COURT OF APPEALS
STATE OF WISCONSIN
DISTRICT IV

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

Plaintiffs-Appellants,

v.

WISCONSIN RAPIDS SCHOOL DISTRICT AND ROBERT CRIST

Defendants-Respondents,

and

DON BUBOLZ,

Intervenor-Respondent.

Appeal No. 2008AOP000967

Circuit Court Case No. 07CV304

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

**BRIEF OF DEFENDANTS-RESPONDENTS WISCONSIN RAPIDS SCHOOL DISTRICT AND ROBERT CRIST**

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August 20, 2008

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## ISSUES PRESENTED

(1) Whether correspondences on public employee's government-owned computer system are public records regardless of whether the contents of the email correspondences are purely personal or related to the conduct of official business.

(2) If the first issue is resolved in the affirmative, does the public's interest in maintaining the privacy of such correspondences outweigh the public records law's presumption in favor of disclosure?

The Circuit Court resolved the issues as follows:

(1) As to issue one, the court found that the emails were public records.

(2) As to issue two, the court found that the public's interest in non-disclosure did not outweigh the presumption in favor of disclosure and thus ordered disclosure.

## STATEMENT OF ORAL ARGUMENT AND PUBLICATION

Respondent does not feel that oral argument will serve to better inform the court with respect to the issues presented and the relevant legal issues. Respondent does believe that publication of this opinion is important because there are currently no published Wisconsin court

opinions addressing the issues presented. With the enormous volume of communications accomplished through electronic means by public employees, the outcome of this case will have application statewide to all public employees and could provide much needed guidance to public employers statewide.

## I. RESPONDENT ACTED AS CUSTODIAN OF RECORDS TO APPLY WISCONSIN'S PUBLIC RECORDS STATUTE TO THE REQUEST IN THIS MATTER AND DETERMINED THAT EMPLOYEE EMAILS ARE RECORDS AND THAT THE PRESUMPTION OF ACCESS WAS NOT OVERCOME BY ANY COUNTERVAILING PUBLIC INTEREST.

The Wisconsin Rapids School District, and the District Administrator, Robert Crist, are the custodians of the records at issue in this matter. As records custodians, they must evaluate each request from the starting point that a record within their possession is subject to public inspection. *See* Wis. Stat. § 19.31 ([public records law] shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business. The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied."); Wis. Stat. § 19.35(1)("Except as otherwise provided by law, any requester has a right to inspect any record.").

Once the custodian establishes that it holds records responsive to a request, it must determine whether a statutory or common law principle nonetheless prohibits disclosure. Wis. Stat. § 19.35(4).

In this matter, the custodian, Respondent, evaluated the request and determined that it did hold records responsive to the request (to wit, records of email

correspondences sent and received on the named teachers' district email accounts); and that no countervailing principle required refusal to disclose.[1]

### A. Respondent determined that teacher email accounts and their contents are public records subject to disclosure pursuant to a request under Wis. Stat. § 19.31, et. seq.

Wisconsin statute section 19.32(2) defines the term "record" as that term is used throughout the public records statute. The definition of record is extremely broad with few limitations. The definition includes material that is (1) written, drawn, spoken, printed, visual or electromagnetic information that is preserved regardless of physical form; and (2) being kept by an authority. Wis. Stat. § 19.32(2). Clearly, written email communication that passes through the District's (the "authority") email system and is archived in that system meets the initial components of the definition of what constitutes a record. The communications are both preserved communications and are being kept by the authority.

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[1] The District has from the very beginning stated that it would redact any information contained in those emails that was confidential and protected from disclosure, specifically this includes any student record information and any personal identifiable information, such as social security numbers, bank account numbers, etc. This redaction determination is likewise reflected in the circuit court's order.

The Association in this matter argues that the District did not have to retain the purely personal email records of teachers under Wis. Stat. 16.61(2)(b) as those records are not created "in connection with the transaction of public business." Assoc. Br. at 7. The Association's discussion is irrelevant to the matter before the court in this case and it is a circular argument that requires the very conclusion of what constitutes a record that the Association is litigating in this case. In effect, this is what the court is being asked to determine. The position is irrelevant because, regardless of whether the District had to maintain the teachers' emails as records, it did so. Once those emails were maintained by the District, they continued to be records of the district and subject to the public records statutes. Whether a record must be maintained and whether one is subject to release are two entirely different issues. *See State ex rel. Gehl v. Connors,* 2007 WI App 238, ¶ 13, 306 Wis. 2d 247, 742 N.W.2d 530.

The Association seeks to connect the language and purpose of the record retention statute to inform the scope of the records statute. This raises some of the practical complications with conducting business in the age of rapid

technological communications that automatically create retainable copies. First, the discussion raises a practical issue: it is simply not feasible to review each and every electronic communication sent and received on the District's email system to determine whether the communication is personal or relates to the conduct of its business. Addressing this issue in the context of retention, rather than pursuant to an actual request, would mean reviewing each and every single email, sent or received on the system. This would certainly be a monumental task and could result in the destruction of records that ought to have been maintained.

