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

MARK GIERL,

Petitioner-Respondent,

v.

MEQUON-THIENSVILLE SCHOOL DISTRICT,

Respondent-Appellant.

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

RESPONSE BRIEF OF PETITIONER-RESPONDENT, MARK GIERL

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INTRODUCTION

This is a public records case. The Petitioner, Mark Gierl, requested three distribution lists containing email addresses from the Respondent, Mequon-Thiensville School District, as well as email messages sent to those lists over three years. The District denied that request and ignored a later request for six months of emails. The Circuit Court ruled that the District's denial was illegal.

This case presents three issues. First, is the District's denial of Gierl's request for the email messages moot? It is not moot. *Wisconsin State Journal v. Blazel*, 2021AP1196 (Wis. Ct. App., Mar. 9, 2023) (rec'd for publication) (P-App. 3-72), establishes that production of records after being sued does not moot a records case – or if it did, exceptions to mootness permit a court to rule on the merits of an initial denial. Gierl's second request did not moot consideration of the District's initial denial.

The second issue is whether the District's denial of Gierl's request for email messages was legal. It was not legal. Because Gierl's request contained the reasonable limitation required by Wis. Stat. § 19.35(1)(h) and was not overly burdensome.

The third issue is whether the District's denial of Gierl's request for email addresses was legal. It was not legal. The balancing test favors disclosure of basic contact information like email addresses. The District fails to meaningfully distinguish this case from *Gierl v. Mequon-Thiensville School District*, 2023 WI App 5, 405 Wis. 2d 757, 985 N.W.2d 116 (*pet. for review denied*) ("*Gierl I*"), decided only a few months ago. *Gierl I* ruled that the District violated the Open Records Law by failing to disclose its list of parental email addresses. 405 Wis. 2d 757, ¶15.

STATEMENT OF ISSUES

Issue 1: Is the District's denial of Gierl's record request for the email messages moot?

Circuit Court's Decision: No.

This Court should answer "No" as well.

Issue 2: If not moot, was the District's denial of Gierl's record request for email messages legal?

Circuit Court's Decision: No.

This Court should answer "No" as well.

Issue 3: Was the District's denial of Gierl's record request for email addresses legal?

Circuit Court's Decision: No.

This Court should answer "No" as well.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case does not need oral argument. It involves closely-related issues and the routine application of the well-established balancing test. The facts are straightforward and undisputed. The case is analogous to the recent decision of this Court in *Gierl I*. Briefing should be sufficient.

Publication of the decision would likely be inappropriate under Wis. Stat. § (Rule) 809.23(1)(a). It is unlikely to enunciate a new rule of law, as it involves the application of the well-established balancing test. *See* § 809.23(1)(a)1. Nor is there a conflict between prior decisions or an opportunity to collect case law or recite legislative history. *See* § 809.23(1)(a)3., 4. Just recently, this Court issued a published decision on the application of the balancing test to requests for emails kept by a school district. *See* § 809.23(1)(a)2. While the facts of this case differ slightly from *Gierl I*, "the issues involve no more than the application of well-settled rules of law to a recurring fact situation." *See* § 809.23(1)(b)1. The issues will be "decided on the basis of controlling precedent" and will "ha[ve] no significant value as precedent." *See* § 809.23(1)(b)3., 6.

STATEMENT OF FACTS

Gierl previously sued the District seeking the email addresses in one of the District's distribution lists – addresses belonging to parents and guardians of students currently enrolled in the District. *Gierl I*, 405 Wis. 2d 757. In *Gierl I*, this Court ruled that the balancing test weighed in favor of disclosure. *Id.*, ¶15.

During discovery in *Gierl I*, Gierl asked the District to "[i]dentify every other list of email addresses kept and used by [the District] in the course of business by what types of email addresses are on the list (e.g., Parents, staff, pupils, community, etc.) and what the list of email addresses is used for." (R.

21:1, 27-28.) The District identified six such lists. (*Id.*) Three of the lists were named and described as follows: (1) "Alumni" – "This goes out to former students"; (2) "Momentum Newsletter" – "This goes out to parents/guardians and community members"; (3) "Mequon-Thiensville Recreation" – "This goes out to Recreation department participants." (*Id.*)

On November 16, 2021, Gierl made a written record request ("November Request") to the District seeking "Email lists and any electronic communications with Alumni, Momentum Newsletter recipients and any and all Recreation Department Participants between 1/1/2019-11/16/2021." (R. 22:1, 3.) On November 24, the District denied the November Request. The District included four reasons for its denial. First, the District claimed that under Wis. Stat. § 19.35(1)(h), Gierl's "request contains no limitation as to the subject matter of the requested records and thus is not a sufficient request." Second, the District claimed that "the request would likely require the production of a large volume of records that would not implicate your interests in any way." Third, the District claimed that "it would be unduly burdensome for the District to have to review all of the records that would potentially be identified as responsive to your request to determine if any such records were protected in whole or in part from being disclosed in response to your request." Fourth, the District claimed that "some of the requested records contain information the disclosure of which is the subject of ongoing litigation and would not be disclosed while that litigation is still active." (R. 22:1, 5.)

On December 14, 2021, in an email sent to Amanda Sievers, Chief of Staff for the Office of the Superintendent of the District, Gierl made a related request ("December Request") for "data going back just six months from today 12/14/2021." (R. 22:1, 3.) The District did not respond to Gierl's December Request prior to this case being filed. (R. 22:1.)

STATEMENT OF THE CASE

Gierl filed this case on February 22, 2022. (R. 2.) On March 10, 2022, the District informed Gierl that there were no emails sent to the Alumni list, provided 42 pages of messages sent to the Momentum list, and explained that the Recreation Department list contained 13,600 emails but the District had not sent any emails to that entire list. The District indicated that emails were sent to individuals and groups within the Recreation Department list and asked Gierl to clarify that request. (R. 21:2, 29-30.) The parties eventually agreed that the

District would provide emails sent to at least 100 recipients on the Recreation Department list, and the District provided those emails (31 pages) to Gierl on May 4, 2022. (R. 21:2, 31.)

The email messages produced by the District from the Momentum list and the Recreation Department list were attached to the Gierl Affidavit as Exhibits C and D. (R. 22:1-2, 6-78.) The email addresses were redacted from the Recreation Department list emails, and the District continues to refuse to provide the email addresses from the three lists Gierl requested. (R. 22:49-78; R. 21:1-2.)

The parties filed cross-motions for summary judgment. (R. 19, 23.) After briefing and a hearing (R. 20, 24, 29, 30, 18, 48), the Circuit Court issued an oral ruling, granting Gierl's motion for summary judgment and denying the District's motion for summary judgment (R. 49 (R-App 23-36)). The court issued its factual findings consistent with the parties' proposed undisputed facts. (*Id.*, 2-5 (R-App. 24-27).)

The Circuit Court began its legal analysis with the statement of policy in Wis. Stat. § 19.31, noting that there is "a presumption of access to records of government business" and the law is "to be construed liberally in favor of access to government records." (*Id.*, 5 (R-App. 27).) The court noted that the presumption is not absolute; that statutory or common law exceptions can apply, but if "none apply the balancing test can come into play." (*Id.*) Finally, the court noted that the District bore the "burden of justifying its denial" and the denial had to be made with specificity and also be legally sufficient. (*Id.*, 6 (R-App. 28).)

The Circuit Court first addressed the District's initial denial of "the content of the email messages." (*Id.*) The court found that the request "was not burdensome" because there were a "limited number of pages" that were "[d]igital in nature" and "easy for government to provide." (*Id.*) The three-year timeframe was not unreasonable. (*Id.*, 6-7 (R-App. 28-29).)

