
THE JOHN K. MACIVER INSTITUTE
FOR PUBLIC POLICY, INC. and
BRIAN FRALEY,
Plaintiffs,

v.

JON ERPENBACH,
Defendant.

Unclassified

Case Code: 30703
Case No. 12-CV-63

**PLAINTIFFS' BRIEF IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION AND STATEMENT OF THE CASE

This is an open records case presenting the issue of whether the custodian of a record may redact information that identifies the author of e-mails sent from one government account to another government account regarding government business. In short, the Plaintiffs ask this Court to rule that the taxpaying public has the right to know which government workers are corresponding with other government workers about government business using public resources.

The Plaintiffs in this case filed an open records request with the Defendant, requesting the production of all correspondence sent or received by the Defendant "regarding the subject of changes to Wisconsin's collective bargaining law for public employees" over a several-week period. The Defendant agreed to produce the requested records, but would first redact "last name[s], personal contact information or other personally identifiable information" from all correspondence. The Plaintiffs insisted on unredacted versions of correspondence from *government* e-mail accounts, although they were willing to accept the redactions on correspondence from private e-mail accounts.

The Defendant refused to produce unredacted copies of correspondence from government e-mail accounts.

The Plaintiffs then filed this lawsuit on February 9, 2012, seeking a writ of mandamus ordering the Defendant to produce “any and all responsive documents originating from a state or local government e-mail account.” The Defendant filed an Answer on April 4, 2012, largely admitting the complaint’s factual averions but raising numerous legal defenses to the Plaintiffs’ claims. The Plaintiffs are now moving for summary judgment on their claims.

PROPOSED FINDINGS OF FACT

1. Plaintiff The John K. MacIver Institute for Public Policy, Inc. is a non-profit corporation organized under the laws of the State of Wisconsin, engaged in news gathering, research, and public education with respect to free markets, individual freedom, personal responsibility, and limited government. (Fraley Aff., ¶2.)
2. Plaintiff Brian Fraley is an adult resident of the State of Wisconsin and the former Communications Director of the MacIver Institute. (Fraley Aff., ¶1.)
3. Defendant Jon Erpenbach is an elected Wisconsin State Senator. (Compl. ¶3; Ans. ¶3.)
4. On March 24, 2011, the Plaintiffs requested, in writing, that the Defendant produce for inspection and copying “all correspondence you have received or sent, (including, but not limited to, letters emails, voice mails, records of phone calls, and logs of in-person meetings) regarding the subject of changes to Wisconsin’s collective bargaining law for public employees . . . between January 1, 2011 and March 23, 2011.” (Compl. ¶6, Ex. A; Ans. ¶6; Fraley Aff., ¶3, Ex. 1.)

5. On April 4, 2011, the Defendant responded in writing, requesting clarification of the Plaintiffs' request. (Compl. ¶7, Ex. B; Ans. ¶7; Fraley Aff., ¶4, Ex. 2.)

6. On April 12, 2011, the Plaintiffs responded to the Defendant's request for clarification. (Compl. ¶8, Ex. C; Ans. ¶8; Fraley Aff., ¶5, Ex. 3.)

7. On April 18, 2011, the Defendant responded in writing, indicating that "a portion" of the request, including e-mails, was ready for pickup at the capitol upon payment of \$1,820.80. (Compl. ¶9, Ex. D; Ans. ¶9; Fraley Aff., ¶6, Ex. 4.)

8. In his April 18, 2011, response, the Defendant indicated he was "redacting only the last name, personal contact information or other personally identifiable information" of citizens who had written correspondence responsive to the record request because both "the personal citizen information you seek is not subject to Wisconsin's Public Records Law" under various constitutional provisions and provisions of the Senate Policy Manual, and because "the public interest in disclosing this personal citizen information is outweighed by the public interest in protecting the confidentiality of that information." (Compl. ¶9, Ex. D; Ans. ¶9; Fraley Aff., ¶6, Ex. 4.)

9. On or about April 20, 2011, the Plaintiffs retrieved the proffered records from the Defendant. (Fraley Aff., ¶7.)

10. Upon reviewing the records, Plaintiffs were able to ascertain – through incomplete redaction – that a number of the records appeared to have been sent from government accounts, e.g., e-mail addresses ending with .gov or .edu. (Fraley Aff., ¶7.)

11. On August 15, 2011, Richard M. Esenberg, counsel for the Plaintiffs, sent the Defendant a letter challenging his redaction of e-mail addresses from "government e-mail

accounts” from the requested records as contrary to the Open Records Law. (Compl. ¶10, Ex. E; Ans. ¶10; Eisenberg Aff., ¶¶1-3, Ex. 1.)

12. On August 29, 2011, the Defendant sent Attorney Eisenberg an e-mail acknowledging the August 15, 2011, letter. (Compl. ¶11, Ex. F; Ans. ¶11; Eisenberg Aff., ¶4, Ex. 2.)

13. On October 3, 2011, the Defendant sent Attorney Eisenberg an e-mail requesting clarification regarding whether the Plaintiffs sought unredacted correspondence from only state e-mail accounts or from all government e-mail accounts. (Compl. ¶12, Ex. G; Ans. ¶12; Eisenberg Aff., ¶5, Ex. 3.)

14. On October 4, 2011, Attorney Eisenberg sent the Defendant an e-mail indicating that the Plaintiffs were requesting unredacted correspondence from all government e-mail accounts, including those from “state government e-mail accounts[, and] from those of any local government including school districts and technical colleges [and] UW accounts.” (Compl. ¶12, Ex. H; Ans. ¶12; Eisenberg Aff., ¶6, Ex. 4.)

15. On November 2, 2011, Attorney Eisenberg sent the Defendant a letter noting he had not responded and demanding a response by November 11, 2011. (Compl. ¶13, Ex. I; Ans. ¶13; Eisenberg Aff., ¶7, Ex. 5.)

16. On November 13, 2011, the Defendant responded in writing, indicating that the remainder of the request – 4,707 pages – was ready for pickup at the Capitol upon payment of \$1,004.03. (Compl. ¶14, Ex. J; Ans. ¶14; Eisenberg Aff., ¶8, Ex. 6.)

