08AP0967

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

KAREN SCHILL, TRACI PRONGA,
KIMBERLY MARTIN, ROBERT DRESSER and
MARK LARSON,

Plaintiffs-Appellants,

v. Appeal No. 2008AP000967
Circuit Court Case No. 2007CV000304

WISCONSIN RAPIDS SCHOOL
DISTRICT AND ROBERT CRIST,

Defendants-Respondents,

and

DON BUBOLZ,

Intervenor-Respondent.

Appeal From The Circuit Court For Wood County
The Honorable Charles A. Pollex,
Adams County Circuit Court Judge Presiding

BRIEF AND APPENDIX OF PLAINTIFFS-APPELLANTS

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ISSUE PRESENTED

Whether employees' purely personal emails created and/or maintained on a government-owned computer system are subject to release under the Wisconsin Public Records Law when they offer no information regarding the affairs of government, and the competing public's interest in protecting Wisconsin citizens' privacy and reputational interests outweighs the public's interest in disclosure.

The circuit court answered this question: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Plaintiffs-Appellants request oral argument and publication because there are no published cases regarding the issue of whether purely personal emails that have no relation to the affairs of government are subject to release under the Wisconsin Public Records Law. Guidance from the Court would be helpful in this case because it has the potential to affect all public employees statewide.

INTRODUCTION

The fundamental purpose behind the Wisconsin Public Records Law is to provide the public with information regarding the affairs of government and the official acts of government officers. The law was never designed to allow the public to monitor the personal lives of employees, especially where there is absolutely no connection to the employees' official duties.

In this case, a private citizen has made an open records request for all the emails of five teachers employed by the school district during a certain time period. The Wisconsin Rapids School District has decided to release those emails, regardless of whether the subject matter of the emails is purely personal in nature, simply because the emails were generated on (or sent to) a government computer. For example, the District would define an email from a teacher to her spouse about the purchase of a house, or an email from a teacher to her friend about transferring money in a personal bank account as "public records" subject to release under the law. However, it is the content that determines whether a document is a "public record" under the law, not the medium or format. Materials that are purely personal in nature are not records subject to release under the law.

However, even if these emails are considered public records, they are still not subject to release under the balancing test, because the interest of protecting privacy and reputational interests outweighs any interest in disclosure. The public would not gain knowledge regarding the official acts of its government by ascertaining the information in these emails such as bank account numbers, personal health information, and off-duty social plans. Only the sender's and receiver's privacy interests would be damaged. Given the imbalance in weighing these interests, any presumption favoring disclosure is overcome. The Court should enjoin the District from disclosing the teachers' personal emails.

STATEMENT OF THE CASE

Karen Schill, Traci Pronga, Kimberly Martin, Robert Dresser and Mark Larson (collectively referred to as "Teachers") are teachers in the Wisconsin Rapids School District ("the District"). (R. 5, A-Ap. 138-142). In April 2007, Mr. Don Bubolz, a private citizen, sent an open records request to the District requesting the emails sent from the Teachers' school computers from March 1 to April 13, 2007. (R. 4, A-Ap. 137, Ex. A). Shortly thereafter, the District notified the Teachers that it intended to release all of the Teachers' emails as public

records pursuant to Mr. Bubolz's request. (R. 5, A-Ap. 139).

The District's computer use policy allowed the Teachers to use the District's email for personal use. (R. 5, A-Ap. 139). As a result, some of the emails the District has decided to release pursuant to Mr. Bubolz's request are purely personal emails that do not relate to the District or to any official acts of government. (R. 4, A-Ap. 134). Some of the emails also contain private and personal information unrelated to any official acts of government. (R. 4, A-Ap. 134). There has been no allegation that any of the five Teachers used the District's email inappropriately. (R. 13; A-Ap. 113-114).