The Circuit Court then addressed whether the initial denial was mooted under *Friends of Frame Park, U.A. v. City of Waukesha*, 2022 WI 57, 403 Wis. 2d 1, 976 N.W.2d 263, given that the District had provided records after being sued. (*Id.* 7-8 (R-App. 29-30).) The court agreed with Gierl that *Frame Park* left open the question of whether voluntary or unilateral production after suit mooted a

records case, concluding that three Court of Appeals cases[1] supported reaching the merits. (*Id.*, 7 (R-App. 29).) The court also agreed with Gierl that even if the case was moot, exceptions to the mootness doctrine applied. (*Id.*, 7-8 (R-App. 29-30).)

The Circuit Court then addressed the second portion of Gierl's request – the request for email addresses. (*Id.*, 8-11 (R-App. 30-33).) The court concluded that the District's denial was "woefully inadequate," the time frame of three years was not unreasonable, there was not a large volume of records, and it would not be unduly burdensome for the District to review. (*Id.*, 8 (R-App. 30).) The Court also rejected the District's claim that "ongoing litigation" prevented release of the email addresses, because the court could not "hypothesize or consider reasons to deny the requests that were not asserted by the custodian." (*Id.*, 8-9 (R-App. 30-31).)

The Circuit Court concluded that because the denial itself was inadequate, that was reason enough for mandamus to issue. (*Id.*, 9 (R-App. 31).) But even if the court were to consider the reference to "ongoing litigation" sufficient to assert a justification for withholding the email addresses under the balancing test, the court found the balancing test favored disclosure. (*Id.*) First, the court noted that sending these messages were not "core functions," but the messages also did not contain "the overt requests or advocacy for social change that were outlined in [*Gierl I*]." (*Id.*, 10 (R-App. 32).)

Second, the court noted that the recipients of the three distribution lists were not part of the District's "core function" to communicate with "existing students, parents, guardians." (*Id.*) Third, the court repeated its conclusion from *Gierl I* that "unwanted emails are a common occurrence" and "not a substantial intrusion." (*Id.*)

The Circuit Court granted summary judgment to Gierl, summarizing that "[t]he denial was inadequate" and that even if the balancing test were considered, "many of the reasons that the Court . . . granted the motion in the first case they apply here. Limited intrusion. The distribution lists include[] people outside of who [the] district would be communicating with for core school purposes." (*Id.*, 10-11 (R-App. 32-33).)

[1] *Portage Daily Register v. Columbia County*, 2008 WI App 30, 308 Wis. 2d 357, 746 N.W.2d 525; *ECO, Inc. v. City of Elkhorn*, 2002 WI App 302, 259 Wis. 2d 276, 655 N.W.2d 510; *State* ex rel. *Young v. Shaw*, 165 Wis. 2d 276, 477 N.W.2d 340 (Ct. App. 1991).

That oral ruling was reduced to a written order on October 19, 2022. (R. 34.) The District filed a timely notice of appeal on November 10, 2022. (R. 36.)

STANDARD OF REVIEW

Appellate courts "review a grant or denial of summary judgment independently, applying the same standard employed by the [lower courts], while benefitting from their discussions." *Westmas v. Creekside Tree Serv., Inc.*, 2018 WI 12, ¶16, 379 Wis. 2d 471, 907 N.W.2d 68. "Summary judgment is appropriate only when there is no genuine dispute of material fact and the moving party has established his or her right to judgment as a matter of law." *Id.*; *see also* Wis. Stat. § (Rule) 802.08(3) (summary judgment affidavits "shall set forth such evidentiary facts as would be admissible in evidence").

"The application of the Open Records Law to undisputed facts is a question of law that this court reviews de novo." *Zellner v. Cedarburg Sch. Dist.*, 2007 WI 53, ¶17, 300 Wis. 2d 290, 731 N.W.2d 240. In a balancing test case, an appellate court's "'inquiry is: (1) did the trial court make a factual determination supported by the record of whether the documents implicate the public interests in secrecy asserted by the custodians and, if so, (2) do the countervailing interests outweigh the public interest in release.'" *Mayfair Chrysler-Plymouth, Inc. v. Baldarotta*, 162 Wis. 2d 142, 157, 469 N.W.2d 638, 643 (1991) (*quoting Milwaukee Journal v. Call*, 153 Wis. 2d 313, 317, 450 N.W.2d 515, 516 (Ct. App. 1989)). Where the relevant facts are not disputed, the court reviews the balancing test *de novo* and affords no deference to the custodian's determination. *John K. MacIver Institute for Public Policy, Inc. v. Erpenbach*, 2014 WI App 49, ¶¶12-14, 354 Wis. 2d 61, 848 N.W.2d 862.

ARGUMENT

I) OPEN RECORDS LAW LEGAL STANDARDS

Wis. Stat. § 19.35(1)(a) and (b) provide that "any requester has a right to inspect any record" and "to make or receive a copy of a record." The first sentences of the Open Records Law declare why the State created such a broad right:

> 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. "This statement of public policy in § 19.31 is one of the strongest declarations of policy to be found in the Wisconsin statutes." *Zellner*, 300 Wis. 2d 290, ¶49.

The presumption in favor of access requires that the Open Records Law "shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business," and "only in an exceptional case may access be denied." Wis. Stat. § 19.31 (emphasis added). The Open Records Law must "be liberally construed to favor disclosure." *ECO*, 259 Wis. 2d 276, ¶23. "[T]he legislature's well-established public policy presumes accessibility to public records . . . ." *Id.* "[T]he legislative presumption [is] that, where a public record is involved, the denial of inspection is contrary to the public policy and the public interest." *Newspapers Inc. v. Breier*, 89 Wis. 2d 417, 426-27, 279 N.W.2d 179, 184 (1979). Access is therefore presumed, and exceptions to access, including under the balancing test, must be narrowly construed. *Jensen v. Sch. Dist. of Rhinelander*, 2002 WI App 78, ¶21, 251 Wis. 2d 676, 642 N.W.2d 638; *In re Zimmer*, 151 Wis. 2d 122, 131, 442 N.W.2d 578, 582 (Ct. App. 1989).

The Court's task in an open records dispute is to review the authority's denial to "determine whether [it] was made with the specificity required by sec. 19.35, Stats., and case law" and is legally "sufficient to outweigh the strong public policy favoring disclosure." *Village of Butler v. Cohen*, 163 Wis. 2d 819, 826-27, 472 N.W.2d 579, 580 (Ct. App. 1991); *see also Wis. Newspress, Inc. v. Sch. Dist. of Sheboygan Falls*, 199 Wis. 2d 768, 784-85, 546 N.W.2d 143, 149-50 (1996) (applying the same two-step test). Only those justifications provided in the denial are considered, unless a specific statutory exemption prohibiting the release of a record applies. *Osborn v. Bd. of Regents*, 2002 WI 83, ¶16, 254 Wis. 2d 266, 647 N.W.2d 158 ("It is not the court's role to hypothesize or consider reasons to deny the request that were not asserted by the custodian."); *Journal Times v. City of Racine Police & Fire Comm'rs*, 2015 WI 56, ¶76, 362 Wis. 2d 577, 866 N.W.2d 563 (court may consider application of "clear statutory exception" even if not raised in a denial).