17. But the Defendant’s position on the redaction of certain information from all of the requested documents did not change. Thus, in his November 13, 2011, response, the Defendant indicated he had “redacted . . . public email addresses of state employees

and other public employees” because “the public interest in disclosing this information is outweighed by the public interest in withholding the information.” (Compl. ¶¶14-15, Ex. J; Ans. ¶¶14-15; Esenberg Aff., ¶8, Ex. 6.)

18. In his November 13, 2011, response, the Defendant wrote that: “My office, like many others, received an overwhelming amount of correspondence [regarding changes to collective bargaining]. We have estimated that we received more than 125,000 contacts to the office in about a five week period.” (Compl. ¶14, Ex. J; Ans. ¶14; Esenberg Aff., ¶8, Ex. 6.)

19. In his November 13, 2011, response, the Defendant gave the following specific reasons for redacting the e-mail addresses of government officials and, more generally, all e-mail addresses:

- a. Under Wis. Const. Art. IV, Secs. 1 and 16, “disclosure of personal citizen information would constitute undue interference with legislators’ constitutional rights and responsibilities, would act as an unconstitutional barrier to free and open communication between legislators and citizens, and would chill free speech and debate in the legislative process”;
- b. Under U.S. Const. Amend. I and Wis. Const. Art. I, Sec. 4, disclosure would “chill[] free speech and debate and operate[] as a prior restraint of rights” and “constitute[] an undue interference with [citizens’] rights to petition [their] government”;
- c. Broad legislative power granted by Wis. Const. Art. IV, Secs. 8 and 10, as evidenced by the Senate Policy Manual and Wisconsin Legislative Council’s Legislator Briefing Book, permits individual legislators to

“choose to withhold or release documents concerning citizens who contact him or her about issues concerning public policy”;

- d. Under the required balancing test, the public interest in “protect[ing] the ability of these citizens to contact their legislators without fear of reprisal, given the highly charged nature of the debate over collective bargaining,” and “protect[ing citizens] so that they feel free to voice their public policy concerns with their legislators,” outweighs the public interest in disclosure. (Compl. ¶¶14-15, Ex. J; Ans. ¶¶14-15; *Esenberg Aff.*, ¶8, Ex. 6.)

STATEMENT OF LAW

D) Wisconsin Law Creates a Broad Presumption of Open Access to Government Records

The Open Records Law, Wis. Stat. §§ 19.31-.39, establishes the public’s right to hold governmental officials accountable and make informed electoral and policy decisions by opening nearly all government files to public inspection. Wis. Stat. § 19.31, entitled “Declaration of policy,” states as follows:

In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them. Further, providing persons with such information is declared to be an essential function of a representative government and an integral part of the routine duties of officers and employees whose responsibility it is to provide such information. To that end, ss. 19.32 to 19.37 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.

The Wisconsin Supreme Court has stated that the Open Records Law “reaffirms that the people have not only the opportunity but also the right to know what the government is doing and to monitor the government.” *Milwaukee Journal Sentinel v. City of Milwaukee*, 2012 WI 65, ¶4, 341 Wis. 2d 607, 815 N.W.2d 357. “Wisconsin’s commitment to open, transparent government rings loud and clear in the [Open] Records Law.” *Id.* Wisconsin “recognizes a presumption of accessibility to public records,” *Nichols v. Bennett*, 199 Wis. 2d 268, 273, 544 N.W.2d 428 (1996), which “reflects the basic principle that the people must be informed about the workings of their government and that openness in government is essential to maintain the strength of our democratic society,” *Linzmeier v. Forcey*, 2002 WI 84, ¶15, 254 Wis. 2d 306, 646 N.W.2d 811.

II) Specific Statutory Procedures Govern Open Record Requests

Wis. Stat. § 19.35(1)(a) and (b) provide that “any requester has a right to inspect any record” and “to make or receive a copy of a record.” “A requester” is defined as “any person who requests inspection or copies of a record,” except for certain incarcerated persons. Wis. Stat. § 19.32(3). “Record,” in turn, is defined as “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.” Wis. Stat. § 19.32(2). An “authority” includes, among other things, any “elected official” “having custody of a record.” Wis. Stat. § 19.32(1).

Upon receiving a “request for any record,” an authority must “as soon as practicable and without delay, either fill the request or notify the requester of the

authority's determination to deny the request in whole or in part and the reasons therefor." Wis. Stat. § 19.35(4)(a). "When an authority withholds a record or part of a record . . . after a written request for disclosure is made, the requester . . . may bring an action for mandamus asking a court to order release of the record." Wis. Stat. § 19.37(1), (a). If "the requester prevails in whole or in substantial part," "the court shall award reasonable attorney fees, damages of not less than \$100, and other actual costs to the requester." Wis. Stat. § 19.37(2)(a).

When reviewing a petition for mandamus to compel complete release of requested records, a court may consider only those reasons for denial (if any) given by the authority or custodian. *Osborn v. Board of Regents of University of Wisconsin System*, 2002 WI 83, ¶16, 254 Wis. 2d 266, 647 N.W.2d 158. The court may not "hypothesize" other reasons for denial or "consider reasons to deny the request that were not asserted by the custodian." *Id.* (citing *Newspapers, Inc. v. Breier*, 89 Wis. 2d 417, 279 N.W.2d 179 (1979)). "If the custodian states insufficient reasons for denying access, then the writ of mandamus compelling disclosure must issue." *Id.* (citing *Oshkosh Northwestern Co. v. Oshkosh Library Bd.*, 125 Wis. 2d 480, 486, 373 N.W.2d 459 (Ct. App. 1985)); *see also Nichols*, 199 Wis. 2d at 275 (refusing to consider a particular argument for withholding a record, because the custodian "did not state it as one of the specified reasons for denying [the requester's] request").