The Teachers subsequently filed an action in circuit court to enjoin the District from releasing their personal emails. (R. 4, A-Ap. 132-137). The Teachers asserted that the personal emails were not subject to release under the Wisconsin Public Records Law because: (1) personal emails are not "records" subject to release under the Public Records Law; and (2) even if the personal emails are records, under the balancing test, the privacy and reputational rights of Wisconsin citizens in their personal emails outweigh the public's interest in disclosure. (R. 7, A-Ap. 143-151).

The circuit court denied the Teachers' action, and instead ordered that the emails were subject to release, largely because of the presumption of disclosure under the law. (R. 13, A-Ap. 101-118). The Teachers ask this Court to reverse the circuit court's decision and instead enjoin the District from releasing the purely personal emails.

ARGUMENT

I. THE PERSONAL EMAILS ARE NOT SUBJECT TO RELEASE BECAUSE THEY ARE NOT PUBLIC RECORDS AS DEFINED BY WISCONSIN LAW

The Wisconsin Public Records Law requires a two-step analysis to determine if a requested record should be released to the public. *Linzmeyer v. Forcey,* 2002 WI 84, 254 Wis. 2d 306, 646 N.W.2d 811. First, it must be determined whether the Public Records Law applies to the materials in question by reviewing the statutory language of the law, and then any statutory and common law exceptions. *Id.* at ¶ 10. If the law applies, then the second step is to determine if other public policy exceptions overcome the presumption of openness under the law. *Id.*

Under the first step, the Public Records Law does not apply to the personal emails because they are not public records subject to the law. The statute defines "record" as essentially any material on which information is

recorded or preserved that is created or kept by an authority, subject to the exclusions in the statute. Wis. Stat. § 19.32(2). The law is clear that a record does not include "drafts, notes, preliminary computations and like materials *prepared for the originator's personal use.*" Wis. Stat. § 19.32(2) (emphasis added). The Teachers' emails containing solely content that was personal and not related to any School District business could only have been prepared strictly for their personal use. Thus, they are not records as defined by the law.

The law also excludes from records "materials which are *purely the personal property* of the custodian and have no relation to his or her office." Wis. Stat. § 19.32(2) (emphasis added). The Teachers in this case do not dispute that the emails are the property of the District's custodian. In addition, there is no dispute that these emails have no relation to the Teachers' or the custodians' office. The purely personal emails are also not records under this exclusion in the statute.

Moreover, for the purposes of the government's duty to retain public records, Wisconsin law defines a public record as "all books, papers, maps, photographs, files, recordings, optical disks, electronically formatted documents or other documentary materials, regardless of

physical form or characteristics *made, or received by any state agency or its officers or employees in connection with the transaction of public business*, and documents of any insurer that is liquated or in the process of liquidation under ch. 645. . . ." Wis. Stat. § 16.61 (2)(b) (Emphasis added). Under this statute, the legislature instructed that custodians do not need to retain personal documents that have no connection to public business. A finding that personal emails are not public records under Wis. Stat. § 19.32(2) would harmonize the Public Records Law with this record retention statute.

A finding that personal emails are not public records would also be in accord with the intent behind the Public Records Law. It is axiomatic that statutes are to be interpreted in a manner that advances the purposes of the law. *Beard v. Lee Enters., Inc.*, 225 Wis. 2d 1, 22, 591 N.W.2d 156 (1999). The purpose of the Public Records Law is to give the public "the greatest possible information *regarding the affairs of government* and the official acts of those officers and employees who represent them." Wis. Stat. § 19.31 (emphasis added); *see also Building and Constr. Trades Council of South Cent. Wisconsin v. Waunakee Cmty. Sch. Dist.*, 221 Wis. 2d 575, 585 N.W.2d 726 (Ct. App. 1998) (stating that the purpose of the Wisconsin Public

Records Law is to shed light on the workings of government and the acts of public officers and employees). As a result, to be a public record, the material must be created or kept in connection with an official purpose or function of the agency. *See State ex rel Youmans v. Owens,* 28 Wis. 2d 672, 679, 137 N.W.2d 470 (1985), *see also* 72 Op. Att'y Gen. 99 (1983) ("public records must have some relation to the functions of the agency").