While the presumption of access is strong, it is not absolute. *Hempel v. City of Baraboo*, 2005 WI 120, ¶28, 284 Wis. 2d 162, 699 N.W.2d 551. "Two general types of exceptions may apply: statutory exceptions and common law exceptions." *Id.* If neither type of general exception applies, then the court applies the balancing test to determine "whether the strong presumption favoring access and disclosure is overcome by some even stronger public policy favoring limited access or nondisclosure." *Id.*

"A request [for records] is deemed sufficient if it reasonably describes the requested record or the information requested. However, a request for a record without a reasonable limitation as to subject matter or length of time represented by the record does not constitute a sufficient request." Wis. Stat. § 19.35(1)(h). The reasonableness of such limitations is measured by the burden the request places on the authority. *State* ex rel. *Gehl v. Connors*, 2007 WI App 238, ¶17, 306 Wis. 2d 247, 742 N.W.2d 530 ("The purpose of this time and subject matter limitation is to prevent a situation where a request unreasonably burdens a records custodian, requiring the custodian to spend excessive amounts of time and resources deciphering and responding to a request."); *Schopper v. Gehring*, 210 Wis. 2d 208, 213, 565 N.W.2d 187, 190 (Ct. App. 1997) ("[W]e may not in furtherance of this policy [in § 19.31] create a system that would so burden the records custodian that the normal functioning of the office would be severely impaired.").

It is the authority's burden to justify any denial of a record request. *Dem. Party of Wis. v. DOJ*, 2016 WI 100, ¶9, 372 Wis. 2d 460, 888 N.W.2d 584. "The party seeking nondisclosure has the burden to 'show that public interests favoring secrecy outweigh those favoring disclosure.'" *Id.* (*quoting MacIver*, 354 Wis. 2d 61, ¶14) (internal quotation omitted). Public records are "subject to a strong presumption favoring their disclosure" and the burden lies with the party resisting disclosure "to rebut the strong presumption to the contrary." *C.L. v. Edson*, 140 Wis. 2d 168, 182, 409 N.W.2d 417, 422 (Ct. App. 1987); *see also Fox v. Bock*, 149 Wis. 2d 403, 417, 438 N.W.2d 589, 595 (1989) (placing the "burden of proof of facts" and "producing evidence" on the authority).

The District argues that this is a case of statutory interpretation (App. Br. 10-12, 15, 35-36[2]), but that is incorrect. This case is controlled by case law. The

[2] The District did not follow the new rules for pagination of appellate briefs. *See* Wis. Stat. § (Rule) 809.19(8)(bm) (briefs must be paginated starting with Arabic number 1 on the cover).

question of mootness is a common-law question, not a statutory one. *Marathon County v. D.K.*, 2020 WI 8, ¶¶19-25, 390 Wis. 2d 50, 937 N.W.2d 901. The question of access to the email messages turns on Wis. Stat. § 19.35(1)(h)'s requirement that requests have a "reasonable" limitation, but the reasonableness determination is based on case law. *See Schopper*, 210 Wis. 2d at 213. The question of access to the email addresses turns either on that same determination of reasonableness or the application of the balancing test, a common-law creation. *State* ex rel. *Youmans v. Owens*, 28 Wis. 2d 672, 681-85, 137 N.W.2d 470, 475-76 (1965).

The only statutory language the District asks this Court to interpret is found in the legislative policy statement in Wis. Stat. § 19.31. (*See* App. Br. 11, 36.) But that preamble contains no operative language, only a statement of goals and a direction that access to government records is presumed. Section 19.31 places no limitations on access; instead, it directs courts to err on the side of transparency. Nowhere does it say what the District wants it to say – that the right of access extends only to records expressly about "the affairs of government and the official acts of officers and employees." (*See* App. Br. 36.) A governmental "record" is defined without reference to its content. Wis. Stat. § 19.32(2).

II) THE CIRCUIT COURT CORRECTLY RULED THAT THE LEGALITY OF THE DISTRICT'S INITIAL DENIAL IS NOT MOOT

The District raises two arguments why the courts should not rule on the legality of its initial denial. First, the District argues that Gierl "withdrew his initial request and replaced it" and that therefore he cannot challenge the initial denial of that request. (App. Br. 6; *see also id.* at 8, 20-21, 24-26.) Second, the District argues that under *Frame Park*, its subsequent production of records moots the issue of the legality of its initial denial. (*Id.*, 27-28.)

Neither argument is correct. The Open Records Law contains no mechanism that would allow a custodian to "cure" an illegal denial by later producing records in response to a different, later request. A claim for mandamus exists whenever a government authority denies a request. Wis. Stat. § 19.37(2)(a).

Gierl cites to the PDF page number printed by the e-filing system at the top-right corner of each page (*e.g.*, "Page 10 of 40").

Gierl never released the District from liability for its denial or waived his right to challenge that denial.

As to *Frame Park*, the question of whether a voluntary or unilateral production after suit is filed moots a challenge to an initial denial or delay was conclusively answered in the negative by this Court in *Blazel*. Slip op., ¶¶3, 38-50 (P-App. 5-6, 20-29). There, this Court concluded "that the voluntary disclosure of a requested record does not render the action moot." *Id.*, ¶43 (P-App. 24).

A) Gierl Did Not Lose His Right to Challenge the District's Illegal Denial of His Request

The District argues that the initial denial is "irrelevant" because Gierl subsequently amended and "dropped" his request for the full three-year period. (App. Br. 25-26.)

The problem with the District's argument is a complete lack of citation to authority. Nowhere in the Open Records Law is there any mention that a later request withdraws or voids an earlier request for similar records. The Open Records Law says that once a request is denied, a requester has the right to file a mandamus action seeking release of the records. Wis. Stat. § 19.37(2)(a). The only time a mandamus claim for records fades is with (1) the production of records, *see Capital Times Co. v. Doyle*, 2011 WI App 137, 337 Wis. 2d 544, 807 N.W.2d 666 (requesters cannot seek damages if authority produces record before suit is filed); or (2) the expiration of the three-year statute of limitations, *see* Wis. Stat. § 893.93(1m)(a).

Gierl has never released the District from liability for the denial of his November Request. When making the December Request, or when accepting production of documents after suit was filed, he never signed away his right to hold the District liable for its illegal behavior. Nor could Gierl be considered to have waived that right by his actions, as "waiver is the intentional relinquishment or abandonment of a known right." *State v. Ndina*, 2009 WI 21, ¶29, 315 Wis. 2d 653, 761 N.W.2d 612. Gierl never intentionally relinquished his right to challenge the initial denial.

This was not a situation where a request was changed before a denial, which might have a different result. If a custodian says "We aren't denying your request, but it's really big, can you narrow it?" and the requester agrees, that may

be different. The request has not been denied, and the mandamus right in Wis. Stat. § 19.37(2)(a) has not been triggered. Here, the request was denied, and there is no legal mechanism for "reviving" a denied request. The District said Gierl's request was too broad. Gierl disagreed, but decided to submit a new, shorter, request. The District ignored it,[3] leading to this suit.

Adopting the District's argument would create perverse incentives. Stripping requesters of the right to challenge illegal denials if they come back with a revised or different request would only encourage requesters to go to court immediately rather than trying to work with the custodian. It would lead to increased litigation. It would also encourage custodians to badger requesters into accepting less than what they are legally entitled to.

The District argues that the parties' counsel never discussed the email messages spanning the longer time frame (App. Br. 25-26), but that is irrelevant. Even if the District had produced those emails after being sued, Gierl could still challenge the initial denial; it would not be moot. *See infra*, Section II.B. Furthermore, the District never offered to provide those emails (*see* R. 28), and actively defend its initial denial (*see* R. 30). The District knew or should have known that the Petition covered the November Request and initial denial (R. 2:4-9), and expressly claimed that the request for three years of email messages had a reasonable limitation as to time and was not unduly burdensome (R. 7-8).