III) E-mails Stored on Government Computers Are "Records" under the Open Records Law

A majority of the Wisconsin Supreme Court has already concluded that e-mails sent to a government account and stored on a government server, regardless of content, meet the definition of a "record" under Wis. Stat. § 19.32(2). *See Schill v. Wis. Rapids*

Sch. Dist., 2010 WI 86, 327 Wis. 2d 572, 786 N.W.2d 177. In *Schill*, the court was asked to determine whether e-mails of a purely personal nature, sent to school district e-mail accounts and stored on school district servers, were accessible under the Open Records Law. *Id.*, ¶7 (Abrahamson, C.J., lead opinion). The lead opinion, which did not garner a majority of votes, concluded that they were not accessible because they were not “records,” but only so long as they did not evince a “misuse of government resources.” *Id.*, ¶¶141-42 (Abrahamson, C.J., lead opinion). The two concurrences and the two dissenters – a majority of justices – *did* conclude that all e-mails sent to school district e-mail accounts and stored on school district servers were “records.” *Id.*, ¶¶149-152 (Bradley, J., concurring); *Id.*, ¶173 (Gableman, J., concurring); *Id.*, ¶188 (Roggensack, J., dissenting, joined by Ziegler, J.). The concurring justices held that these records could be withheld only if they were purely personal in nature and did not reflect the misuse of government resources. *Id.*, ¶172 (Bradley, J., concurring); *id.*, ¶173 (Gableman, J., concurring).¹

IV) Withholding All or a Portion of a Public Record Is Rarely Permissible

Complete access to records may only be denied in two situations: (1) where “a statute [] or common law creates a blanket exception”; or (2) where “the strong presumption favoring access and disclosure is overcome by some even stronger public policy favoring limited access or nondisclosure.” *Hempel v. City of Baraboo*, 2005 WI 120, ¶4, 284 Wis. 2d 162, 699 N.W.2d. 551. When a record contains both disclosable and nondisclosable information, the record must be released with the nondisclosable

¹ The two concurring Justices thus formed a majority of justices – with the lead opinion – for the result that the e-mails at issue would not be released. The dissenters concluded that the balancing test favored releasing purely personal e-mails. *Id.*, ¶188 (Roggensack, J., dissenting).

information redacted. Wis. Stat. § 19.36(6); *Osborn*, 2002 WI 83, ¶45 (“[Wis. Stat. § 19.36(6)] requires the custodian to provide the information subject to disclosure and delete or redact the information that is not.”).

The Defendant has raised no statutory or common law exception, and none exist that are potentially applicable here. There is, for example, no recognized exception for communications to a legislator. Therefore, a lengthy discussion of those exceptions is unnecessary.

If the requested document is a “record,” and no statutory provision or common law exemptions are applicable, it must be disclosed unless “permitting inspection would result in harm to the public interest which outweighs the legislative policy recognizing the public interest in allowing inspection.” *Osborn*, 2002 WI 83, ¶15. This is often referred to as the “balancing test.” See, e.g., *Milwaukee Journal Sentinel v. Wis. Dep’t of Admin.*, 319 Wis. 2d 439, 768 N.W.2d 700 (“The balancing test involves balancing the public interest in disclosure against the public interest in non-disclosure.”). “This test should be applied when the record custodian has refused to produce the record, in order to evaluate the merits of the custodian’s decision.” *Id.*; compare *Zellner v. Cedarburg Sch. Dist.*, 2007 WI 53, 300 Wis. 2d 290, 731 N.W.2d 240 (finding that the public interest in investigating a teacher’s use of school computers to view pornography outweighed the public interest in protecting the teacher’s privacy) with *Hempel*, 2005 WI 120, ¶4 (finding that the public interest in investigating allegations of sexual harassment by a police officer was outweighed by the public interest in protecting the identities of confidential informants and complainants).

In applying this balancing test, there is a “strong presumption” in favor of disclosure, *Linzmeier*, 2002 WI 84, ¶ 14, and in permitting the “broadest possible access” to public records, *Woznicki v. Erickson*, 202 Wis. 2d 178, 193-94, 549 N.W.2d 699. To be sufficient to outweigh the strong public interest in disclosure, assertion of harm or other public interest favoring nondisclosure must be rooted in the specific circumstances of the case at hand. *Linzmeier*, 2002 WI 84, ¶¶37-40 (noting that while the sensitivity of police investigative files *generally* weighs in favor of nondisclosure, the *specific* circumstances of *Linzmeier* required disclosure). Balancing must be undertaken on a case by case basis. *Id.*, ¶ 42.

ARGUMENT

The Plaintiffs are not asserting a generalized right to learn the identities and e-mail addresses of ordinary constituents who contacted their legislative representative with a private concern. Nor are they claiming a broad right to learn the identities of all government employees who have communicated with a legislator on a matter of government interest. Rather, they are seeking to learn the identities of government employees who communicated with a legislator on a political matter *using government resources*.

There is no question that the requested e-mails are “records” maintained by an “authority.” The Defendant has conceded as much by agreeing to produce them, in part. Because it is undisputed that the e-mails at issue are records and that no statutory or common law exemption applies, the question before the Court is whether any of the

reasons advanced by the Defendant for redacting information from the records outweigh the strong public interest in disclosure of these records.

I) Summary Judgment Standard

Summary judgment “shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Wis. Stat. § 802.08(2).

Here, no material facts are in dispute. The relevant facts, as set forth above, are established by averments in the Complaint, admissions in the Answer, and as-of-yet uncontested Affidavits attached to this Motion. The Plaintiffs are entitled to a judgment as a matter of law for the reasons set forth below.

II) The Balancing Test Does Not Justify Withholding the Identities and E-Mail Addresses at Issue.

An application of the balancing test cannot justify the redaction of the identities and e-mail addresses of government employees communicating with another government employee on government business or a political matter using government resources. The Defendant is essentially asking this Court to create a blanket exception prohibiting the release of *all* information that would identify the government worker who corresponded with a legislator. But the balancing test cannot be used to create a blanket exception; it must be applied on a case-by-case basis. *Woznicki*, 202 Wis. 2d at 184 (quoting *Wisconsin Newspress Inc. v. Sch. Dist. of Sheboygan Falls*, 199 Wis. 2d 769, 781, 546 N.W.2d 143 (1996)).

