Appeal No. 2008AP967-AC **Cir. Ct. No. 2007CV304**

WISCONSIN COURT OF APPEALS
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,

DON BUBOLZ,

INTERVENOR-RESPONDENT.

FILED

April 30, 2009

David R. Schanker
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Vergeront, Lundsten and Bridge, JJ.

Five employees of the Wisconsin Rapids School District appeal an order holding that emails they sent and received, using district email accounts and district-owned computers, are public records subject to release to the public, even if the content of the emails is personal and unrelated to their employment with the district. We certify the appeal to permit the supreme court to determine if the employees' personal emails are public records and, if they are, whether public policy reasons outweigh the public's interest in disclosure. *See* ***Linzmeyer v. Forcey***, 2002 WI 84, ¶¶11-12, 254 Wis. 2d 306, 646 N.W.2d 811.

A citizen sent the district a public records request for emails from the five appellants "from the computers they use during their school work day," over a six-week period. The district subsequently informed the appellants that it intended to comply with the request. The appellants did not object to release of their work-related emails, but commenced this action to enjoin release of their personal emails. The circuit court denied the injunction and ordered release of all the requested emails, including personal emails, subject to deletion of home addresses, home telephone numbers, home email addresses, social security numbers, medical information, bank account numbers and pupil record information.

The district has a written computer use policy that permits employees to use their district email accounts for occasional personal use. Users are advised that the district owns the email accounts and they are not private. The records requester stated to the court that the purpose of his request was to determine if the appellants were violating the "occasional personal use" policy. There is no allegation that any of the five appellants have in fact violated the district's email policies. The requester described his request as a "fishing mission."

The first step in a public records proceeding is determining whether the public records law applies to the requested records by examining the statutory language of the public records law, along with its statutory and common law exceptions. ***Linzmeyer***, 254 Wis. 2d 306, ¶10. The basic definition of a record

subject to disclosure is set forth in WIS. STAT. § 19.32(2) (2007-08),[1] which states in relevant part:

> "Record" means any material on which written, drawn, printed, spoken, visual or electromagnetic information is recorded or preserved, regardless of physical form or characteristics, which has been created or is being kept by an authority.

An "authority" is, broadly speaking, any public agency or office, WIS. STAT. § 19.32(1), and there is no dispute that an email "kept by an authority" is generally a "record" under § 19.32(2) subject to disclosure. However, a "record"

> does not include drafts, notes, preliminary computations and like materials prepared for the originator's personal use or prepared by the originator in the name of a person for whom the originator is working; [or] materials which are purely the personal property of the custodian and have no relation to his or her office …. WIS. STAT. § 19.32(2).

The appellants contend that their personal emails are exempt as "drafts, notes, preliminary computations and like materials prepared for the originator's personal use." The district responds that they are not "drafts, notes or preliminary computations," but instead "final form" compositions, and therefore not exempt under the statute's plain language. The district also contends that they are plainly not exempt as materials prepared for the "originator's personal use" because they are sent to others, and become the property of the district when sent to or from a district email account.[2]

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] The record fails to clarify whether the circuit court's order applies to emails received by the appellants as well as those sent by the appellants. However, both the appellants and the district indicate that to be the case, and we accept it as the case.

If a "personal use" exemption from the public records law does exist for personal emails, there are at present no guidelines to assist in determining when an email would fall into the exempt category. For example, a public employee's email invitation to a family member's birthday would appear to fall into a personal use exemption, but it is not so clear if an email between the same two persons would be exempt as "personal use" if it discussed public business. In the latter case, the employee might intend the email as a personal and private communication, strictly between friends or relatives, but a "personal use" exemption based on content, rather than on the subjective intent of the communicating parties, might nevertheless require disclosure. Clearly, a valuable aspect of the decision in this case, if it were to recognize a public records exemption for personal emails in the first instance, would be to provide a workable set of guidelines for record custodians to apply.

Additionally, the appellants point to the legislature's stated purpose behind the public records law, which 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). Construing WIS. STAT. § 19.32(2) to permit access to personal emails does not, in the appellants' view, advance that purpose. Both the appellants and the City of Milwaukee Attorney's office, in a non-party brief, cite opinions from other jurisdictions holding that emails of public employees are not subject to disclosure under open records laws unless they bear some connection to a public agency's business. However, review of the cited cases indicates that the jurisdictions in question have more restrictive definitions of the public records subject to disclosure than does Wisconsin. *See, e.g.,* ***Denver Pub. Co. v. Board of County Comm'rs of County of Arapahoe***, 121 P.3d 190, 191-92 (Colo. 2005)

(personal emails exempt under statute that limits disclosure to records made, maintained, or kept by a public agency that have a demonstrable connection to the exercise of functions required or involved in the receipt or expenditure of public funds); ***Cowles Pub. Co. v. Kootenai County Bd. of County Comm'rs***, 159 P.3d 896, 900 (Idaho 2007) (emails ordered disclosed under statute that defines public records as those containing information relating to the conduct or administration of the public's business).

If it is determined that the disputed records are public records subject to disclosure, the second step in an open records proceeding is determining, under the public records law balancing test, whether the presumption favoring release is overcome by a public policy interest in confidentiality. ***Linzmeyer***, 254 Wis. 2d 306, ¶11. In the appellants' view, "the public's interest in disclosure [of personal emails] 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." The appellants cite recognition by the supreme court of the State's concern in protecting the reputation and privacy of citizens. *See* ***Armada Broad., Inc. v. Stirn***, 183 Wis. 2d 463, 475, 516 N.W.2d 357 (1994) ("[p]rotection of a citizen's good name is a proper concern of the state."). However, as the appellants recognize, the interest to be balanced is not their personal interest in privacy, but the public's interest in their privacy. *See* ***Linzmeyer***, 254 Wis. 2d 306, ¶31 ("[T]he public interest in protecting individuals' privacy and reputation arises from the public effects of the failure to honor the individual's privacy interests, and not the individual's concern about embarrassment."). Of course, the distinction between private matters and the public business is muddied in this case, because here the purpose of the request was to examine whether the appellants are devoting excessive attention to their

private affairs at the expense of their public duties. In any case, if a balancing test is to be applied on review, it must take place in the context of the circuit court's order, which already protects the appellants' privacy to the extent of excluding substantial personal information.

Whether and to what extent personal emails of public employees are subject to the open records law is a question of first impression in Wisconsin. We believe the supreme court is the appropriate forum to decide this important question.