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

REPLY BRIEF OF RESPONDENT-APPELLANT, MEQUON-THIENSVILLE SCHOOL DISTRICT

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ARGUMENT

In essence, Petitioner-Respondent Mark Gierl's brief treats the Public Records Law like a binary test whereby the existence of an item in a public entity's possession requires its disclosure upon request. Gierl ignores the significant duty imposed on records custodians to apply a balancing test and only disclose those "records" that further the public policy inherent in the law itself—*i.e.*, to reveal the affairs of government and/or the official acts of those who represent the public. *See* Wis. Stat. § 19.31.

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. Along with governmental transparency, the public has an interest in the privacy of its personal contact information, and the state's public records laws should not be subverted to aid a private party in usurping that interest to achieve his personal agenda.

Rather than recapitulate arguments set forth in its initial brief, the District shall address three points Gierl made in his response brief. First, and contrary to Gierl's assertions, this case involves fundamental issues of statutory interpretation. Second, not only does *Gierl I* misconstrue the law, but its facts are also distinguishable from the present case. Finally, Gierl paints a misleading picture of the mootness issue. Accordingly, and for the reasons set forth below, Respondent-Appellant Mequon-Thiensville School District requests this Court reverse the lower court's decision and grant summary judgment in its favor.

I. THE CIRCUIT COURT'S RULING EVISCERATES THE PURPOSE AND INTENT OF THE PUBLIC RECORDS LAW.

Despite what Gierl claims, this case involves fundamental issues of statutory interpretation and is not a simple, run-of-the-mill public records case. On this issue, Gierl states the following, in pertinent part:

> This case is controlled by case law. . . 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. 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.
>
> The only statutory language the District asks this Court to interpret is found in the legislative policy statement in Wis. Stat. 19.31. But the 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."

[App. Br. p. 14-15 (internal citations omitted)]. In addition to oversimplifying the parameters and nuances of "statutory interpretation," the foregoing assertion is patently false.

As the District stated in its initial brief, 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 lower court's interpretation and application of the law—which Gierl would have this Court uphold—contravenes its textually manifest statutory purpose. 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).

Contrary to Gierl's assertions, this language in Wis. Stat. § 19.31 is not merely "a legislative policy statement" or a "statement of goals" to be considered when convenient. [App. Br. p. 15]. Rather, s. 19.31 manifests the *purpose* behind the law itself (*i.e.*, to reveal the affairs of government and the acts of those who represent the public), which, pursuant to Wisconsin law, the court *cannot* disregard when construing or interpreting any provision of the Public Records Law. *Kalal*, 2004 WI 58, ¶ 49.

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. Likewise, the District has already provided descriptions of recipient groups to which the distribution lists were sent. 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. In forcing the District to release this information despite the complete lack of statutory authority compelling such disclosure, the Circuit thus misapplied the Public Records Law and thereby obfuscated the law's fundamental purpose.

II. THE *GIERL I* DECISION IS INAPPLICABLE TO *GIERL II*.

A. The Circuit Court Erroneously Applied the Unfounded *Gierl I* Rationale to Unrelated Facts in the Current Case.

As discussed in the District's initial brief, the parties to this action recently appeared before this Court in *Gierl v. Mequon-Thiensville School District*, 2023 WI App 5, 405 Wis. 2d 757, 985 N.W.2d 116 ("*Gierl I*"). There, the appellate court held the Public Records Law's presumption in favor of disclosure outweighed the District's interest in maintaining the privacy of parents' personal email addresses. *Gierl I*, 2023 WI App 5. Over the protests of District parents, the *Gierl I* court compelled disclosure of the personal information requested, conflating the analysis required under the Public Records Law with the First Amendment's limited public forum doctrine and thereby expanding the law far behind its intended parameters. For example, the appellate court stated the following:

> Essentially, the District is concerned that Gierl disagrees with some issues or positions about which it has communicated with parents using the e-mail list, and it fears Gierl will utilize the list to identify and perhaps organize parents who might share his views regarding the District's positions. In short, the District wants to be able to use government resources to collect and utilize these e-mail addresses to promote and advance the particular "community outreach" issues and positions of District (government) leaders while denying others in the community the opportunity to utilize the e-mail addresses to share differing viewpoints. Gierl states: "If the District had the discipline to limit itself to emails about bus schedules, enrollment, office closures and the like, the public interest in accessing this Distribution List would not be as high." We agree; the balancing test does not tolerate utilizing taxpayer resources for an ideological or political monopoly.

Gierl I, 2023 WI App 5, ¶ 14. In addition, the appellate court inserted a nonexistent causal standard into the public records analysis, asserting "it was little more than speculation that parents would be unwilling in the future to provide e-mail addresses

for District communication if those addresses were at risk of being released to third parties upon request." *Id*. at ¶ 11.

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. Nevertheless, the Circuit Court applied the same rationale of *Gierl I* to this case. The Circuit Court purported 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 foundationless causal standard it created in *Gierl I* into *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 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. Various 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). Further, Wisconsin courts have determined 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). 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.