Gierl never waived his right to challenge the District's initial denial or released the District from liability for that denial. The Open Records Law contains no language that would strip Gierl of his right to challenge that denial. But even if Gierl somehow lost that right, the fact remains that the District did not fulfill the request for six months of email messages until after it was sued.

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[3] The District claims it never received the December Request (App. Br. 17, 25), but offers no evidence in the record to support that claim. Its citation to R. 27:1 is to a statement by the District's attorney apologizing for the oversight and stating it was "entirely unintentional." The statement does not claim it was never received or even that it was inadvertently missed, but more importantly was made by someone not under oath and without personal knowledge.

In contrast, Gierl submitted an affidavit swearing that he sent it to the same point of contact in the District who had denied his first request (R. 22:1, 3), and the District never rebutted that evidence. The Circuit Court expressly found that Gierl had in fact sent the December Request to the District (R. 49:4), a finding the District does not challenge.

B) The District's Production of Records After Being Sued Does Not Moot its Initial Denial

The District also argues that its initial denial of email messages is moot because it produced messages after being sued. (App. Br. 27-28.)

That argument is foreclosed by this Court's recent decision in *Wisconsin State Journal v. Blazel*. In *Blazel*, requesters sued for investigation records the State Assembly had refused to provide. Slip op., ¶¶6-8 (P-App. 6-7). After being sued, the Assembly changed its mind and released responsive records, and then argued the requesters could not challenge the initial denial. *Id.*, ¶¶11, 19 (P-App. 8, 11-12). The circuit court disagreed, and this Court affirmed that ruling. *Id.*, ¶¶14, 20-21 (P-App. 9, 12-13).

This Court found that *Frame Park* had eliminated the causation test[4] and replaced it with a requirement that to prevail, a requester "must obtain a judicially sanctioned change in the parties' legal relationship." *Id.*, ¶37 (P-App. 20) (*citing Frame Park*, 403 Wis. 2d 1, ¶3). But "no majority of justices ruled that voluntary release of requested records in the course of litigation of a public records action renders the action moot." *Id.*, ¶38 (P-App. 20-21). This Court concluded that voluntary production did not moot a record case, because "a decision on the merits . . . will have a practical effect on the [requester's] entitlement to attorney fees." *Id.*, ¶¶40-44 (P-App. 22-25). Addressing an alternative argument, this Court also concluded that even if the case were moot, the legality of the denial could still be decided under several exceptions to the mootness doctrine. *Id.*, ¶¶45-50 (P-App. 25-29).

Blazel is consistent with prior Court of Appeals cases rejecting arguments that later production moots a records case. In *Portage Daily Register*, an authority denied a request, but released the record after being sued. 308 Wis. 2d 356, ¶¶3, 6-7. The courts reached the merits of the initial denial, *id.* ¶¶6-8, with this Court expressly concluding the case was not moot, *id.* ¶¶8, 10-26. In *ECO*, an authority ignored two requests and denied a third, but relented and provided records after being sued. 259 Wis. 2d 276, ¶¶2-8. The courts reached the merits of the initial denial and delays. *Id.* ¶¶12-14, 20-30. In *Young*, an authority denied a request,

[4] For four decades, requesters could "prevail" (and therefore claim attorney fees and costs) despite a custodian voluntarily producing records after suit, if they could show that the lawsuit was a cause of the release of records. *Racine Educ. Ass'n v. Bd. of Educ.*, 129 Wis. 2d 319, 326-28, 385 N.W.2d 510, 512-13 (Ct. App. 1986).

but released the record after being sued. 165 Wis. 2d at 283-85. The courts reached the merits of the initial denial, *id.* at 285-91, with this Court expressly concluding the case was not moot, *id.* at 285.

The District claims that *Journal Times*, 362 Wis. 2d 577, "refute[s]" Gierl's assertion that voluntary production does not moot a records case. (App. Br. 28.) The District fails to explain how *Journal Times* refutes that assertion, and cannot do so because *Journal Times* is not a mootness case. While the authority in that case argued the case was moot, the Supreme Court did not base its ruling on that argument. Rather, the Court concluded that mandamus was inappropriate and that the authority did not violate the law, because no responsive record existed at the time of the request. *Id.*, ¶104.

Under binding precedent, the legality of the District's denial of Gierl's November Request is not moot. Even if the issue were moot, several exceptions would permit the courts to reach the question.

III) THE CIRCUIT COURT CORRECTLY RULED THAT THE DISTRICT ILLEGALLY DENIED GIERL'S REQUEST FOR EMAIL MESSAGES

The District provided three reasons[5] for denying Gierl's request for email messages sent to the three distribution lists: (1) the request was insufficient under Wis. Stat. § 19.35(1)(h), because it contained no limitation as to subject matter; (2) the request would generate a large volume of records that would not implicate Gierl's interests; and (3) it would be unduly burdensome for the District to review all the records for redaction or withholding. (R. 2:12.) All three reasons essentially boil down to an argument that Gierl was requesting too many records.

The Circuit Court rejected these arguments. Contrary to the District's claims (*see* App. Br. 13, 18, 23-24), the court did not "completely disregard" these arguments, but went over each one. The court found "that the initial timeframe requested was not an unreasonable request in light of the nature of the records." (R. 49:6-7 (R-App. 28-29).) The court found that the volume was not large, rather that it produced "a very limited number of pages." (*Id.*, 6 (R-App. 28).) The court

[5] Gierl believes that the fourth reason in the denial letter, that information in the records was the subject of ongoing litigation (*see* R. 2:12), would apply only to the email addresses, not the email messages. *Gierl 1* did not involve withholding email messages, only email addresses. 405 Wis. 2d 757, ¶2.

found that Gierl's "purpose for seeking the records is irrelevant under the law." (*Id.*, 7 (R-App. 29).) The court found that it "was not burdensome" because it was "[d]igital in nature" and "[e]asy for [the] government to provide." (*Id.*, 6 (R-App. 28).)

The court's rulings were correct. First, Gierl's request was sufficient under Wis. Stat. § 19.35(1)(h). A request for records "is deemed sufficient if it reasonably describes the requested record or information requested." *Id.* A request may be denied as insufficient only if it is "without a reasonable limitation as to subject matter or length of time." *Id.* Section 19.35(1)(h) does not require that a request include both a time limitation and a subject matter limitation. The statute uses the term "or," indicating that one or the other is sufficient. Gierl's request for communications sent to the email lists had a reasonable limitation as to length of time: 1/1/2019-11/16/2021. Furthermore, Gierl's request had a reasonable limitation as to subject matter – the subject matter was defined by the sender (the District) and the recipient (people on the distribution lists).

Second, the request did not generate a large volume of records. The December Request generated only 42[6] pages of emails sent to the Momentum List. (R. 22:6-47.) No emails were sent to the Alumni list or the entire Recreation Department list. (R. 21:29.) As modified (to include emails sent to at least 100 addresses on the Recreation Department list), that added only 31 more pages of emails. (R. 22:58-78.) But even if a request would generate a large volume of records, that is an insufficient basis to deny a request. *Gehl v. Connors*, 306 Wis. 2d 247, ¶23 ("We agree that the fact that the request may result in the generation of a large volume of records is not, in itself, a sufficient reason to deny a request as not properly limited.").

