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

REPLY BRIEF AND APPENDIX OF PLAINTIFFS-APPELLANTS TO THE DEFENDANTS-RESPONDENTS WISCONSIN RAPIDS SCHOOL DISTRICT AND ROBERT CRIST'S BRIEF AND INTERVENOR DON BUBOLZ'S BRIEF

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INTRODUCTION

While the Wisconsin Public Records Law contains a presumption supporting disclosure, that presumption is far from absolute. When the public policy behind the Public Records Law would not be served by disclosure and, instead, is weighed down by a competing public policy, the presumption fails. This is one of those cases.

The Wisconsin Rapids School District (the "District") and Mr. Bubolz are asking this court to find that any document or record created with a government resource must therefore be a public record, but that is not the law. Rather, the content of a document determines if it is a "record" and therefore subject to release. Here, the content of the emails are clearly personal in nature and have nothing to do with the teachers' official duties. As a result, they are not public "records" under the law.

However, even if these emails are considered records, the public interest in protecting privacy and reputational interests outweighs any interest in disclosure. The public would not gain any knowledge about the official acts of its government by ascertaining the personal information in these emails, such as dinner preparations, child care arrangements and off-duty social plans. However, the sender's and receiver's privacy interests would be severely damaged. Given the imbalance in weighing these interests, any presumption favoring disclosure is overcome. The court should enjoin the District from disclosing the personal

emails, or in the alternative, order the District to redact the personal content prior to release.

ARGUMENT

I. A PERSONAL EMAIL CREATED ON A SCHOOL COMPUTER IS NOT A RECORD UNDER THE WISCONSIN PUBLIC RECORDS LAW

As the record custodian, the District's first step after receiving the public records request for all of the teachers' email should have been to determine whether the Public Records Law applied to the personal emails by reviewing the statutory language of the law, and then any statutory and common law exceptions. *Linzmeyer v. Forcey,* 2002 WI 84, ¶ 10, 254 Wis. 2d. 306, 646 N.W.2d. 811.

When examining the law and its exceptions, it is evident that the legislature intended that personal materials are not records under the Wisconsin Public Records Law. The Wisconsin Supreme Court has instructed 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 provide the public with "the greatest possible access to information concerning the affairs of government and official acts of those officers and employees who represent them." Wis. Stat. § 19.31 (emphasis added). In addition, the law excludes "materials prepared for the originator's personal use" and "materials which are personal property of the custodian and have no relation to his or her office." Wis. Stat. § 19.32(2). Moreover, for the purposes

of the government's duty to retain public records, Wisconsin law defines public records as materials that are "made, or received by any state agency or its officers or employees in connection with the transaction of public business. . . ." Wis. Stat. § 16.61 (2)(b) (emphasis added). Reading these statutes in harmony, it is evident that the legislature meant to exclude personal items from disclosure under the law.

The District misstates the law when it argues that the court should not harmonize the records retention statute with the Public Records Law and that once the District retained the personal emails on its system, they were subject to the Public Records Law. (District Brief, p. 5). Simply maintaining a document does not make it a public record. The document must still meet the law's definition to be a public record. For example, under the law, drafts are not public records. Wis. Stat. § 19.32(2). If the District maintained a draft document, it would not need to produce it pursuant to a public records request simply because it possessed the document. The same should hold true here.

The District argues that even though the law excludes material prepared for the originator's personal use, the emails are not for the teachers' personal use because they were archived on the District's computer system. Wis. Stat. § 19.32(2). (Brief at 8). However, as argued in the initial brief, it is not the medium that determines 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. For example, suppose the judge in *Panknin* had written his personal notes on his computer, instead of a legal pad, and that the notes were archived on the government's computer system. *See State v. Panknin*, 217 Wis. 2d 200, 212-213, 579 N.W.2d 52 (finding that a judge's personal notes were not a public record). That should not transform his personal notes into public records simply because they were in an electronic format that the government happens to store.

The District argues that the legislature has not created an explicit exception for personal emails (District Brief at 13), but the legislature enacted the law in 1983, well before the Internet and emails, so it is doubtful they could have anticipated the government collecting and maintaining personal communications such as email. *See* Wis. Stat. § 19.31. Given the legislative intent to exclude personal materials from the Public Records Law, the court should find that purely personal emails are not public records subject to release under the Public Records Law.

