advocacy for social change that were outlined in the first case.
>
> Then we have to look at who the information is being sent to. Recreation department participants is not just the school district, parents of students, guardians of students. Momentum is being sent to former students. Not just existing

> students.[6] So this is not necessarily core function to existing students, parents, guardians. It's broader than that. The intrusion of emails as we discussed as it relates to Hathaway, and as the Court ruled in the prior case, spam or unwanted emails are a common occurrence easily dealt with with technology in today's day and age. And it's not substantial intrusion.
>
> So for those reasons I'm granting Mr. Gierl's motion for summary judgment. The denial was inadequate as it relates to the emails. If I were to infer that the privacy issues were implicated in their broad statement about prior litigation for many of the reasons that the Court denied the—or granted the motion in the first case they apply here. Limited intrusion. The distribution lists include people outside of who school district would be communicating with for core school purposes.

[R. doc#49, pp. 3, 9-11].

Through the foregoing statements, the Circuit Court purports to balance the public's interest in nondisclosure against the presumption of disclosure by evidently determining "many of the reasons the Court [granted] . . . the motion in the first case" outweigh the "privacy issues" implicated in this case. [R. doc#49, p. 11]. In so doing, and despite its many overt attempts to distinguish the cases, the court imports the nonexistent causal standard it created in *Gierl I* into *Gierl II*.

As the District has noted in *Gierl I* and *Gierl II*, Wisconsin's Public Records Law does not require the records custodian to demonstrate harm incurred through disclosure. Rather, the law directs custodians to assess whether the public interest in nondisclosure of the requested material outweighs the public interest in disclosure. *See, e.g., Milwaukee Journal*, 153 Wis. 2d at 317. Here, the requested records include personal email addresses of private citizens who opted to receive one-way email communications from the District. The asserted public interest in nondisclosure concerns the privacy interests of unsuspecting citizens whose personal information the District warranted it would not disclose to third parties without consent.

There is a cognizable public interest in privacy. As the Public Records Compliance Guide states, "[p]ublic policies that may be weighed in the balancing test can be identified through their expression in other areas of law. Relevant public

[6] *See* footnote 5, *supra*, regarding target recipients of the Momentum newsletter.

policies also may be practical or common sense reasons applicable in the totality of the circumstances presented by a particular public records request." Josh Kaul, *Wisconsin Public Records Law Compliance Guide*, Wis. Dep't Justice (Oct. 2019), p. 33. Numerous statutes and court decisions recognize the importance of an individual's interest in his or her privacy and reputation as a matter of public policy. *See, e.g.*, Wis. Stats. §§ 995.50, 19.81(1)(f), 230.13; 42 U.S.C. § 405(c)(2)(C)(viii)(I); 20 U.S.C. § 1232g; *Woznicki v. Erickson*, 202 Wis. 2d 178, 549 N.W.2d 699 (1996), *superseded by statute*, Wis. Stat. §§ 19.356 and 19.36(10)–(11); *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157 (2004). Moreover, Wisconsin courts have determined that public interests in confidentiality, privacy, and reputation outweighed the public interest in disclosure in many cases. *See, e.g.*, *Village of Butler v. Cohen*, 163 Wis. 2d 819, 472 N.W.2d 579 (Ct. App. 1991); *Hempel v. City of Baraboo*, 2005 WI 120, 284 Wis. 2d 162. 699 N.W.2d 551; *Kraemer Bros., Inc. v. Dane Cty*., 229 Wis. 2d 86, 102, 599 N.W.2d 75 (Ct. App. 1999). And, if there is a public interest in protecting an individual's privacy, there is a public interest favoring the protection of such individual's privacy interests. *See Linzmeyer v. Forcey*, 2002 WI 84, ¶ 254 Wis. 2d 306, 646 N.W.2d 811. Therefore, the public interest in maintaining private citizens' privacy rights in their personal email addresses is certainly evident here.

On the other hand, we have no discernable *public* interest in the records requested, aside from the fundamental presumption thereof. We do, however, know Gierl's *personal* interest in such records: to SPAM the email addresses requested with his political messaging. And, importantly, the Wisconsin Supreme Court has found that the purpose of a request can be relevant to the balancing test, though stating the purpose of a request is not a prerequisite its submission. *See* Wis. Stat. § 19.35(1)(h), (i) (indicating that a requester need not state the purpose of his or her request). For example, the Wisconsin Supreme Court held the identity of the requester and political nature of the request weighed against disclosure when the requester was the Democratic Party of Wisconsin and the request was submitted

during a contested election. *Democratic Party of Wis. V. Wis. Dep't of Justice*, 2016 WI 100, ¶ 23, 372 Wis. 2d 460, 888 N.W.2d 584 (where the petition for mandamus suggested a partisan purpose underlying the records request). Here, then, the District certainly has grounds to take Gierl's stated interests into account when performing the balancing test.

Ultimately, the District weighed the aforementioned interests against each other and determined that the public interest in nondisclosure won the day. In so doing, the District did absolutely nothing inconsistent with the Public Records Law.

IV. THE COMPLETE RELEASE AND DISCLOSURE OF PRIVATE, THIRD-PARTY EMAIL ADDRESSES FAILS TO FURTHER THE OBJECTIVES OF THE PUBLIC RECORDS LAW.

Finally, and as briefly discussed in the Introduction Section, *supra*, the Circuit Court failed to account for the law's inherent purpose and intent when it granted Gierl's Motion for Summary Judgment and compelled the disclosure of personal, third-party email addresses.