To a great extent the Association's position in this regard also begs the very question at issue here - what is a record created in the conduct of business? Is it a record created in the furtherance of official business of the entity or is it much broader to include any record created with the entity's resources and/or on public time? This is the crux of the issue before this court and one that cannot be answered purely by resort to the records retention statute.

We now turn back to the review process performed by the District in this matter. The District determined that

it did maintain the emails that were requested. It then turned to the definition of "record" within the applicable statute, Wis. Stat. § 19.32(2). The Association essentially submits two methods of parsing the language of this statutory section to reach the determination that personal emails of teachers are not records. First, the Association points to the following sentence:

"'Record' does not include drafts, notes, preliminary computations and like materials prepared for the originator's personal use"

Wis. Stat. § 19.32(2).

Respondent, in evaluating the request, simply reviewed the statutory language. The language cited above is inapposite to the question at issue because, the emails were not prepared for the teachers' own personal use. The emails were communicated by or to another party and thus were never solely for their own personal use. The statutory section refers to the personal notes or drafts maintained by the public employee. For example, in *State v. Panknin*, 217 Wis. 2d. 200, 209-210, 579 N.W.2d 52 (Ct. App. 1998) the court held that notes maintained by a judge in a criminal matter before that judge are not public records. The notes were held for the purpose of

formulating a decision and for the judge's own personal reflection. *Id.* Such is not the case with the emails at issue here. First, there is no indication that they are notes for any larger purpose or that they are drafts of some not yet completed final composition. They are final form communications to other persons and as such are not for their own personal use and reflection and thus are not excluded from the statutory definition of records. In addition, and perhaps most significantly, the communications were transmitted through the District controlled email system which archives those communications within the District records retention structure. Accordingly, they ceased to be purely the personal notes or drafts of the writer, because they now belong to and are under the exclusive control of the District. It is this fact that distinguishes teacher emails from a handwritten grocery list in a desk drawer.

Second, the Association points to the following clause within the definition of "Record" as a basis to exclude the emails at issue:

"'Record' does not include materials which are purely the personal property of the *custodian* and have no relation to his or her office."

Wis. Stat. § 19.32(2).

This language also fails to resolve the issue, because the individual teachers in this case are not "custodians". Custodians are designated by Wisconsin statute section 19.33 to include elected officials and their designees. Wis. Stat. § 19.33 et seq. Individual teachers within the school district are not record's custodians. Whether these emails "have no relation to" the professional duties of the teachers is also a questionable position. It is the use of public resources at issue that places the records in the position of a record subject to disclosure. The public has an interest in monitoring how the resources it finances are used by the public employees that use them. *See Zellner v. Cedarburg Sch. Dist.*, 2007 WI 53, ¶¶ 45-58, 300 Wis.2d. 290, 731 N.W.2d 240. In that sense, the teachers' use of their district computers, regardless of whether school policy allows for reasonable personal usage, connects that usage to the teachers' public employment. Again, as noted previously, the District retains the emails through its archiving and retention system. These emails then cannot be said to be purely the teacher's personal property.

In reviewing the applicable statutory provisions, the District determined that the emails were records.

Respondent began its required review of the request from the presumption of openness and access, and concluded that nothing within the exclusions from the term "Record" pertained to these emails with sufficient clarity to overcome that presumption.

### B. The District determined that the Public Interest in Disclosure and the Presumption of Disclosure Are Not Outweighed by The Public Interest in Not Disclosing the Teachers' Emails.

Once the District determined that no statutory exclusion or exemption prohibited it from disclosing the records sought, the District then performed the common law balancing test. *Linzmeyer v. Forcey*, 2002 WI 84 ¶¶ 10-20, 254 Wis.2d. 306, 646 N.W. 2d 811. The presumption in favor of disclosure of records is "one of the strongest declarations of policy to be found in the Wisconsin statutes." *Zellner*, 2007 WI 53, ¶ 49. To overcome this presumption, there must be compelling public interest in maintaining the confidentiality of the requested materials. *Local 2489, AFSCME, AFL-CIO v. Rock County*, 2004 WI App 210, ¶¶ 21, 277 Wis.2d. 208, 689 N.W.2d 644. The individual record subject's personal embarrassment is not sufficient to overcome the presumption of disclosure. *Linzmeyer*, 2002 WI 84, ¶ 34-35. The court must look at the

public detriment arising out of the failure to protect the individual employee's personal privacy interests. *Id.*

In the instant matter, it is difficult to conceive of a public interest in protecting the privacy interest of individual teachers who choose to use their district-owned computers to engage in personal communications, with the exception of otherwise protected items which would be redacted (social security numbers, bank account numbers, etc.). While it may be true that public access to those records in many cases is of limited value, the reality is that the presumption is on the side of disclosure. As the authority over the records, it is the District's responsibility, not to determine if there exists sufficient public interest in access to the records, but rather to determine whether sufficient public interest in not disclosing the records overcomes the presumption towards disclosure. The Association's analysis puts the required process on its head and requires records requestors to establish that their request serves some public interest. The public records statute in Wisconsin, for better or for worse, is not designed in that fashion. In fact, the statutes state that a requestor need not state his or her purpose for requesting the records. Wis. Stat. §

19.35(1)(i). Whether a request, therefore, is motivated by some greater public interest is not relevant to the custodian's review of whether the requested records are in fact records subject to disclosure.