There is certainly a public interest in maintaining private citizens' privacy rights in their personal email addresses. By contrast, there is no discernable *public* interest in the records requested, aside from the baseline presumption thereof. Ultimately, the District weighed the aforementioned interests against each other and determined the public interest in nondisclosure won the day. In so doing, the District did absolutely nothing inconsistent with the Public Records Law.

B. Regardless, *Gierl I* Is Distinguishable from the Case at Bar.

Notwithstanding the fact *Gierl I* misapplied and inappropriately expanded the Open Records Law beyond its intended purpose, the facts of this case are distinguishable.

The issue in *Gierl I* centered on the private email addresses of parents with children in the District. *Gierl I*, 2023 WI App 5, ¶ 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. Thus, the basis for the Court of Appeals' decision in *Gierl I* has no bearing here.

Finally, this Court in *Gierl I* found a public interest in knowing the identity of individuals with whom the District is communicating. *Gierl I*, 2023 WI App 5, ¶¶ 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. Further, 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. Contrary to Gierl's contentions, the trial court bears the responsibility of conducting an *in camera* inspection if it has incomplete knowledge regarding the contents of records sought. [App. Br. p. 30]. *See, e.g., State ex rel. Morke v. Donnelly*, 155 Wis. 2d 521, 455 N.W.2d 893 (1990). The Wisconsin Supreme Court has set forth the procedure that must be followed in determining whether the public interest in non-disclosure outweighs that of disclosure as follows:

> The duty of first determining that the harmful effect upon the public interest of permitting inspection out-weighs the benefit to be gained by granting inspection rests upon the public officer having custody of the record or document sought to be inspected. If he determines that permitting inspection would result in harm to the public interest which outweighs any benefit that would result from granting inspection, it is incumbent upon him to refuse the demand for inspection and state specifically the reasons for this refusal. If the person seeking inspection thereafter institutes court action to compel inspection and the officer depends upon the grounds stated in his refusal, *the proper procedure is for the trial judge to examine* in camera *the record or document sought to be inspected.* Upon making such *in camera* examination, the trial judge should then make his determination of whether or not the harm likely to result to the public interest by permitting the inspection out-weighs the benefit to be gained by granting inspection.

State ex rel. Youmans v. Owens 28 Wis. 2d 672, 682, 137 N.W.2d 470 (1965) (emphasis added).

Therefore, the impetus was on the lower court—not the District—to conduct an *in camera* review. While the District bore the initial duty of inspecting the requested records and balancing the public interests in disclosure versus nondisclosure before granting or denying access thereto, the Circuit Court bore the secondary duty of examining such records in performing its own balancing test.

Again, the question on appeal is whether the trial court's factual findings were insufficient or clearly erroneous. *See* Wis. Stat. 805.1(2); *Milwaukee Journal v. Call*, 153 Wis. 2d 313, 319, 450 N.W.2d 515 (Ct. App. 1989). In this case, neither Gierl nor the lower court has any concept of what personally identifiable information these email addresses contain. Accordingly, the Circuit Court *had no factual basis* upon which to conclude the District's stated reasons for denial were legally insufficient. Where, as here, the trial court's factual findings are insufficient or clearly erroneous, the appellate court may supplement such findings or otherwise remand. *See Milwaukee Journal*, 153 Wis. 2d at 319 (citing *State v. Williams*, 104 Wis. 2d 15, 22, 310 N.W.2d 601, 605 (1981)).

III. THE CIRCUIT COURT'S DECISIONS ON MOOTNESS WERE IMPROPER.

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.

In his response brief, Gierl argues *Wisconsin State Journal v. Blazel* conclusively answers the *Friends of Frame Park* question—*i.e.*, whether a government entity's voluntary production of records moots a challenge to an initial delay in their production. [App. Br. pp. 15-19 (citing *Friends of Frame Park, U.A. v. City of Waukesha*, 2022 WI 57, 403 Wis. 2d 1, 976 N.W.2d 263; *Wis. State Journal v. Blazel*, No. 2021AP1196, unpublished slip op. (WI App Mar. 9, 2023))]. This argument is disingenuous for two reasons. First, the *Blazel* decision is, as of yet, unpublished and therefore has no current precedential value. Second, and as the District stated in its initial brief, Gierl fails to mention that other appellate case law—which was not explicitly abrogated in *Friends of Frame Park*—also exists to refute *Blazel*. *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 several 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 email contents obfuscates the fundamental purposes underlying mandamus actions: to compel performance of a particular act by correcting a governmental entity's prior action or omission. *See Friends of Frame Park*, 2022 WI 57, ¶ 29 (Grassl Bradley, J., concurring) (citing *Mandamus*, Black's Law Dictionary).

CONCLUSION

For the foregoing reasons, the Mequon-Thiensville School District respectfully requests that this Court reverse the lower court's decision in this matter.

Respectfully submitted this 1st day of May, 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 2,977 words long, calculated using Word Count function of Microsoft Word.

Dated this 1st day of May, 2023.

Electronically signed by Joel S. Aziere
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