A) Strong Public Interest Factors Favor Release

In this situation, many public interests are furthered by disclosure; none or few are served by secrecy. The Defendant has failed to explain how the specific circumstances of this case show that the disclosure of any single, particular e-mail creates a risk of harm sufficiently severe to overcome the strong presumption in favor of disclosure. As noted above, that strong presumption of public access weighs heavily in favor of the release of all public records. Wis. Stat. § 19.31 (“[The Open 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.”); *Nichols v. Bennett*, 199 Wis. 2d 268, 273, 544 N.W.2d 428 (1996) (“[Wisconsin] recognizes a presumption of accessibility to public records.”).

This presumption is strengthened here because the Plaintiffs’ request goes to the core focus and purpose of the Open Records Law – “the affairs of government.” See Wis. Stat. § 19.31. The Plaintiffs are asking which government workers (the e-mail senders) are communicating with another government worker (the Defendant) regarding government business (proposed legislation) using government resources (government e-mail accounts and possibly government computers) potentially on government time. It is hard to imagine what more government-affairs focused information the Plaintiffs could be seeking.

That would be enough to resolve the matter. But this case also implicates the public interest in discovering potential violations of law and employer policy by government workers. See *Wisconsin Newspaper, Inc.*, 199 Wis. 2d at 786 (“The public has a particularly strong interest in being informed about public officials who have been

‘derelict in [their] duty.’”) (quoting *State ex rel. Youmans v. Owens*, 28 Wis. 2d 672, 685, 137 N.W.2d 470 (1965)). Although the *Schill* court fractured over the release of purely personal e-mails evincing no violation of law or policy, it was *unanimous* in concluding that e-mails reflecting the misuse of public resources are subject to disclosure. *Schill*, 2010 WI 86, ¶141 (Abrahamson, C.J., lead opinion) (“[I]f the e-mails were used as evidence in a disciplinary investigation or to investigate the misuse of government resources, the personal e-mails would be records.”); *Id.*, ¶172 (Bradley, J., concurring) (concluding that personal e-mails are records, but the public interest favors withholding such e-mails, so long as they “evince[] no violation of law or policy”); *Id.*, ¶¶173, 180 (Gableman, J., concurring) (same, and also noting that even “purely personal” records “are relevant to the conduct of government affairs when personal conduct violates state or federal law, for example, or when the records evince a violation of the public employer’s internal policy,” because releasing such records “accords with the purpose of sunshine laws such as the open records law—to ensure that government is behaving itself and spending our tax dollars legally and wisely”); *Id.*, ¶188 (Roggensack, J., dissenting) (concluding that personal e-mails are records and the public interest favors releasing such e-mails, in order to permit the public to “discover[] what public employees are doing during the workday, in the workplace, using equipment purchased with public funds”).

Political communications made by government employees on their work computers almost certainly constitute misuse of public resources. Government workers are commonly bound by workplace policies proscribing permissible and impermissible uses of government e-mail accounts and government computers. *See, e.g., Schill*, 2010 WI 86, ¶12 (describing such a policy in place for the Wisconsin Rapids School District);

Collin Roth, *Tom Barrett's Wife Used MPS Email to Lobby, Enlist Campaign Help*, May 14, 2012, <http://mediatrackers.org/2012/05/14/exclusive-tom-barretts-wife-used-mps-email-to-lobby-enlist-campaign-help/> (last accessed November 14, 2012) (describing such a policy in place for the Milwaukee Public School District). Under these policies, government employees are generally forbidden from using their publicly provided computers and e-mail accounts for political purposes, such as advocating for or against pending legislation. For one example, the Milwaukee Public Schools' policy defines the sending of any "political or campaign materials" as an "unacceptable use" of an MPS e-mail account. *Id.* The state Department of Administration prohibits use of state provided internet and e-mail access "for political activities." *Department of Administration's Internet and E-Mail Usage Policy*, (available at http://www.doa.state.wi.us/docs_view2.asp?docid=521) (last accessed November 14, 2012). University of Wisconsin-Madison employees are forbidden from using IT resources "to support the nomination of any person for political office or to influence a vote in any election or referendum." Responsible Use of Information Technology Policy (available at <http://www.cio.wisc.edu/policies-responsibleuse.aspx>) (last accessed November 14, 2012).

In extreme cases, such abuse may even violate state statutes, *see, e.g.*, Wis. Stat. §§ 11.36, 19.45, 19.46, 19.59, and can in some cases rise to a criminal violation, *see* § 946.12; *see generally State v. Jensen*, 2004 WI App 89, 272 Wis. 2d 707, 681 N.W.2d 230; *State v. Chvala*, 2004 WI App 53, 271 Wis. 2d 115, 678 N.W.2d 880.

There is no need to decide the extent to which the e-mails here violated state law or policy. The public cannot investigate potential wrongdoing without being able to

know *who* sent *what* and *when* and from *where*. The Defendant released the “what” and the “when,” but not the “who” and the “where.” The “where” matters in determining whether government resources have been used to communicate on a political matter. The “who” matters, not only to find out which government employees may be abusing the public trust, but because different government workers are subject to different statutory rules and workplace policies.

Many of these government workers may be subject to workplace policies specifying that their e-mails are not private and they have no reasonable expectation of privacy as to their content. *See, e.g., Schill*, 2010 WI 86 ¶226 (Roggensack, J., dissenting) (quoting the following language from the school district’s “Network and Internet Acceptable Use Policy”: “By signing below I acknowledge that e-mail messages and Internet usage are not private and recognize that all employee’s activities on the [school’s network] may be monitored.”); *cf. Muick v. Glenayre Elecs.*, 280 F.3d 741, 743 (7th Cir. 2002) (employees of private employer have no reasonable expectation of privacy in information stored on employer laptops because of employer’s announced policy that it could inspect the laptops it furnished for employee use). As such, they have already been informed that what they write is subject to inspection and the public interest favors such openness.

The public’s interest in disclosure is even stronger where communications involve a misuse of public resources. The public has absolutely no cognizable interest in preventing the harm that may come to individuals as a natural consequence of their improper actions. *Cf. Zellner*, 2007 WI 53, ¶52, (holding that a school teacher’s “personal interest in protecting his own privacy, character, and reputation, and his interest

in avoiding embarrassment,” should the pornographic images he viewed on a school computer be released to the public, does not “give rise to a public interest in the protection of the privacy and reputation of citizens generally”). Here, the public has no interest in shielding government workers from discipline for any violations of law or workplace policies they may have committed.

