STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

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

Plaintiffs-Appellants,

v.

Case No. 2008AP000967AC
Circuit Court Case No. 2007CV000304

WISCONSIN RAPIDS SCHOOL
DISTRICT AND ROBERT CRIST,

Defendants-Respondents,

and

DON BUBOLZ,

Inervenor-Respondent.

AMENDED OFFICE OF MILWAUKEE CITY ATTORNEY NON-PARTY AMICUS BRIEF ON THE MERITS

APPEAL FROM THE CIRCUIT COURT FOR WOOD COUNTY, THE HONORABLE CHARLES A. POLLEX, ADAMS COUNTY CIRCUIT COURT JUDGE PRESIDING

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INTRODUCTION

The Office of the Milwaukee City Attorney (City Attorney) advises all City of Milwaukee departments and the Milwaukee Board of School Directors on matters relating to compliance with the Wisconsin Public Records Law. Wis. Stat. §§ 19.31-39. This includes representation of thousands of City and school district employees. A significant portion of these employees are provided with government-owned computers for use at their workplace. City and school policy allow incidental personal use of government computers. In discharging its responsibilities, the City Attorney offers formal and informal legal opinions interpreting the public records law. The City Attorney has consistently advised that personal communications are not "records" as defined by Wis. Stat. § 19.32(2).

The main issue in this case is whether personal e-mails, even when sent and received by government employees on government-owned computer systems, on government time, are "records" as defined under the public records law.

ARGUMENT

PURELY PERSONAL E-MAILS, EVEN WHEN SENT OR RECEIVED ON A GOVERNMENT-OWNED COMPUTER SYSTEM, ON GOVERNMENT TIME, ARE NOT "RECORDS" AS DEFINED BY THE WISCONSIN PUBLIC RECORDS LAW

No Wisconsin court has ruled on whether purely personal e-mails when sent or received on a government-owned computer system, on government time, are "records" as defined by the Wisconsin Public Records Law. This court should clarify the law by ruling that the personal e-mails at issue are not records subject to disclosure. The court should first look at the definition of a "record" under the public records law. A "record" means "any material on which written, drawn, printed, spoken, visual or electromagnetic information is recorded or preserved . . .." Wis. Stat. § 19.32(2). A "record" does not include materials "prepared for the originator's personal use" or "materials which are purely the personal property of the custodian and have no relation to his or her office." Id.

According to the record in this case the e-mails in question are completely personal and have nothing to do with the business of the school district. Accordingly, they should not be treated as "records" under the public records law. They are not subject to analysis as to whether disclosure is appropriate or not under the public records law. They are not "records" and are therefore not subject to disclosure to the public.

Other state courts, with public records laws similar to Wisconsin's law, have ruled that personal e-mails are not records subject to disclosure under their public records laws. The Florida Supreme Court ruled that while e-mail records may be subject to Florida's public records law, all e-mails that are "private" fall outside the definition of a public record because they are not made in connection with the City's official business. Personal e-mails are therefore not subject to disclosure. "Although digital in nature, 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." *State v. City of Clearwater*, 863 So. 2d 149, 153 (Fla. 2003).

The Colorado Supreme Court held that romantic e-mails between two government employees on their work computers were "personal" and were not subject to disclosure under Colorado's equivalent to Wisconsin's Public Records Law, even though the e-mails were exchanged on government time and on government-owned computers. *Denver Publ'g. Co. v. Board of County Com'rs*, 121 P.3d 190 (Colo. 2005). The court held that public records as defined by Colorado's Open Records Act include only those e-mail messages that address the performance of public functions or the receipt or expenditure of public funds. *Id.* at 202.

A Washington court has also ruled that employees' personal e-mail are not public records. The court ruled that when excess use of government

paid work time on personal e-mail was grounds for an employee's discharge the volume of e-mail use was disclosable, although the personal content was not. *Tiberino v. Spokane County*, 13 P.3d 1104 (Wash. Ct. App. 2000).

Similarly, the Arizona Supreme Court has ruled that purely personal e-mails generated and maintained on a government-owned e-mail system are not necessarily public records under Arizona's Public Records Law. *Griffis v. Pinal County*, 215 Ariz. 1, 156 P.3d 418, ¶ 11 (Ariz. 2007). The court ruled that the definition of a public record does not include documents "of a purely private or personal nature. Instead, only those documents having a "substantial nexus" with a government agency's business activities qualify as a public record. *Id.* at ¶ 10.

In a case from the Supreme Court of Idaho, the court ruled that e-mail records are public records if they include information relating to the conduct or administration of the public business and were prepared, owned, or used by a governmental agency. E-mail records were ordered to be released under Idaho's Public Records Law, even though they may have included information relating to a personal relationship, because the records also contained information relating to the conduct and administration of the public agency's business. *Cowles Publ'g Co. v. Kootenai County Bd. of County Com'rs*, 144 Idaho 259, 159 P.3d 896, 899-900 (Idaho, 2007).

There is nothing in the record in this case to indicate that the subject personal e-mails included school business.

In a case of first impression, the Wisconsin Court of Appeals ruled that the personal notes of a trial judge, even when work-related, are not subject to disclosure. The court ruled that such notes are a "voluntary piece of work completed by the trial court for its own convenience and to facilitate the performance of its duties." *State v. Panknin*, 217 Wis. 2d 200, 212, 579 N.W. 2d 52 (Ct. App. 1998). Personal notes, whether those of a judge or any other public employee, and whether kept in electronic format or handwritten format, are not "records" as defined by the public records law. Wis. Stat. § 19.32(2).

There is no evidence in the record that the subject personal e-mails included information relating to the conduct and administration of the government's business. The record is clear that they are purely personal in content. They are not "records." It is not necessary to resort to the balancing test in this case because the e-mails at issue are not "records."

CONCLUSION

The circuit court decision in this case should be reversed because the e-mails at issue are not records and are therefore not subject to analysis or disclosure under the public records law.

Dated and signed at Milwaukee, Wisconsin this 6th day of October, 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), Wis. Stats., for a brief and appendix produced with a proportional serif font. The length of this brief is 1,065 words.

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CERTIFICATE OF SERVICE

Melanie R. Swank, herein certifies that she is employed by the City of Milwaukee as an Assistant City Attorney in the office of the City Attorney, 200 East Wells Street, 800 City Hall, Milwaukee, WI 53202; that on the 6th of October, 2008, she deposited in the United States mail at City Hall in the City of Milwaukee, Wisconsin, and left there to be carried a Office of the Milwaukee City Attorney Non-Party Amicus Brief on the Merits, securely enclosed, the postage duly prepaid, addressed to:

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