As previously indicated, the Judiciary's guiding aim is to "faithfully give effect to the laws enacted by the legislature" by applying their stated mandate. *Kalal*, 2004 WI 58, ¶ 44. Therefore, "[i]n construing or interpreting a statute the court is not at liberty to disregard the plain, clear words of the statute." *State v. Pratt*, 36 Wis. 2d 312, 317. A statute's scope, context, and purpose are relevant to its plain meaning, provided they are ascertainable from the text and structure of the statute itself. *Kalal*, 2004 WI 58, ¶ 48. Further, a court's plain-meaning interpretation *cannot contravene a textually or contextually manifest statutory purpose*. *Id*. at ¶ 49 (emphasis added).

Here, the Circuit Court's interpretation and application of the balancing test contravenes the textually manifest statutory purpose of the Public Records Law. The Public Records Law serves an "informed electorate" who is "entitled to the greatest possible information regarding the *affairs of government and the official acts* of those officers and employees who represent them." *Schill*, 2010 WI 86, ¶ 80

(lead op.) (emphasis in original). Pursuant to Wis. Stat. § 19.31, the law "shall be construed in every instance with a presumption of complete public access, *consistent with the conduct of governmental business*." (Emphasis added). Accordingly, the presumption of complete public access is not absolute; rather, such presumption is limited to access "consistent with the conduct of governmental business." Wis. Stat. § 19.31; *Schill*, 2010 WI 86, ¶ 82 (exempting a teacher's personal emails from disclosure under the Public Records Law).

The Public Records Law seeks to ensure government transparency and accountability, creating a presumption of public access as a means to this end. The focus is—and, pursuant to the statute's textually manifest purpose and intent, must *in every instance* be—on the affairs of government and the official acts of officers and employees who represent the Wisconsin electorate. Wis. Stat. § 19.31. Therefore, this focus must guide any reviewing court's interpretation and application of the Public Records Law.

In this case, Gierl seeks access to the personal email addresses of private citizens who passively received emails from the District. However, disclosure of such email addresses does absolutely nothing to shed light on the affairs of government and the official acts of public servants. As the Wisconsin Supreme Court held in *Schill v. Wisconsin Rapids District*, materials "with no connection to government functions" are not disclosable records under the Public Records Law. 2010 WI 86, ¶¶ 49, 89 (lead op.). While the emails themselves shed light on government affairs, such records have already been provided to Gierl. *See* Section II, *supra*. Likewise, the District has already provided descriptions of recipient groups to which the distribution lists were sent; therefore, such information also enables Gierl insight into the District's affairs. The email addresses themselves, by contrast, provide no information about the District's business. These email addresses are simply personal information of private, third-party citizens.

The District's determination to withhold the personal email addresses at issue aligns with the purpose and intent of Wisconsin's Public Records Law. Therefore,

the Circuit Court misapplied Wisconsin's Public Records Law when it compelled the District to release private, third-party contact information despite the complete lack of statutory authority compelling such disclosure and thereby obfuscated the law's fundamental purpose and intent. Accordingly, the Mequon-Thiensville School District respectfully requests this Court reverse the opinion of the lower court, granting the District's Motion for Summary Judgment and denying that of Mr. Gierl.

V. THE WISCONSIN COURT OF APPEALS' DECISION IN *GIERL I* HAS NO BEARING ON THE INSTANT CASE.

As mentioned above, the parties to this action recently appeared before this Court in a tangentially related case, *Gierl v. Mequon-Thiensville School District*, 2023 WI App 5 ("*Gierl I*"). The issue in *Gierl I* centered on the private email addresses of parents with children in the District. *Id*. at ¶ 2. The request for said email addresses followed the District's distribution of an email regarding an online presentation by an outside group. *Id*. at n.3. This Court took issue with the email, claiming, "the District wants to be able to use government resources to collect and utilize these e-mail address to promote and advance the particular 'community outreach' issues and position of District (government) leaders while denying other in the community the opportunity to utilize the e-mail addresses to share differing viewpoints." *Id*. at ¶ 14. This Court based its decision regarding the release of parent email addresses on its assertion that "the balancing test does not tolerate utilizing taxpayer resources for an ideological or political monopoly." *Id*. There are no such assertions regarding the District's use of the three email distribution lists in the instant case. There have been no claims of any ideological or political distributions by the District. There have been no issues raised regarding the District's use of these email addresses or the contents of any email sent by the District. Thus, the basis for the Court of Appeals' decision in *Gierl I* has no bearing on the instant case.

Finally, in *Gierl I*, this Court found a public interest in knowing the identity of individuals with whom the District is communicating. *Id*. at ¶¶ 8-9. The District has never challenged this assertion. However, in this case, Gierl never requested the names of the individuals receiving communications from the District. In fact, the identity of said individuals was never even raised to the Circuit Court. In addition, the Circuit Court never performed an *in camera* review of the email addresses at issue to ascertain whether they could be used to identify the owners. Such a review would have revealed virtually none of the email addresses consist of firstname.lastname@mail.com. Most of them contain little information regarding the identity of the owner. As such, the issue of whether Gierl is entitled to know the identity of the individual recipients is not at issue in this case. A records custodian simply cannot be held responsible for disclosing information never requested by a member of the public.

CONCLUSION

The Mequon-Thiensville School District, on behalf of its duty to students, families, alumni, and the community at large respectfully requests this Court reverse the lower court's decision in this matter. Specifically, the District asks the Court to affirm the District's analysis under the balancing test to deny Gierl access to private, personal third-party information and prevent the erroneous expansion of the Public Records Law to an unintended and detrimental extent.

Respectfully submitted this 20th day of March, 2023.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c) for a brief produced with proportional serif font.

The length of this brief is 10,576 words long, calculated using Word Count function of Microsoft Word.

Dated this 20th day of March, 2023.

Electronically signed by Joel S. Aziere
Joel S. Aziere