Third, it is irrelevant whether the responsive records would "implicate Gierl's interests." (R. 2:12.) All government records are presumptively subject to disclosure, Wis. Stat. §§ 19.31, 19.35(1)(a), (b), and a requester need not express any purpose for a request, § 19.35(1)(i). The District does not know the extent of

[6] Although these numbers come from the December Request for six months of emails, there is no record evidence on which to conclude the three-year request would have generated more than approximately six times as many records, which is still a manageable amount.

Gierl's "interests,"[7] and it is not the government's job to decide what a requester "really" wants to see.

Fourth, it did not take the District long to review the responsive records. An electronic search for emails sent to the lists over a six month period should not have taken more than minutes. There were only 73 pages of records to review (over six months, suggesting approximately 450 pages over three years). These communications were sent publicly to large numbers of people and should not have contained any confidential communication to review. Even working through counsel, the District produced one set of responsive records (with no redactions) approximately two weeks after counsel first spoke about the case.

The purpose of the "reasonable limitation" requirement in § 19.35(1)(h) is to not overburden the government authority. *Gehl*, 306 Wis. 2d 247, ¶17 ("The purpose of this time and subject matter limitation is to prevent a situation where a request unreasonably burdens a records custodian, requiring the custodian to spend excessive amounts of time and resources deciphering and responding to a request."); *Schopper*, 210 Wis. 2d at 213 ("[W]e may not in furtherance of this policy [in § 19.31] create a system that would so burden the records custodian that the normal functioning of the office would be severely impaired.").

The work necessary to fulfill Gierl's request comes nowhere near the levels at issue in *Gehl* and *Schopper*. In *Gehl*, the requester made one request for two-and-a-half years of emails between all staff in five offices and 39 individuals and another request for five offices' emails for the same period containing any of dozens of search terms. 306 Wis. 2d 247, ¶¶7-8. In *Schopper*, the requester asked the custodian to copy and transcribe 180 hours of 911 tape. 210 Wis. 2d at 212-13. Gierl's request, which would have covered only a few hundred pages of responsive records and required minimal review, cannot be considered burdensome under those cases.

The District suggests that the request was overly burdensome because it would have involved emails sent to over 13,000 addresses. (App. Br. 21, 23-24.) But the number of email address recipients is immaterial. Gierl asked for the

[7] The District claims that Gierl wants "to SPAM the email addresses requested with his political messaging." (App. Br. 34.) As with the District's claim that it never received Gierl's December Request, the District offers no record evidence supporting this claim, and none exists.

individual messages sent to the lists. (R. 2:10.) If the District sent one email message to 13,000 recipients, that's one responsive record, not 13,000. A single email sent to only 20 recipients would still generate the same number of responsive records: one.

The District criticizes the Circuit Court for confusing the specificity and sufficiency tests. (App. Br. 23-24, 29.) Admittedly, the Circuit Court's language was imprecise. The court initially distinguished the specificity and sufficiency tests. (R. 49:6 (R-App. 28).) But thereafter the court repeatedly called the denial "inadequate" (*id.*, 8-10 (R-App. 30-32)), making it unclear whether the court was saying the denial was not specific, not sufficient, or both.

However, that confusion is immaterial, because Gierl never challenged the specificity of the District's letter. The Petition relied only on the sufficiency test (R. 2:7), and Gierl's briefing argued only the sufficiency test (*see, e.g.*, R. 20:7-19; R. 29:12-14). Gierl expressly stated that he "does not argue the District's denial was not specific." (R. 20:6.) There never was a specificity challenge, so the court did not need to discuss it. The court's conclusions – that the request had a reasonable limitation, did not generate a large amount of records, and was not overly burdensome – judged the sufficiency of the justifications offered by the District.

Finally, the District claims the Circuit Court made erroneous factual findings (*see* App. Br. 19, 22-24), but fails to identify the specific factual findings it is challenging, much less point to the record evidence that establishes those findings are clearly erroneous. *See Call*, 153 Wis. 2d at 318-19. Nowhere does the District explain what it wants this Court to find as a matter of fact different than the lower court's findings.

Instead, the District attacks the court's legal conclusions. The District begins by discussing the standard of review for factual findings: an "appellate court must reverse when the lower court's factual findings are clearly erroneous." (App. Br. 22.) The District then criticizes the court for skipping the specificity step and going right to sufficiency, an alleged legal error, not a factual one. (*Id.*, 23.) Next, the District claims the court "misapplied the second phase of the analysis" (*id.*) – also an alleged legal error.

When the District finally starts talking about facts, it cites evidence from the record but fails to contrast that evidence with any inconsistent Circuit Court factual findings. The District says "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." (*Id.*) Neither Gierl nor the Circuit Court disagrees that the attorneys corresponded to clarify what Gierl sought. But whether the fact that negotiations happened "confirms" that the denial was reasonable is a legal question, not a factual one.

Similarly, the fact that there were "upwards of 13 and a half thousand" email addresses (agreed with by the Circuit Court and Gierl) does not prove there were so many responsive records as to be overly burdensome – a legal question. The record contains no evidence of how many email messages would have been responsive to the request for three years of emails, other than extrapolating that it might be about four times as much as the 73 pages from six months. The District identifies no record evidence that contradicts the Circuit Court's factual findings. (*See* R. 49:2-5 (R-App. 24-27).)

The Circuit Court correctly held that the District illegally withheld the email messages from Gierl. The District failed to meet its burden of proving, with record evidence, that the request lacked a reasonable limitation and was so large as to be overly burdensome.

IV) THE CIRCUIT COURT CORRECTLY RULED THAT THE DISTRICT ILLEGALLY DENIED GIERL'S REQUEST FOR EMAIL ADDRESSES

In its Brief in Support of Summary Judgment, the District argued solely that the email address owners' privacy justified withholding the records. (R. 24:6-12.) Not until its Response Brief did the District argue that the entire request (not the request for addresses specifically) was unduly burdensome. (R. 30:7-8.) There, the District claimed– without any supporting evidence – that "[t]wo years of email communications sent to three different distribution lists would have resulted in thousands of pages of documents." (R. 30:8.) Gierl had no opportunity to respond to this new argument in briefing, although the lack of evidence was addressed in oral arguments. (*See* R. 48:5 (R-App. 5).)

Both arguments fail. The District failed to introduce any evidence of the burdens imposed by Gierl's request. The District should not be able to raise a

balancing test argument. Even if it can, the privacy interests are minimal and do not outweigh the presumption that the public interest favors disclosure.

A) Gierl's Request for Email Addresses Was Not Overly Burdensome

For all the reasons discussed above, *see supra*, Section III, the District's argument that Gierl's request for email addresses is overly burdensome fails. Its argument lacks any factual support. The record contains no evidence of how much work the request would require, and it strains credulity to believe that the amount of work would remotely approach that addressed in *Gehl* and *Schopper*.

The record also contains no evidence supporting the District's argument that the email addresses on the lists contained confidential information that needed to be reviewed for redaction. (*See* App. Br. 31-32.) It claims "neither Gierl nor the lower court has any concept of what personally identifiable information these email addresses contain" (*id.*, 31), but that is because the District never introduced that evidence.

It also strains credulity to believe that people are putting sensitive, confidential information in the email addresses they share with other people. Who puts social security numbers or medical conditions in their email addresses? The District mentions home addresses, but those are neither exempt nor inherently confidential. *See, e.g.*, *State* ex rel. *Pflaum v. Psychology Examining Board*, 111 Wis. 2d 643, 331 N.W.2d 614 (Ct. App. 1983) (disclosure of names, addresses, and telephone numbers does not violate right to privacy). The District mentions student information, but student names, telephone numbers, and home addresses would normally have to be released as part of directory information unless students opt out. *See* Wis. Stat. § 118.125(1)(b), (j); *cf. Hathaway v. Joint Sch. Dist.*, 116 Wis. 2d 388, 342 N.W.2d 682 (1984) (parent names and addresses were not protected pupil records).