Moreover, a finding that these emails are not public records is sound public policy as it would cost the taxpayers more to have the government store and maintain these "records." The District discounts this fact, but the

Wisconsin Department of Administration's ("DOA") own policy entitled Draft Standard For Retention of Electronic Mail Public Records instructs that "unnecessary electronic mails messages should be deleted to avoid excess accumulation and demand for storage on electronic mail servers." *See* www.doa.state.wi.us/docview.asp?docid=6072&locid=0.[1] (A-Ap. 157-161). The DOA also instructs that materials that do not contribute to an understanding of department operations or decision-making processes and materials that have no substantial programmatic value are not records. *See* www.doa.state.wi.us/RecordsQA_Quizzes/RecordsQA/No-non.asp. (A-Ap. 162-163).

The District argues that personal emails must be deemed public records because otherwise it would be too burdensome to review all emails for personal content and to redact the personal contents from emails (Brief at 14), but the Wisconsin Supreme Court held in *Osborn v. Board of Regents* that the burden of redacting information cannot trump a custodian's responsibility under the law. 2002 WI 83, ¶ 46, 254 Wis. 2d 266, 647 N.W.2d 158. The court should find that the personal emails are not public records as defined by the law.

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[1] The court may take judicial notice of this fact as its accuracy can be readily verifiable by going to the DOA's website. Wis. Stat. § 902.01(2); *see also State v. Harvey*, 242 Wis. 2d 189, 197, 625 N.W.2d 892, 896 (Ct. App. 2001).

II. PROTECTING WISCONSIN CITIZENS' REPUTATIONAL AND PRIVACY INTERESTS OUTWEIGHS THE PUBLIC BENEFIT IN RELEASING THE PERSONAL EMAILS

If the Court disagrees, and finds that purely personal emails are public records, then the Court should still enjoin release under the Public Records Law. The District essentially takes the position that the presumption in favor of release automatically obligates them to disclose the personal emails. (District Brief at p. 11). The District's argument ignores Wisconsin law that other public policy reasons can trump the presumption of disclosure. *Woznicki v. Erickson*, 202 Wis. 2d 178, 192-93, 549 N.W.2d 699 (1996) (finding that the protection of privacy and reputational interests may favor the non-release of records).

The District makes a conclusory statement that, on balance, the personal emails are subject to release, even though it concedes that the emails are of "limited value." (District Brief at p. 1). The teachers agree that there is no public interest served by releasing private, personal emails. The public's knowledge regarding a teacher's dinner planning, child care arrangements or off-duty social plans serves no public interest. Releasing these emails cannot accord with the fundamental public policy of the Public Records Law which is to inform the public about official acts of the government. *See* Wis. Stat. § 19.31 (emphasis supplied).

Mr. Bubolz argues that he needs the emails to monitor the teachers' email to see which ones are personal (Bubolz

Brief at 3), but the legislature entrusted the records custodian and the courts with that task. Wis. Stat. §§ 19.31-19.39. Mr. Bubolz gives the example of a principal observing an employee, but the legislature instructed that employees' evaluations are not public records. Wis. Stat. § 19.36(10)(d). In any event, as the Association argued in its initial brief, if the Court accepts his argument, he only needs to see the time an email was sent and the number of emails, he does not need to see the personal content or the recipient of the emails.

Mr. Bubolz further argues that he needs to see if the teachers were emailing regarding school board candidates (Bubolz Brief at 3), but any emails regarding school board candidates are not at issue in this case because those emails would not be purely personal emails. The Association has not objected to the release of any of the teachers' emails relating to school business.

There is no public interest in disclosing these emails, but there is a compelling public interest in protecting the privacy interests of Wisconsin's citizens in their personal emails. Mr. Bubolz and the District argue that the teachers waived all expectation of privacy by using a District-owned computer to send emails (District Brief at 11, Bubolz Brief at 6), but the District's computer policy merely states that the employees' activities may be monitored. It says nothing about the Public Records Law. It is one thing to email with

the understanding that the District's computer tech might monitor your emails, it is quite another to imagine a private citizen obtaining your personal emails and potentially posting them on a website for the world to read.