Finally, many of the factors in favor of disclosure identified in *Linzmeyer v. Forcey* are applicable here. First, legislating and getting constituent input into legislation are “official responsibilit[ies]” of a Senator like the Defendant, comprising a significant use of government personnel, time, and resources. *See* 2002 WI 84, ¶27 (describing the public interest in oversight over a core function of police officers – investigation). The Defendant’s response letters admit as much: “My office, like many others, received an overwhelming amount of correspondence [regarding changes to collective bargaining]. We have estimated that we received more than 125,000 contacts to the office in about a five week period.” (PFOF ¶18.) Public interest in the oversight of that core legislative function is strong.

Second, as an “elected official,” the Defendant is in a position of high “visibility” and many of the e-mail senders are likely to be, like the teachers in *Linzmeyer*, in “positions of some visibility,” “support[ing] public scrutiny of potential misconduct, particularly if it occurs in the [workplace].” *See* 2002 WI 84, ¶¶28-29. “[M]isconduct . . . occur[ing] in the location where the public has entrusted [a government worker] to work and during the performance of [a government worker’s] public duties . . . should be more subject to scrutiny.” *Id.*, ¶28.

Finally, the public has a right to hold its elected officials and hired employees responsible, which it can only do if it has the ability to learn what those government workers actually are doing with government resources on government time. *See id.*, ¶¶27-29.

B) Only Weak Factors, if any, Support Redaction

In his denial, the Defendant raised two public policy interests supporting redacting the e-mail addresses of government workers from the requested records (PFOF ¶19(d)); this Court may therefore consider only those two interests. *Osborn v. Board of Regents of University of Wisconsin System*, 2002 WI 83, ¶16, 254 Wis. 2d 266, 647 N.W.2d 158. This Court may not “hypothesize” other reasons for denial or “consider reasons to deny the request that were not asserted by the custodian.” *Id.* (citing *Newspapers, Inc. v. Breier*, 89 Wis. 2d 417, 279 N.W.2d 179 (1979)).

First, the Defendant claimed that “protect[ing] the ability of these citizens to contact their legislators without fear of reprisal, given the highly charged nature of the debate over collective bargaining” was a public interest favoring nondisclosure of the e-mail addresses and identities of public workers contacting him on a topic of public concern. (PFOF ¶19(d).) Second, the Defendant claimed that “protect[ing citizens] so that they feel free to voice their public policy concerns with their legislators” was a public interest favoring nondisclosure of the e-mail addresses and identities of public workers contacting him on a topic of public concern. (PFOF ¶19(d).)

In other words, the Defendant is attempting to create an impermissible blanket exception for “individuals” in general to communicate privately with a legislator without

regard to who the individual is and whether the communication occurred in the conduct of government business or undertaken with government resources.

There can be no such blanket and generalized exception to disclosure. Disclosure of the source of a message – especially a political message, such as are at issue here – will always create at least some disincentive to speak. *See generally Citizens United v. FEC*, 558 U.S. 310, 130 S. Ct. 876 (2010) (addressing the chilling effect of disclosing the identities of political speakers); *Buckley v. Valeo*, 424 U.S. 1 (1976) (addressing the chilling effect of disclosing the identities of political donors). But, in both *Citizens United* and *Buckley*, the Supreme Court held that public interests outweighed the chilling effect disclosure had. *Citizens United*, 130 S. Ct. at 913-16; *Buckley*, 424 U.S. at 64-68.

The situation in this case involves a far more remote and unlikely threat of harm than in the few cases where Wisconsin courts have found that the threat of harm justified nondisclosure. For example, in *State ex rel. Ledford v. Turcotte*, 195 Wis. 2d 244, 536 N.W.2d 130 (Ct. App. 1995), the court of appeals held that a prisoner's request for the names, home addresses and telephone numbers of all persons employed at his prison was properly denied because it would jeopardize employees' safety. *Id.* at 726; *see also Klein v. Wisconsin Resource Center*, 218 Wis. 2d 487, 496, 582 N.W.2d 44 (Ct. App. 1998) (preventing the disclosure of personnel files of staff members at an institution housing sexually violent persons, because, in part, such disclosure would "subject employees and their families to a substantial risk of harassment or other jeopardy; . . . and . . . jeopardize[e] employee safety and compromise[e] [the facility's] interest in maintaining a safe and secure environment").

Likewise, the serious threats of harm to the membership of the National Association for the Advancement of Colored People in the 1950's South prohibited Alabama from compelling that organization to disclose a list of its members. *NAACP v. Alabama*, 357 U.S. 449 (1958). In Wisconsin, the direct reprisals confidential informants might face from the criminals they helped convict prevent disclosure of their identities. *See Stelloh v. Liban*, 21 Wis. 2d 119, 125, 124 N.W.2d 101 (1963) (recognizing a public policy in favor of keeping the names of informants confidential in order “to protect [the informant] and his family from harm”); *see also Mayfair Chrysler-Plymouth, Inc. v. Baldarotta*, 162 Wis. 2d 142, 469 N.W.2d 638 (1991) (applying the same policy in the context of an open records request).

The situation here is more akin to – or even less volatile than – cases where courts have already determined that the risk of harm was not great enough to require nondisclosure. In *Zellner v. Cedarburg School District*, for example, the harm to the teacher's reputation caused by release of the pornographic images he viewed on his school computer was not sufficient to require nondisclosure. 2007 WI 53, ¶52, 300 Wis. 2d 290, 731 N.W.2d 240.

The Government Accountability Board has already weighed in on the exact topic at issue in this case – whether the charged atmosphere of the collective bargaining changes justified redacting personal information from government records, concluding that it did not. The GAB determined that, under the balancing test, the admittedly tense circumstances surrounding the passage of the collective bargaining bill *did not* raise a risk of harm significant enough to require the redaction of *home addresses* – information far more sensitive than the government e-mail addresses sought by the Plaintiffs here –

from recall petitions before release. Government Accountability Board, *Recall Petition Update 4*, <http://gab.wi.gov/node/2184> (last accessed November 14, 2012). The GAB refused to redact contact information from the petitions, even where domestic violence victims had contacted the GAB expressing specific safety concerns. *Id.* (“[T]he balancing test of the Public Records Law favors disclosure of the entire recall petition without redaction of information on a recall petition, even when individual signers have expressed a concern arising from prior abuse or violence committed against them by a person who is now subject to a restraining order.”).