Even if they had to review the email lists, the task is not unduly burdensome. The District would have to read about 13,600 words to review the email addresses on the recreation department list. That is less than the number of words this Court will likely read in the District's briefs. *See* Wis. Stat. § (Rule) 809.19(8)(c) (11,000 words for an appellant's brief and 3,000 words for a reply brief). They can hardly claim reading the equivalent of a couple briefs is unreasonable.

B) "Ongoing Litigation" Is Not a Legitimate Justification to Withhold Records and Is Insufficient to Invoke the Balancing Test

In denying Gierl's request for the email addresses on three distribution lists, the District argued that "some of the requested records contain information the disclosure of which is the subject of ongoing litigation and would not be disclosed while that litigation is still active." (R. 2:12.) This denial is legally insufficient. There is no legal exemption for records involved in ongoing litigation, much less records that are just similar to records involved in ongoing litigation. The government authority still must determine whether the records are subject to disclosure. *See Cohen*, 163 Wis. 2d at 825 (*citing Oshkosh Nw. Co. v. Oshkosh Library Bd.*, 125 Wis. 2d 480, 485, 373 N.W.2d 459, 462 (Ct. App. 1985)) ("When faced with a demand for inspection, the records custodian must balance the public's right of inspection against the public interest in nondisclosure."). The denial to a written request must be accompanied by a statement of the specific public policy reason for the refusal. *Id.* (*citing Journal/Sentinel, Inc. v. Aagerup*, 145 Wis. 2d 818, 822, 429 N.W.2d 772, 774 (Ct. App. 1988)).

Simply referencing ongoing litigation, without more, is not a statement of specific public policy reasons for refusal. The Circuit Court explained it well:

> [Gierl] says, although the district did not expressly cite the balancing test in its denial, it may have intended to incorporate the balancing test it utilized in denying the request that is the subject of the prior litigation. The fact that he cites that it may have intended puts the Court in a situation where if I were to try to determine what the district may have been intending I would be hypothesizing or trying to fabricate reasons that they denied the request. Which is what the case law says is not this Court's role to try to speculate what the reasons are.

(R. 49:9 (R-App. 31).) "It is not [a] court's role to hypothesize or consider reasons to deny the request that were not asserted by the custodian." *Osborn*, 254 Wis. 2d 266, ¶16 (*citing Breier*, 89 Wis. 2d 417).

Furthermore, the defense raised by the District in *Gierl I* has no logical application here. The only balancing test argument raised by the District in *Gierl I* was the public's interest in preserving channels of communication between schools and parents. 405 Wis. 2d 757, ¶¶10-11. The District argued that if parents' email addresses were released, parents would stop providing those addresses to the

school, which would hamper their ability to communicate efficiently with parents. *Id.*, ¶¶2, 10. This Court rejected that argument. *Id.*, ¶11.

Here, different interests are in play. The District is not communicating with parents, but with alumni, recreation department participants, and whoever signs up for their community newsletter, Momentum. (R. 2:10; R. 21:28.) The District is relying on a different set of public interests here – primarily the "privacy" interests of people who might get some unwanted email. (*See* App. Br. 31-35.) Incorporating the defenses from *Gierl I* has no effect on the outcome of this case.

C) Because the District Did Not Raise the Balancing Test in its Denial, It Cannot Argue the Balancing Test in Court

A court's role in a records lawsuit is to review the reasons provided by an authority in support of its denial, not consider whether there was any other rationale the authority could or should have considered. *Osborn*, 254 Wis. 2d 266, ¶16. "In reviewing a mandamus action seeking to compel the custodian to disclose the requested public records, we first examine the sufficiency of the custodian's stated reasons for denying the request." *Id.* (*citing Rathie v. N.E. Wis. Tech. Inst.*, 142 Wis. 2d 685, 687, 419 N.W.2d 296, 298 (Ct. App. 1987)). "It is not [the] court's role to hypothesize or consider reasons to deny the request that were not asserted by the custodian." *Id.* (*citing Newspapers*, 89 Wis. 2d 417). "If the custodian states insufficient reasons for denying access, then the writ of mandamus compelling disclosure must issue." *Id.* (*citing Oshkosh Nw. Co.*, 125 Wis. 2d at 486).

The Wisconsin Supreme Court has recognized a narrow exception to the rule that only the reasons given in a custodian's denial are reviewed, but that exception is not applicable here. If a statute expressly and clearly exempts a record – categorically prohibiting its disclosure – a court can consider its application even if not raised in a denial. *Journal Times*, 362 Wis. 2d 577, ¶¶75-76.

The exception has no application here. The balancing test is a common-law creation, not a statutory exception. *See Youmans*, 28 Wis. 2d at 681-83. It is not a clear statutory exception, so it may not be considered if not raised by a custodian in its denial.

The District claims it "asserted [a] public interest in nondisclosure concern[ing] the privacy interests of unsuspecting citizens" (App. Br. 33), but its denial letter never asserted such an interest – or any other public interests in nondisclosure (*see* R. 2:12). Rather, it relied exclusively on a statutory defense – claiming that the request lacked a reasonable limitation – as well as the nonexistent exemption for "ongoing litigation." (*Id.*)

The Circuit Court correctly ruled that the District could not make a balancing test argument, although it proceeded to consider it as an alternative argument (concluding the test favored disclosure). (R. 49:8-11 (R-App. 30-33).) This Court should reach the same conclusion.

D) Even if the Balancing Test Is Considered, It Weighs in Favor of Disclosure

The Circuit Court correctly ruled that, even if the balancing test should be considered, the balance weighs in favor of disclosure. The court applied the presumption of disclosure (R. 49:5 (R-App. 27)) and determined that the public interests in nondisclosure were minimal and did not outweigh that presumption (*id.*, 9-11 (R-App. 31-33)). In particular, the court concluded that the email address lists were not being used to further the District's "core function" of educating students and that unwanted emails were not a "substantial intrusion" upon privacy. (*Id.*, 10 (R-App. 32).)

Under the balancing test, the question is whether the authority has proven, with supporting record evidence, that the public interest in nondisclosure of the records at issue outweighs the strong public interest in disclosure. *MacIver*, 354 Wis. 2d 61, ¶13. "'It is the burden of the party seeking nondisclosure to show that public interests favoring secrecy outweigh those favoring disclosure.'" *Gierl I*, 405 Wis. 2d 757, ¶6 (*quoting MacIver*, 354 Wis. 2d 61, ¶14) (internal quotations omitted).

When an authority asserts potential negative consequences would be caused by the release of records, it must prove that those consequences are reasonably probable with record evidence, and may not rely on speculation or opinion, even by an expert. *MacIver*, 354 Wis. 2d 61, ¶¶14, 23, 26; *C.L.*, 140 Wis. 2d at 184 (rejecting an expert's opinion that release would create a "potential" for harm, because "there is no factual foundation to support the expert's conclusion"); *see*

also Fox, 149 Wis. 2d at 417 ("[T]he custodian has the burden of producing evidence and persuading the finder of fact that the proffered facts are true."). This Court must "make a factual determination supported by the record of whether the documents implicate the public interests in secrecy asserted by the custodians." *Call*, 153 Wis. 2d at 317 (emphasis added).