The Wisconsin Supreme Court stated the following:

> Finally, although we recognize the importance of protecting privacy and reputation interests, applying the common-law balancing test articulated by this court in *Linzmeyer*, we hold that the presumption of complete public access, based on a public policy determination that records should usually be open for review, outweighs the public's interest in protecting privacy and reputation interests of a citizen such as *Zellner* in this case.

*Zellner*, 2007 WI 53, ¶ 58. (Citation omitted).

From the above language of the Supreme Court, the District felt it was compelled to conclude that Wisconsin's tradition and public policy of maintaining strong privacy rights of its citizens did not overcome its even stronger policy of access to records of governmental entities. In that sense, whether the communications emanated from within or from outside of the entity, their retention within the District's system made them a record subject to disclosure. The District then could not in good faith determine that some public interest prevented their disclosure.

It may be appropriate - even wise - for the legislature to specifically exempt certain email communications sent and/or received by public employees from public records. As the law currently stands however, the District felt the only responsible conclusion was that there is insufficient basis for a records custodian to exclude emails such as those in this case from disclosure, given the law's presumption in favor of disclosure.

## II. THE ASSOCIATION'S ARGUMENT THAT THE CIRCUIT COURT'S DECISION WILL INCREASE COSTS AS IT REQUIRES GOVERNMENTS TO SORT THROUGH EMAILS IS MISLEADING.

The Association argues in its brief that the court ought to prevent the disclosure of personal emails of public employees due to the cost of maintaining, sorting, and storing the communications such a decision will create. Assoc. Br. at 12. It is unclear whether this is another purported pubic interest in non-disclosure argument or merely an invitation for the court to adopt a cost-reduction analysis to determine access under the public records law. In either event, the position misses the mark.

If "purely personal" email correspondences are not public records, the District would have to either (1) review all email correspondences to determine those that

are personal and those that are business related to determine what to retain and what to destroy - an immensely expensive proposition to say the least; or (2) review all such communications responsive to a request to determine which are purely personal and which are business related. In the case of the latter process, the district would have to review all of the communications as it currently does (no cost reduction) and would be making decisions about what is personal and what is business-related, which can often be a very difficult distinction to make. Finally, it is the reality that many communications contain a mix of personal and professional communications thus requiring review and redaction in any event.

## III. WHETHER A RECORD CONTAINS A MIX OF MATERIALS SUBJECT TO DISCLOSURE AND NOT SUBJECT TO DISCLOSURE IS NOT A BASIS TO WITHHOLD THE ENTIRE RECORD.

The Association's brief suggests that disclosure of the emails at issue is necessary because these correspondences contain or may contain personal information, such as bank account numbers, and student record information. Assoc. Br. at 14. Both the District's initial decision and the circuit court's order stated that such information will be redacted prior to disclosure. This concern is not a dispositive consideration. This

court, as the circuit court before it, should address this concern by acknowledging the right of the custodian to redact such information in the event it is contained within the requested material.

## IV. CONCLUSION

Respondent's position in this litigation is one simply of recounting the rationale for its actions in responding to a request for access to its records under Wisconsin's public records laws. The District did not conclude that the emails at issue could appropriately be excluded from the statutory definition of "Records" and did not feel that there was a significant public interest in non-disclosure that outweighed the legislature's and the courts' consistent reiteration of the strong presumption in favor of access.

Finally, the District considered the Supreme Court's decision in *Zellner* to be instructive. Although factually very different, the case does stand for the proposition that access to government records also serves the purpose of enabling the population to monitor its public employee's usage of taxpayer funded resources. In this case, District-owned and publicly funded email accounts are at issue. In *Zellner*, inappropriate internet usage and

resulting disciplinary action was at issue. In both cases, the fundamental issue is the quality of a public employee's usage of the publicly funded resources at his or her disposal in a position of public employment.

The District could not determine that any statutory or common law principle precluded disclosure. As such, it was compelled to conclude that it is required to err on the side of disclosure. The type of technology at issue makes this a difficult case and one that carries significant implications regarding how public entities conduct business. However, as the records custodian, the District simply was not in the position to pronounce the appropriate public policy for the state's public records laws. That is the responsibility of this court and/or the state legislature.

Dated this 20th day of August, 2008

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**FORM AND LENGTH CERTIFICATION**

I hereby certify that this brief conforms to the rules contained in §809.19(8)b) and (c) for a brief produced with a monospaced font.

The length of this brief is sixteen (16) pages.

Respectfully submitted this 20th day of August, 2008.

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**CERTIFICATE OF SERVICE**

The undersigned, an attorney, hereby certifies that he has caused three (3) true and correct copies of the foregoing Brief and Appendix to be served upon all counsel of record via first class mail as follows:

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