The United States Supreme Court reached a similar conclusion in *Doe v. Reed*, 130 S. Ct. 2811 (2010). There, the Court addressed the application of a state open records law to a request for the unredacted release of petitions calling for a referendum vote against a newly-signed law granting additional rights and privileges to same-sex domestic partners. *Id.* at 2815-16. Petition signers and the sponsor filed suit to stop the release of those public records, claiming that release would result in “harassment and intimidation,” citing to specific “examples from the history of a similar proposition in California, and from the experience of one of the petition sponsors in th[e] case.” *Id.* at 2816, 2820. The Court concluded, however, that although such concerns could potentially work to block disclosure in some individual circumstances where there was a reasonable likelihood of threats, harassment, or reprisals, they did not justify wholesale withholding of the petitions. *Id.* at 2821; *see also Buckley v. Valeo*, 424 U.S. at 68 (upholding disclosure requirements on campaign contributors, despite potential for “harassment or retaliation” against contributors).

Disclosure is particularly important to allow the public to know who is attempting to influence a legislator regarding a piece of pending legislation. *See, e.g., Citizens United v. FEC*, 130 S. Ct. at 915-16 (holding that an “informational interest” in learning who is “attempt[ing] to influence legislation” justified the burdens on speech created by a disclosure requirement); *cf. Buckley*, 424 U.S. at 66-68 (holding that disclosure of campaign donations facilitates public awareness of an elected official’s proclivities and interests); *U.S. v. Harriss*, 347 U.S. 612, 625-26 (1954) (holding that placing disclosure requirements on lobbyists “provides for a modicum of information from those who for hire attempt to influence legislation”). All of these cases recognized the potential chilling effect of disclosure requirements, but found that effect outweighed by the public interest in open and accountable government.

This case involves a much stronger public interest – and a much weaker privacy claim – than existed in those examples because here, government workers are using government resources. The public has the right to know which government workers are trying to influence an elected official with regards to pending legislation, particularly because they did so using government resources. *See Wis. Stat. § 19.31* (“[I]t is declared to be the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government.”); *Local 2489 v. Rock County*, 2004 WI App 210, ¶26, 277 Wis. 2d 208, 689 N.W.2d 644 (“When individual become public employees, they necessarily give up certain privacy rights and are subject to a degree of public scrutiny.”). These government workers could have chosen to write to the Defendant anonymously or with private e-mail accounts and shield themselves with that

cloak, but they instead chose to use their public identities and government roles, which should be open to public oversight.

Sunshine laws rest on the bedrock principle that the public gets to see what government workers are doing with government resources, even if that makes government workers a little squeamish of speaking in their government persona. In fact, discouraging government workers from using government resources to engage in political discussions should be counted a public policy weighing in favor of disclosure, not non-disclosure. The Defendant has demonstrated no public interest in affording government workers a shield from public scrutiny of their government-related activities.

Viewing the strong public policy interests favoring disclosure in comparison to the weak and non-existent public policy interests favoring nondisclosure, this Court should conclude that the balance favors disclosure. Thus, because all of the statutory and common law requirements have been established, this Court should enter judgment ordering the Defendant to release the records to the Plaintiff without redaction of government e-mail addresses.

III) The Defenses Raised in the Defendant's Answer Are Unavailing

The Defendant raised additional arguments in his denial letter and Answer that do not fit properly under the established framework for adjudicating Open Records Law disputes. First, that the Senate has the constitutional authority to unilaterally exempt itself and its members from the Open Records Law. Second, that the e-mail addresses themselves are not related to a government function. Third, that the Plaintiffs are seeking this information for purely political purposes. For the reasons explained below, none of these arguments are availing.

A) *The Wisconsin Constitution Does Not Grant the Senate Authority to Exempt Senators' Constituent Contacts from the Open Records Law*

The Defendant makes four separate arguments claiming that, generally speaking, he has the authority to exempt himself from the Open Records Law because he is a Senator: (1) "Pursuant to Wis. Const. Art. IV, Sec. 8, the Senate policy of maintaining the confidentiality of personally identifiable information of constituents who contact his or her Senator constitutes a 'rule of proceeding' enacted by the Senate to govern its functioning"; (2) "Pursuant to Wis. Const. Art. IV, Sec. 10, the Senate has the right to determine which of its proceedings should be secret, including proceedings involving Senator Erpenbach and his constituents. Pursuant to such Constitutional authority, the Senate has adopted a policy that allows Senators to maintain the confidentiality of personally identifiable information pertaining to constituents who contact their Senators"; (3) "The Senate Policy Manual, adopted pursuant to Wis. Const. Art. IV, Sect. 8, exempts from disclosure personal identification information about constituents who contact a Senator to voice personal concerns with regard to proposed legislation, such as the legislation pertaining to the change in Wisconsin's collective bargaining law"; and (4) "[T]he Wisconsin Legislative Council's Legislator Briefing Book provides that in certain circumstances a legislator may redact personally identifiable information about a constituent from documents produced in response to a public records request." (Ans., ¶¶4-6.) The Defendant provided substantively similar arguments in his responses to the Plaintiffs' record requests. (PFOF ¶19.)

First and most importantly, these arguments have no place in the framework for judging the legality of an open records request denial. They do not attack the status of the e-mails as records, they do not identify a statutory or common law exemption, and

they do not provide public policy interests in favor of nondisclosure. Courts have repeatedly stated that once a document is categorized as a record, only common law exemptions, statutory exemptions, or the balancing test can prohibit its release. *Hempel v. City of Baraboo*, 2005 WI 120, ¶4, 284 Wis. 2d 162, 699 N.W.2d. 551. No court has ever concluded that a chamber of the Legislature or an individual legislator has the authority to exempt a record from disclosure, nor has any court concluded that the Wisconsin Constitution provides any exemptions to the Open Records Law.