1) Strong Public Interests Favor Disclosure of the Distribution List

The default presumption in favor of access to all public records is strong and exists automatically. *See* Wis. Stat. § 19.31. The Open Records Law "shall be construed in every instance with a presumption of complete public access," and "only in an exceptional case may access be denied." *Id.* (emphasis added). The Supreme Court has expressly rejected the argument that there is no public interest in some public records, concluding that the legislative declaration of policy establishes a "strong, legislatively-created presumption in favor of disclosure" of all public records. *Milwaukee Journal Sentinel v. DOA*, 2009 WI 79, ¶59, 319 Wis. 2d 439, 768 N.W.2d 700. The "public interests are independent of [record subjects'] status as private persons." *C.L.*, 140 Wis. 2d at 182. "[A court's] determination does not hinge on whether there is some interest sufficient to justify disclosure. The legislature has already answered that question." *MJS v. DOA*, 319 Wis. 2d 439, ¶59.

Here, the public has a heightened interest in accessing the contact lists of people the government is communicating with. If a government entity uses a distribution list to communicate to a large group of people at the same time, the public has an interest in accessing the same list to spread their own messages. *See Gierl I*, 405 Wis. 2d 757, ¶14. Government entities should not be able to promote one-sided messaging while prohibiting anybody with a contrary message from accessing the same audience. *Id.* It is dangerous to democracy to allow government to keep a captive audience inaccessible to the public.

Access to distribution lists also allows the public to learn with whom government officials are communicating. *See MacIver*, 354 Wis. 2d 61, ¶¶19-20. While *MacIver* addressed the public interest in learning "'who' is attempting to influence public policy," *id.*, ¶20, the public has an interest in the opposite as well – learning whom the government is attempting to influence.

2) The District Failed to Produce Any Evidence that Disclosure of the Email Addresses Would Cause Harm to any Public Interest

Some public interests in favor of nondisclosure can be presumed as a matter of law. For example, Gierl does not contest that there is generally some level of public interest in personal privacy. But while evidence of a specific harm can increase the public interest in nondisclosure, the lack of such evidence weakens the case for nondisclosure. *Gierl I*, 405 Wis. 2d 757, ¶11 (contrasting that case with *Hempel*, 284 Wis. 2d 162, ¶79, which described how "factual support for the custodian's reasoning is likely to strengthen the custodian's case").

Here, the District introduced no evidence relevant to the balancing test. Well after it had moved for summary judgment – and after Gierl had filed his response brief pointing out this lack of evidence (*see* R. 29:2-3) – it filed a conclusory affidavit from its superintendent, Dr. Matthew Joynt, stating that communications with the three distribution lists are one-way and that they assure individuals their information will not be shared (R. 31:2). But Gierl is not arguing that there is a heightened interest here because people are using email communications to influence government officials. *Compare*, *MacIver*, 354 Wis. 2d 61, ¶20. And government authorities cannot exempt themselves from the Open Records Law simply by telling people their records will be confidential. *See Baldarotta*, 162 Wis. 2d 142 (promise of confidentiality must meet rigorous four-part test to overcome presumption of disclosure). Dr. Joynt's affidavit addresses arguments Gierl is not making.

The District claims that Gierl will invade people's privacy by spamming them with political messages. (App. Br. 34.) The District is engaging in pure speculation. There is no evidence in the record of Gierl's purpose or intentions. Speculation is insufficient to justify withholding records. *Gierl I*, 405 Wis. 2d 757, ¶¶10-11; *see MacIver*, 354 Wis. 2d 61, ¶¶23, 26 (discounting the "possibility of threats, harassment or reprisals" without supporting evidence).

More importantly, it is not an invasion of privacy to use somebody's contact information to contact them. That is the entire purpose of having contact information – a way for other people to find or communicate with you. Basic contact information is not inherently confidential or dangerous, in the absence of a particularized threat of danger. *See, e.g.*, Wis. Stat. § 165.68 (Safe At Home program requires showing a real risk of harm to obtain a pseudonymous address).

Of all the ways to contact somebody else, an email is the least intrusive – it can be easily ignored and blocked. As the Circuit Court recognized, "unwanted emails are a common occurrence easily dealt with with technology in today's day and age." (R. 49:10 (R-App. 32); *see also Gierl I*, 405 Wis. 2d 757, ¶13.)

Finally, the District faults the Circuit Court for not performing an *in camera* review of the records. (App. Br. 38.) But no party asked the court to do so. If the District wanted the lower court to consider the content of the list of email addresses, it was incumbent upon the District to provide those to the court as evidence. The District claims *in camera* review would have revealed that "virtually none" of the email addresses contained a first and last name and that most contained little information identifying the owner. (App. Br. 38.) The relevance of those claims aside, this is yet another example of the District making up facts that have no basis in the evidentiary record. Nobody knows what emails are actually included in the list, and the fault for that lies with the District, not Gierl or the Circuit Court.

3) The Circuit Court Correctly Ruled that the Public Interest in Disclosure Outweighed the Public Interest in Nondisclosure

The Circuit Court correctly ruled that the District had failed to meet its burden of proving that the public interests in nondisclosure outweighed the public interests in disclosure. (R. 49:9-10 (R-App. 31-32).) The court focused on the limited intrusion of unwanted emails and that sending community-wide emails was not a part of the District's core function of educating students. (*Id.*) The District calls the court's analysis "threadbare" buy then quotes four full paragraphs from the court's decision, showing the court's complete analysis. The Circuit Court did its job properly.

The result in this case is influenced heavily by this Court's decision in *Gierl I*. In *Gierl I*, Gierl requested the list of email addresses to which an invitation for a webinar titled "The Talk: A Necessary Conversation on Privilege and Race with Our Children" had been sent. 405 Wis. 2d 757, ¶2. The District provided staff email addresses, but denied the remainder of the addresses (parent and guardian addresses), claiming that releasing such addresses would "inhibit parent-school communication by discouraging parents from providing their e-mail addresses." *Id.* This Court, applying the balancing test, ruled that denial illegal. *Id.*, ¶1.

The District's weak attempt to distinguish the case demonstrates how little room remains for the arguments they want to make. It would be hard for the two cases to be more similar – they both involve requests from the same requester to the same authority for the same kind of records – lists of email addresses the authority uses to communicate with the public. The cases have some distinguishing facts, true, but no more than any other pair of Open Records Law cases not seeking the exact same records.

Most importantly, this Court in *Gierl I* rejected many of the broader arguments and assertions the District tries to make here.

First, this Court rejected the argument – also made here – that the email addresses did not "relate to the 'affairs of government and the official acts of those officers and employees who represent them.'" *Id.*, ¶8 (*quoting* Wis. Stat. § 19.31). This Court noted that "[t]he District, a government entity, uses government resources to collect e-mail addresses . . . and then uses those e-mail addresses to promote and advance selected matters of interest," then quoting at length the Circuit Court's findings of how the District used those email addresses. *Id.*

Second, this Court rejected the argument – similar to one made here – that the public just needs to know the general category of people to whom emails were sent – "District parents." *Id.*, ¶9. This Court concluded that the relevant information – the actual record – was the "specific individual's e-mail contact information the District was using." Contrary to the District's claim that the relevant public interest in *Gierl I* was "in knowing the identity of individuals with whom the District is communicating" (*see* App. Br. 38 (emphasis added)), this Court focused on the "specific individual's e-mail contact information," which is the same information Gierl seeks here.