The Teachers' personal emails are not "records" under the law because they have no connection to any purpose or function of the District. They are purely personal in nature. Even though the Teachers might have used a government-owned computer to send the emails, the Wisconsin Attorney General's Office has instructed that it is not the medium or format of the document that determines whether a document is a public record, it is the content. *Wisconsin Public Records Law Compliance Outline,* Wisconsin Department of Justice Office of the Attorney General, p. 2, 2005.

Here, the content of the personal emails has nothing to do with the District, the Teachers' duties or the Teachers' employment. Rather, they are emails from the Teachers to their spouses, partners and friends about personal business. It takes more than a public employee using a computer owned by a governmental agency to render

that email a public record. *See In re John Doe Proceeding*, 2004 WI 65, ¶ 45, 272 Wis. 2d 208, 237, 680 N.W.2d 792, 805 (2004) ("not everything a public official creates is a public record") *see also State v. Panknin*, 217 Wis. 2d 200, 212-213, 579 N.W.2d 52 (Ct. App. 1998) (holding that the personal notes of a sentencing judge were not public records). The record must have some nexus to official duties or governmental business. The personal emails have no such nexus.

While the Teachers have found no published case by a Wisconsin court that has addressed this issue, the Wisconsin Attorney General's Office has opined that the purely personal emails of public employees are not public records under the Public Records Law. *See Attorney General Memorandum,* Wisconsin Department of Justice, Office of the Attorney General. (R. 7; A-Ap. 152-156). In addition, courts in other jurisdictions have agreed that a public employee's personal emails are not public records subject to release, largely because there is no connection with any official government business. *State of Florida v. City of Clearwater*, 863 So. 2d 149 (Fla. 2003); *Griffis v. Pinal County*, 156 P.3d 418 (Ariz. 2007); *State ex rel. Wilson-Simmons v Lake County Sheriff's Department*, 693 N.E.2d 789 (Ohio 1998); *Denver Publishing Co. v. Board of County*

Comm'rs of the County of Arapahoe, 121 P.3d 190 (Colo. 2005); *Pulaski County v. Arkansas Democrat-Gazette, Inc.*, 370 Ark. 435 (Ark. 2007); *Brennan v. Giles County Bd. Of Educ.*, No. M2004-00998-COA-R3-CV, 2005 WL 1996625 (Tenn. Ct. App. Aug. 18, 2005)(unpublished).

This case is most closely aligned with the *Clearwater* case in Florida where the newspaper sought a court order compelling the city to release all emails sent from or received by two city employees over the city's computer network during a certain time period. 863 So. 2d at 151. The city sorted the emails into two categories: personal and public. The city released the public emails, but did not release the personal emails. The Florida Supreme Court held that personal emails did not fall within the definition of public records because they were not made or received in connection with the transaction of official business. *Id.* at 155. The court reasoned that "private documents cannot be deemed public records solely by the virtue of their placement on an agency-owned computer. The determining factor is the nature of the record, not its physical location." *Id.* at 154. The court stressed that a document subject to release must be in some way connected to "official business." *Id.* at 152. The court enjoined the release of the personal emails.

Similarly, in *Griffis*, a public employee accused of misusing public funds filed an action to block the release of personal emails he had sent or received on the county's computer system. 156 P.3d at 418. The Arizona Supreme Court held that emails maintained on a government-owned computer system are not automatically public records. *Id.* at 421. The records must possess the requisite nexus to official duties in order to be public records. *Id.* at 422. The court reasoned that adopting a rule that the mere possession of a document by the government makes it a public record would lead to the "absurd" result such that "[e]very note made on government-owned paper, located in a government office, written with a government-owned pen, or composed on a government-owned computer would presumably be a public record." *Id.* at 421.