Second, taken to its logical and not-terribly-distant conclusion, this argument would permit the Defendant and all other state legislators to completely exempt themselves from obeying any facet of the Open Records Law. Under this argument, either chamber could adopt a “rule of proceeding” that no records maintained by any member are subject to the Open Records Law. While the Legislature as a whole could do this through the ordinary legislative process, one chamber – not to mention one Senator – cannot. *Id.*, ¶71 (calling “correct” the plaintiff’s assertion that “an authority may not avoid the operation of the Open Records Law simply by enacting its own policy.”).

Third, a document cited by the Defendant himself, the Legislative Council’s Legislator Briefing Book, states that “legislators are public officials and correspondence with them is public, unless the Open Records Law provides a reason to deny access.” (Kamenick Aff., Ex. 1.) That correct statement of law is made meaningless if constituent correspondence can be withheld at a legislator’s whim for reasons external to the Open Records Law.

Finally, none of these provisions or documents actually permit the Defendant to ignore the Open Records Law, as explained in the following sections.

- 1) Wis. Const. Art. IV § 8 does not create or permit an exemption to the Open Records Law

Article IV, Section 8 of the Wisconsin Constitution provides, in part, that “[e]ach house may determine the rules of its own proceedings.” “Rules of proceeding have been defined as those rules having ‘to do with the *process* the legislature uses to propose or pass legislation or how it determines the qualifications of its members.’” *Milwaukee Journal Sentinel v. DOA*, 2009 WI 79, ¶18, 319 Wis. 2d 439, 768 N.W.2d 700 (quoting *Custodian of Records for the LTSB v. State*, 2004 WI 65, ¶30, 272 Wis. 2d 208, 680 N.W.2d 792).

One example of such a “rule of proceeding” is a provision in an act that required that any deficit in the operation budget of a newly-created state agency be made up in a bill introduced by the Joint Finance Committee. *Wisconsin Solid Waste Recycling Authority v. Earl*, 70 Wis. 464, 484-87, 235 N.W.2d 648 (1975) (holding that such a requirement was “a mere rule of committee procedure” authorized by Article IV, Section 8).

Another example comes from a 1943 case, where the Assembly was allowed to circumvent the 2/3rds vote requirement to override a veto through the process – established by Assembly rule – of “pairing,” by which representatives on opposite sides of an issue would each agree not to cast a vote and not be counted as “members present.” *Integration of Bar Case*, 244 Wis. 8, 29-31, 11 N.W.2d 604 (1943). That rule was held to be a valid exercise of the Assembly’s Article IV, Section 8 powers. *Id.* at 35-36.

The Defendant’s purported “rule of proceeding” allowing individual Senators to keep constituent contacts confidential has nothing to do with “the process the legislature uses to propose or pass legislation.” It is not at all similar to either of the rules assessed

in *Integration of Bar Case* and *Earl*, both of which directly affected the methods by which legislation could be passed. By no stretch of the imagination could a communication from a constituent – whether or not a government worker – be considered a “proceeding” of the Senate. In fact, the Wisconsin Supreme Court has already determined that a statute creating an electronic system of storing “communications created or received by legislators” was *not* a rule of proceeding under Article IV, Section 8. *Custodian of Records for the LTSB v. State*, 2004 WI 65, ¶30.

Such a rule would also be contrary to – and therefore voided by – the Legislature’s choice to apply the Open Records Law to all “elected official[s].” Wis. Stat. § 19.32(1). The Legislature has the power to proscribe the action of elected officials, including legislators, and by making legislators subject to the Open Records Law, the Legislature has removed any individual legislator’s or chamber’s ability to exempt itself from the Open Records Law. Such an exemption would profane the declared public policy of open access to government as enacted by the Legislature in Wis. Stat. § 19.31.

The Legislature could have chosen to fully or partially exempt itself from the Open Records Law or to permit an individual chamber or individual legislators to fully or partially exempt itself or themselves from the Open Records Law, but it chose not to do so. By comparison, the Legislature exempted partisan caucuses from the Open Records Law’s sunshine companion, the Open Meetings Law, Wis. Stat. §§ 19.81 et seq., and permitted each chamber to create rules in conflict with the Open Meetings Law. Wis. Stat. § 19.87(2), (3). It did not take a similar route with the Open Records Law, indicating the Legislature’s intent to prohibit similar exemptions in that area. *See Rupert*

v. Home Mut. Ins. Co., 138 Wis. 2d 1, 11, 405 N.W.2d 661 (Ct. App. 1987) (“Where a comprehensive statute specifically grants a power in one section and is silent with respect to that power in another, we must assume a legislative intent to exclude the exercise of power under the latter section.”).

- 2) Wis. Const. Art. IV § 10 does not create or permit an exemption to the Open Records Law

Article IV, Section 10 of the Wisconsin Constitution provides, in part, that “[e]ach house shall keep a journal of its proceedings and publish the same, except such parts as require secrecy,” and that “[t]he doors of each house shall be kept open except when the public welfare shall require secrecy.” “The manifest purpose of this provision is to prevent state legislative business from being conducted in secret except in extremely limited circumstances.” *State ex rel. Ozanne v. Fitzgerald*, 2011 WI 43, ¶67, 334 Wis. 2d 70, 798 N.W.2d 436.

This provision is even more removed from the e-mails at issue in this case. The e-mails do not form any part of the journal of the Senate’s proceedings, so the first sentence is irrelevant. Nor are the e-mails being kept inside the Senate chamber, making whether the door to that room is ajar irrelevant. If this constitutional provision has any relevance to this case, it would be a weight in *favor* of disclosure based on its “manifest purpose” of openness.

- 3) The Senate Policy Manual does not create or permit an exemption to the Open Records Law

The Defendant claimed in his denial letter that under its Article IV Section 8 authority, the Senate adopted a Policy Manual that “exempts from disclosure under the public records law any information that identifies, discusses, or refers to proposed

legislation that has not been introduced into the legislative process.” (PFOF ¶19(c).) He reiterated this defense in his Answer, claiming that the Policy Manual “exempts from disclosure personal identification information about constituents who contact a Senator to voice personal concerns with regard to proposed legislation, such as the legislation pertaining to the change in Wisconsin’s collective bargaining law.” (Ans., Aff. Def. 6.)