Third, this Court rejected the District's reliance on a claimed chilling effect because the District failed to produce any evidence supporting that effect. *Id.*, ¶10. Rather, it was pure speculation to believe parents would stop providing their email addresses to the District. *Id.* The "speculative chilling effect [wa]s insufficient to 'overcome the strong presumption of complete openness' with regard to the e-mails.'" *Id.*, ¶11 (*citing MacIver*, 354 Wis. 2d 61, ¶¶27-32) (internal citations omitted).

Fourth, this Court agreed with Gierl that the intrusion from an unwanted email is of minimal concern, especially when compared to phone calls or home

visits, which this Court noted had previously been released under the Open Records Law. *Id.*, ¶¶12-13. Unwanted email is "a daily reality" and an "inconvenience" that can be addressed with "modern technology" that is "common with most email systems today." *Id.*, ¶13. The District makes that same argument about emails being an invasion of privacy here.

Finally, this Court rejected the argument – also made here – that Gierl's alleged purpose to "spam" email recipients justified withholding the email addresses. *Id.*, ¶14. This Court held that the District could not complain about somebody else sending one-sided messages when it was doing the same thing. *Id.* "[T]he balancing test does not tolerate utilizing taxpayer resources for an ideological or political monopoly." *Id.* Thus, *Gierl I* forecloses many of the arguments the District makes here.

Gierl agrees with the District that not all of the interests in *Gierl I* are present here. (*See* App. Br. 37.) *Gierl I* considered the District's use of the email addresses to "promote and advance the particular 'community outreach' issues and positions of District (government) leaders" as a factor creating a heightened public interest. 405 Wis. 2d 757, ¶14. That heightened interest is not applicable here, so the public interest in disclosure is admittedly lower. But the District ignores that the public in nondisclosure is also lower. The District in *Gierl I* claimed a public interest in preserving efficient communication between itself and the parents of the students it educates. *Id.*, ¶¶2, 10. That interest is not present here. As the Circuit Court noted, emailing the recipients in this case is not a part of the District's "core school district functions." (R. 49:9-10 (R-App. 31-32).) Both sides of the scale are less weighty, suggesting the same result.

After *Gierl I*, this case is most like *MacIver*, which also addressed whether email addresses could be released to a record requester. There, State Senator Jon Erpenbach redacted the names and email addresses of people who had sent him emails regarding Act 10. 354 Wis. 2d 61, ¶¶1-4. Erpenbach argued that under the balancing test, the risk to the senders' safety and privacy, as well as a chilling effect on communications, justified redacting that information. *Id.*, ¶5. This Court rejected both arguments. *Id.*, ¶¶1, 32. With regard to safety and privacy, Erpenbach argued that the "nuclear environment" surrounding Act 10 made it likely people would face threats, harassment, and reprisals if they were identified. *Id.*, ¶¶22-23. While this Court acknowledged the legitimacy of that concern, it held that without a specific showing that such risks were not just possible but

reasonably probable, they could not form the basis for denying a request. *Id.*, ¶¶23-26 (*citing Doe v. Reed*, 561 U.S. 186 (2010) (requiring release of names and home addresses of signers of a petition to repeal a controversial same-sex marriage law)). Here, there is even less reason to believe that the email address owners' privacy or safety is at risk, yet the District does not address the application of *MacIver* to this case except to cite it for the *de novo* standard of review. (*See* App. Br. 19.)

By contrast, this case is not similar to the balancing test cases relied upon by the District (which even the District mentions only in passing) (*see* App. Br. 34). Those cases involved significantly elevated concerns for confidentiality and privacy in sensitive situations. *Hempel* involved an internal law enforcement investigation into alleged sexual harassment, permitting redaction of the names of victims and witnesses who feared recrimination. 284 Wis. 2d 162, ¶¶2, 69-70. *Linzmeyer v. Forcey* involved a male teacher's inappropriate behavior toward female students, permitting redaction of the names of minor victims and witnesses. 2002 WI 84, ¶¶4, 20, 40, 254 Wis. 2d 306, 646 N.W.2d 811. *Cohen* involved portions of police personnel files, but did not explain what was and what was not disclosed. 163 Wis. 2d 819. The court described the privacy interests in play as those that might prevent an employee from even seeing their own records, such as "investigations into criminal activities; letters of reference; portions of test documents; materials used for staff management planning such as evaluations, bonus plans, promotions and job assignment; personnel information about another person; and records relating to a claim pending between an employee and an employer." *Id.* at 831.[8] *Kramer Bros., Inc. v. Dane County* involved the records of a third-party contractor, and came from the *Woznicki* era where record subjects were permitted to sue and assert their own privacy interests. 229 Wis. 2d 86, 89, 599 N.W.2d 75 (Ct. App. 1999); *see Wis. Mfrs. & Commerce v. Evers*, 2022 WI 38, ¶¶9-11, 14-15, 19, 405 Wis. 2d 478, 977 N.W.2d 374 (describing the rise and fall of *Woznicki v. Erickson*, 202 Wis. 2d 178, 549 N.W.2d 699 (1996)). None of these cases is more analogous to this case than *Gierl I* or *MacIver*.

[8] Furthermore, since *Cohen*, courts have moved away from broad conclusions that privacy considerations protect personnel files. In *Hempel*, the authority argued that *Cohen* and other cases had established a blanket exemption for police officer personnel files, but the Supreme Court disagreed. 284 Wis. 2d 162, ¶¶61-62.

Persuasive authority also supports releasing governmental mailing lists. In 68 OAG 78, the Attorney General opined[9] that governmental mailing lists, including subscriber lists for newsletters should be disclosed. That opinion also rejected an argument that a right to privacy prohibited release of those lists. *Id.* at 69-70. In 61 OAG 297, the Attorney General opined that a list of students on a waiting list for a particular program should be disclosed to a competing educational institution.

The Attorney General has also considered email distribution lists, concluding that they, too, should be released "absent a specific statutory exception or a showing of particularized harm to the public interest from release of such records." 02 OAG 03, 5 (R. 7:41) (emphasis added). The formal opinion first reviewed 61 OAG 297 and 68 OAG 78 and "considerable precedent" requiring the disclosure of names and street addresses. *Id.*, 3-4. Finding emails analogous to street addresses, the Attorney General concluded distribution lists of email addresses should be treated like street addresses. *Id.*, 4-5.

Based on substantial binding and persuasive authority, the Circuit Court correctly concluded that the District failed to prove that the public interests in nondisclosure outweighed those in favor of disclosure. What the District calls "judicial creep" (*see* App. Br. 7, 12) is merely applying a well-established legal test to a closely analogous set of facts, which courts do day in and day out.

CONCLUSION

The Circuit Court correctly ruled that no portion of this case is moot, that the District illegally withheld the email messages Gierl requested, and that the District illegally withheld the email addresses Gierl requested. This Court should affirm the lower court's order granting Gierl's motion for summary judgment.

Dated this April 19, 2023

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[9] Attorney General opinions on the Open Records Law, while not binding on courts, are considered persuasive because the Attorney General is statutorily charged with interpreting the Open Records Law. Wis. Stat. § 19.39; *Milwaukee Journal Sentinel v. City of Milwaukee*, 2012 WI 65, ¶41, 341 Wis. 2d 607, 815 N.W.2d 367.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in section 809.19(8)(b), (bm), and (c) for a brief produced with proportional serif font. The length of this brief is 10,794 words, calculated using the Word Count function of Microsoft Word 365.

Dated: April 19, 2023

Electronically signed by Thomas C. Kamenick
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APPENDIX CERTIFICATION

Pursuant to Wis. Stat. § 809.19(8g)(b)2., I hereby certify that filed with this brief is a supplemental appendix.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of ufll names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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