The District argues, relying on *Linzmeyer*, that an individual record subject's personal embarrassment is not sufficient to overcome the presumption of disclosure, but *Linzmeyer* involved a teacher's alleged misconduct. 2002 WI 84, 254 Wis. 2d. 306, 646 N.W.2d. 811. (District Brief at 10). Here, there are no allegations of misconduct. Moreover, this case also involves some emails of private citizens who sent emails to the teachers at school. There is a significant public interest in protecting their privacy rights as well.

The District's reliance on *Zellner* to the contrary is misplaced. *Zellner v. Cedarburg Sch. Dist.*, 2007 WI 53, 300 Wis. 2d 290, 731 N.W.2d 240 (2007). (District Brief at 9). In *Zellner*, contrary to the District's assertions, the Court never established a public interest in monitoring how government resources are handled; instead, the Court found a public interest in receiving information regarding allegations of teacher misconduct and how the government handled disciplinary actions. *Id.* at p. 53. *Zellner* involved a public records request for a compact disc and memo regarding adult images allegedly found on a teacher's computer after the teacher had been fired for viewing adult

images for one minute and seven seconds on a weekend. *Id.* at ¶ 9. The Court determined that the CD and memo were public records, and noted that disclosure was supported by the strong public policy that the public has a right to know about allegations of teacher misconduct and how they are handled. *Id.* at ¶ 53. *Zellner* does not apply in this case because here, the District has appropriately not made any allegations of misconduct nor has it taken disciplinary action against the teachers. Accordingly, because the privacy and reputational rights of the senders and those mentioned therein outweigh any public interest that might be gained by release, the emails should not be released.

The fact that this case involves emails should not change personal privacy rights. If a teacher makes a personal phone call at lunch time with a District-owned phone, she does not waive all expectation of privacy in her phone conversation. *See Fischer v. Mt. Olive Lutheran Church*, 207 F. Supp. 2d 914 (W.D. Wis. 2002) *citing Watkins v. L.M. Berry & Co.*, 704 F.2d 577, 582 (11th Cir. 1983) (finding that an employee had an expectation of privacy in personal calls and an employer had to cease monitoring them). If a teacher receives a personal letter at school in her school mailbox, she should not waive all expectation of privacy in her "snail mail." Likewise, employees should not forfeit all rights to privacy in their personal emails.

Mr. Bubolz's argument that if the teachers were sending personal emails at school that did not relate to official

duties, then they should not be paid is not reasonable. (Bubolz Brief at 4). Not only does the District's policy allow the teachers to send personal emails, but the reality of today's world is that employees are spending more and more time at work. Many government employees, especially teachers, cannot leave work to attend to personal business, and it often difficult to make personal calls at work because of work related demands. Using the government-owned email is often a simpler, quicker way to take care of personal business that must be accomplished during the work day. Teachers generally arrive for school much earlier than their contract day, they have a lunch period, and they stay at school well after the contract day in order to grade papers, call parents, meet with students, prepare their lesson plans, etc. Thus, teachers can send personal emails from work without taking anything away from their assigned duties.

In an attempt to bolster his argument, Mr. Bubolz relies heavily on an article written by the undersigned in a publication to WEAC's members, (Bubolz Brief at 3) but that article discussed general advice to WEAC's members, it did not address the legal issues in this case, such as the distinction between personal and business emails, and should not be relied upon by this court, just as courts do not rely on or admit evidence regarding subsequent remedial measures. Wis. Stat. § 904.07.

The teachers here did nothing wrong. They used the District-owned computers to take care of personal business in accordance with the District's computer policy. While the teachers understood that the computer policy stated that the District could monitor their emails, they did not intend to check all of their privacy rights at the classroom door. It would trample on all public employees' privacy rights to allow any person to request and receive personal emails without any restraint on what that person could do with those emails after receipt, especially in this day and age of the internet, blogging and myspace. The court should find that, under the balancing test, the personal emails are not subject to release.

CONCLUSION

Disclosure under the Public Records Law is not limitless. The legislature intended that, as a general rule, government business material should be disclosed, but its intent to exclude personal information from release is evident. Courts in other jurisdictions that have addressed this issue have agreed that personal emails are not public records, and neither the District nor Mr. Bubolz have cited one case to the contrary. This court should find the same.

However, even if the court determines that the personal emails are public 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 public employees where there are absolutely no

allegations of misconduct, while Wisconsin citizens' privacy rights have much to lose. 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 5th day of September, 2008.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this reply 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 twelve (12) pages.

Respectfully submitted this 5th day of September, 2008.

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