As noted above, Article IV Section 8 grants no such authority, because such a rule would not be a “rule of proceeding.” So if the Policy Manual actually said that, it would be void for the reasons described above. To whatever extent the Policy Manual purports to allow elected officials to ignore the Open Records Law, it is void.

Moreover, the Defendant’s Answer mischaracterizes what the Policy Manual actually says. On Page 33, the 2011-12 Senate Policy Manual states as follows:

Pursuant to the holding in *State v. Zien*, Dane County Case No. 05 CV 2896, proposed legislation *that has not been introduced* may be withheld from public inspection under the public records law as a draft document, regardless of whether the proposed legislation was shared with other individuals or entities. To accomplish the public policy objectives of this exception from disclosure, it is likewise the policy of the Senate that any information that *identifies, discusses, or refers to such proposed legislation* may be withheld from public inspection.

(Kamenick Aff., Ex. 2 (emphasis added).) The Policy Manual purportedly permits confidentiality for “proposed legislation that has not been introduced,” contrary to the Defendant’s assertion that it permits confidentiality for mere “proposed legislation.” The collective bargaining bill, 2011 Wis. Act 10, was introduced on February 15, 2011.

(Kamenick Aff., Ex. 3.) Once the bill was proposed, the Policy Manual’s confidentiality rule no longer covered any records relating to that legislation. The Plaintiffs made their record request on March 24, 2011 (PFOF ¶4), 37 days after the bill was proposed.

Because the bill had already been introduced, any confidentiality that the Policy Manual could impose was no longer in effect.

- 4) The Wisconsin Legislative Council's Briefing Book does not create or permit an exemption to the Open Records Law

The Defendant claimed in his denial letter that "the Wisconsin Legislative Council's Legislator Briefing Book indicates that, although constituent correspondence is generally a public record, in certain circumstances a legislator may redact personally identifiable information about a constituent." (PFOF ¶19(c).) He reiterated this defense in his Answer, claiming that "the Wisconsin Legislative Council's Legislator Briefing Book provides that in certain circumstances a legislator may redact personally identifiable information about a constituent from documents produced in response to a public records request." (Ans., Aff. Def. 6.)

First and foremost, the Briefing Book does not create binding law of any kind. It is merely helpful handbook prepared by the Legislative Council, laying out a legislator's duties and responsibilities in general terms. The Briefing Book warns legislators that the book is not the definitive answer to any situation.²

Moreover, all the Briefing Book has to say about this issue is that "*in certain circumstances*, a legislator may redact from a letter personally identifiable information about a constituent." (Kamenick Aff., Ex. 2 (emphasis added).) That statement is certainly true; the Open Records Law provides several circumstances in which personally identifiable information about a constituent can be redacted.³ But the Briefing Book lists

² "This document cannot fully guide a legislator's decision in the variety of situations that may arise." (Kamenick Aff., Ex. 1.) "Legislators are strongly advised, prior to responding to a request to inspect records, to seek additional advice beyond that set out in this chapter." (*Id.*)

³ See, e.g., Wis. Stat. §§ 19.35(1)(am)1., 2., §19.36(7), (8), (10)-(13).

no situation in which a government worker's government e-mail address can be redacted from governmental correspondence with another government worker.

B) *E-Mail Addresses Are Related to Government Functions; Any Argument to the Contrary Is Impermissible Because the Defendant Failed to Raise It in his Denial*

The Defendant asserts in his Answer that “[t]he redacted information from the documents produced does not constitute a record for the purposes of Wis. Stat. § 19.32(2) because, among other reasons, the information redacted has no connection to a government function. (Ans., Aff. Def. 3.)

This Court may not consider this argument, because it was not raised in the Defendant's denials of the Plaintiffs' record requests. *See Osborn v. Board of Regents of University of Wisconsin System*, 2002 WI 83, ¶16, 254 Wis. 2d 266, 647 N.W.2d 158.

Furthermore, the only redacted information at issue is the public e-mail addresses of government workers, so the Defendant is arguing that *government* e-mail addresses have no connection to *government* functions. Such an assertion strains credulity. Government e-mail addresses are provided to government workers, by government entities, for the purpose of carrying out government business, often on government equipment.

More fundamentally, if these communications are unrelated to government business, then they constitute political communications made by government employees using government resources – presumably on work time. As noted above, this makes them fully disclosable under *Schill* and, indeed, the interest in disclosure that the *Schill* court recognized can only be served if, as noted above, the “who” and “from where” aspects of the communication are disclosed.

C) *The Plaintiffs' Purpose Is Irrelevant; Any Argument to the Contrary Is Impermissible Because the Defendant Failed to Raise It in his Denial*

The Defendant asserts in his Answer that: "Plaintiffs seek the information for purely political purposes and to use such information to the advantage of supporters [sic] of the change in Wisconsin's collective bargaining laws and to the detriment of the constituents of Senator Erpenbach who contacted him to voice personal concerns about the change in the collective bargaining law." (Ans., Aff. Def. 9.) He also accuses the Plaintiffs of intending to misuse the information in order to subject the government workers who corresponded with the Defendant to "harassment, intimidation and reprisals from government officials or private parties." *Id.*

There is absolutely no basis for such an allegation, which is itself nothing more than political obfuscation. Such gross assumptions are not only unsupported and unwarranted, but irrelevant. *See State ex rel. Ledford v. Turcotte*, 195 Wis. 2d 244, 252, 536 N.W.2d 130 (Ct. App. 1995) ("Neither the identity of the requester *nor the reasons underlying the request* are factors that enter into the balanc[ing test].") (emphasis added).

More importantly, this Court may not consider this argument, because it was not raised in the Defendant's denials of the Plaintiffs' record requests. *See Osborn*, 2002 WI 83, ¶16.

CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that this Court declare that the Defendant violated the Open Records Law, issue a writ of mandamus ordering him to provide unredacted public records as requested by the Plaintiffs, and award the

Plaintiffs the actual and necessary costs of prosecuting this action, including reasonable attorney fees.

Dated this 14th day of November, 2012.

Respectfully submitted,
WISCONSIN INSTITUTE FOR LAW & LIBERTY,



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