Teachers urge this Court to follow the reasoning enunciated in *Clearwater* and *Griffis* and enjoin the District from releasing the Teachers' personal emails under the Public Records Law. Here, as in the *Clearwater* case, the Teachers' emails are purely personal. The emails sent and received were intended to be personal correspondence not for public view. Like the emails in *Clearwater* and *Griffis*, they were not sent as part of any "official" act related to their occupation as teachers. As the court

noted in *Clearwater*, "there is little to distinguish such e-mail from personal letters delivered to government workers via a government post office box and stored in a government-owned desk." 863 So. 2d at 153. Accordingly, because the emails are purely personal and unrelated to the function of the District, they are not "records" under the Public Records Law and therefore not subject to release.

If the Court holds otherwise, then the legislature's bright line between personal and public records is hopelessly blurred. What if a teacher had created a grocery list using the District's pen and paper at school during lunch time? What if a principal saved personal recipes on the District's computer? What if a police officer made a holiday shopping list on the city's provided notebook while on duty? What if a clerk's husband left her a personal note at the office? Would those documents now be public records subject to disclosure that the government must maintain? In this era of tight budgets, expanding the legislature's definition of public records will only increase costs, as employers will need to maintain, store and sort through all of these new "public" records.

Given the lack of public interest in these documents, the Court should find that these are not public records as defined by the law.

II. THE EMAILS SHOULD NOT BE RELEASED BECAUSE THE PUBLIC INTEREST IN PROTECTING INDIVIDUAL PRIVACY AND REPUTATIONAL RIGHTS OUTWEIGHS ANY INTEREST IN DISCLOSURE

However, if the Court determines that the personal emails are "records", then the Court moves to the second prong of the test and determines if other public policy exceptions overcome the presumption of openness under the law. *Linzmeyer*, 2002 WI 84 at ¶ 11. In this case, given that the personal emails provide no insight into the affairs of government, the public's interest in disclosure must be overcome by the public's interest in protecting its citizens' privacy and reputational rights because, absent any job nexus, the public has no legitimate interests in employees' private lives.

Wisconsin has a strong tradition of protecting the privacy and reputational rights of its citizens. *See Owens*, 28 Wis. 2d at 685; *see also Newspapers, Inc. v. Breier*, 89 Wis. 2d 417, 432, 279 N.W.2d 179, 186 (1979) ("[t]he extent of harm to individual reputations by release of certain records should be considered"); *Armada Broadcasting, Inc. v. Stirn*, 183 Wis. 2d 463, 475, 516 N.W.2d 357 361 (1994) ("Protection of a citizen's good name is a proper concern of the state.") That tradition extends to protecting Wisconsin's citizens' privacy interest in

their personal emails. The emails in this case were intended to be private correspondence. The Teachers sent the emails with the understanding that they were allowed to use the District's computer system for personal use. (R. 13, A-Ap. 113). The members of the public who sent and received emails from the Teachers expected the contents of their personal emails to remain private. For example, some of the emails contain bank account numbers and personal health information. Both the Teachers and the members of the public who communicated to them could not have imagined that their personal emails would be released for the entire world to see.

Their privacy rights should not be trumped in this case by the presumption of openness in the Public Records Law. There is no public interest served by disclosing purely personal emails. As argued above, a fundamental purpose behind the Public Records Law is to inform the public regarding the acts of government. Wis. Stat. § 19.31. The emails have nothing to do with any governmental business. The Wisconsin Supreme Court has declined to release records when doing so would offer little information regarding the official acts of government. *Morke v. Record Custodian, Department of*

Health & Social Services, 159 Wis. 2d 722, 465 N.W.2d 235 (1990).

Courts in other jurisdictions have also declined to release private information that reveals little or nothing about governmental acts. In *State ex rel. McCleary v. Roberts*, 725 N.E.2d 1144, 1147 (Sup. Ct. Ohio 2000), the court declined to release the personal information regarding children who used the city's recreational facilities, in part, because the purpose of shedding light on governmental affairs was not fostered by the disclosure of information about private citizens that revealed little or nothing about the government's conduct. In *Kallstrom v. Columbus*, 136 F.3d 1055, 1064-65, the Sixth Circuit Court of Appeals exempted from disclosure certain personal information contained in law enforcement officers' personnel files. In *United States Department of Justice v. Reporters Committee For Freedom Of The Press*, 489 U.S. 749, 780, 109 S. Ct. 1468, 1485 (1989), the United States Supreme Court prohibited the release of information under the Freedom Of Information Act, in part, because it reasoned that the invasion of a person's privacy is unwarranted when its offers no official information about the governmental authority.

The protection of personal information is even more critical in this age of technology. As the court in *McCleary* recognized, "the advent of the Internet and its proliferation of users has dramatically increased, almost beyond comprehension, our ability to collect, analyze, exchange, and transmit data, including personal information." 725 N.E.2d at 1149. This is the era of instant access to information. If the emails are released, they could be posted on the Internet and potentially transmitted to hundreds of thousands of people. The Court should not condone the invasion of Wisconsin's citizens' privacy to this magnitude. The Court should enjoin the release of the personal emails and order the District to redact all personal, non-governmental business from the business emails prior to their release.

III. IN THE ALTERNATIVE, THE COURT SHOULD ORDER THE DISTRICT TO REDACT THE PERSONAL TEXT

The Teachers vehemently dispute that the purely personal emails should be released under the law. However, if the Court finds that the emails are subject to release, then the Teachers ask this Court to order the District to redact the text of the personal emails. The circuit court hypothesized that the District may have a concern about the extent of the Teachers' use of the email and the amount of

time that was taken up by the email use. (R. 13, A-Ap. 115, p. 15). However, the District never made any such allegations. (R. 13, A-Ap. 113-114, pp. 13-14). In any event, the public does not need to read the text of the personal emails, or even know to whom the emails were sent, in order to see if the Teachers have followed school policy. The public would only need to see the times and dates that the Teachers sent the emails. The content and recipients of the emails are irrelevant.

The fundamental purpose behind the Wisconsin Public Records Law is to inform the public regarding the acts of government. Wis. Stat. § 19.31. At the same time, Wisconsin has a strong tradition of protecting the privacy and reputational rights of its citizens. *See Owens*, 28 Wis. 2d at 685; *see also Newspapers, Inc. v. Breier,* 89 Wis. 2d 417, 432, 279 N.W.2d 179, 186 (1979) ("[t]he extent of harm to individual reputations by release of certain records should be considered"); *Armada Broadcasting, Inc. v. Stirn,* 183 Wis. 2d 463, 475, 516 N.W.2d 357 361 (1994) ("Protection of a citizen's good name is a proper concern of the state.") Redacting the text of the personal emails, along with the name of the recipient or sender if not a Teacher, would allow the public to receive information about when the Teachers were sending the emails, while at

the same time, protecting the privacy of the Teachers and any recipients in the content of their personal emails. This would allow the Court to balance the public's interests in disclosure with the public's interest in protecting its citizens' privacy interests.

CONCLUSION

While there is a presumption favoring disclosure, the Public Records Law is not limitless. The legislature created an express definition of the records that are subject to release, and personal emails do not meet that definition. Where other courts have spoken on this very question, they have concluded that purely personal emails are not subject to release. This Court should likewise find that purely personal emails are not records under the law.

However, even if they are records, the policy objectives of the Public Records Law would not be served by release here. The public has little to gain from reading the personal emails of its teachers where there are absolutely no allegations of misconduct. Enjoining the District from releasing these emails serves that policy and preserves the integrity of the Public Records Law. The Court should enjoin the District from releasing the

personal emails or, in the alternative, order the District to redact all personal text before they are released.

Respectfully submitted this 10th day of July, 2008.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a monospaced font. The length of this brief is nineteen (19) pages.

Respectfully submitted this 10th day of July, 2008.

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