STATE OF WISCONSIN CIRCUIT COURT GRANT COUNTY

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

vs.

JON ERPENBACH,
Defendant.

DECISION and ORDER

Case No. 12-CV-63

PROCEDURAL BACKGROUND

Plaintiffs request a Writ of Mandamus as a result of an open records request made at the height of the debate over Governor Scott Walker's proposal to substantially limit collective bargaining rights for most government employees as part of the Budget Repair Bill. The plaintiffs initially requested copies of all documents, including e-mails, received by the defendant, Senator Jon Erpenbach, concerning Governor Walker's proposed legislation. Senator Erpenbach provided the substance of the e-mails, but redacted the names and e-mail addresses of the senders. Plaintiffs subsequently amended their request to ask for only the senders' names and addresses for those e-mails sent from government-owned computers. Citing the Senate's Rules of Proceeding, as well as the need to maintain constituents' confidentiality, the Senator refused. He noted that he had provided the content of the requested e-mails, amounting to approximately 25,000 pages. Both parties moved for summary judgment.

SUMMARY JUDGMENT

Summary judgment is appropriate to avoid trials when there are no factual disputes to resolve. Wis. Stat. § 802.08. Because both parties filed motions seeking summary judgment, it

is apparent they both believe the outcome of this case is not fact-dependent. The affidavits reveal no disputed issues of material fact and at oral arguments both counsel conceded this point.

PLAINTIFF'S POSITION

The plaintiffs' position is relatively straightforward. While the Wisconsin Supreme Court's decision in *Schill v. Wisconsin Rapids Sch. Dist.*, 2010 WI 86, 327 Wis.2d 572, 786 N.W.2d 177, was rendered by a fragmented court, five Justices agreed that e-mails sent by government employees, using government computers, are public records subject to disclosure if they evince a violation of employer policy or of law. *Id* at 634 fn2. They further argue that because it is inappropriate for government workers to use government computers for political purposes, the e-mails are public records and automatically subject to disclosure because they were sent to an elected politician.

DEFENDANT'S POSITION

Senator Erpenbach does not dispute that the content of the e-mails are public records, but contends that as a Senator, his application of the Open Records law is not reviewable pursuant to Senate custom and practice, and even if it were, he properly concluded that his constituents' right to be free from risk of harassment and reprisal outweighed the public's right to know the identity of the e-mails' authors.

JUSTICIABILITY

The issue of whether the court may even review Senator Erpenbach's decision to withhold the senders' names and addresses for e-mails sent from government computers turns on a separation of powers argument. Senator Erpanbach states at page 7 of his brief that "it has long been a custom and precedent of the Wisconsin Senate, and thus one of its Rules of Proceeding, to leave it up to each individual Senator whether to disclose personally identifiable information

regarding constituents who contact the Senator." Because Article IV, § 8 of the Wisconsin Constitution gives the legislature control over its "rules of proceeding," this court may not review the Senator's actions.

In his concurring and decisive opinion in *State ex rel. Ozanne v. Fitzgerald*, 2011 WI 43, 334 Wis.2d 70, 798 N.W.2d 436, Justice Prosser quoted, with approval, the following language from *Goodland v. Zimmerman*, 243 Wis. 459, 466-67, 10 N.W.2d 180 (1943):

> It must always be remembered that one of the fundamental principles of the American constitutional system is that governmental powers are divided among the three departments of government, the legislative, the executive, and judicial, and that each of these departments is separate and independent from the others except as otherwise provided by the constitution. The application of these principles operates in a general way to confine legislative powers to the legislature, executive powers to the executive department, and those which are judicial in character to the judiciary.... While the legislature in the exercise of its constitutional powers is supreme in its particular field, it may not exercise the power committed by the constitution to one of the other departments.
>
> What is true of the legislative department is true of the judicial department. The judicial department has no jurisdiction or right to interfere with the legislative process. That is something committed by the constitution entirely to the legislature itself. It makes its own rules, prescribes its own procedure, subject only to the provisions of the constitution and it is its province to determine what shall be enacted into law.

In *Ozanne*, the Supreme Court was also dealing with 2011 Wisconsin Act 10, commonly referred to as the Budget Repair Bill. At issue concerned an apparent violation of the other "Sunshine" law, the Open Meetings law, and the failure of majority Republicans to provide 24-hour advance notice of the proposed vote on part of the bill. Wis. Stat. § 19.81. Relying on *Goodland v. Zimmerman*, a majority of the court found the circuit court had "usurped the legislative power" by seeking to apply the Open Meetings law in conflict with the legislature's internal rules. *Ozanne* at 75.

Senator Erpanbach acknowledges there are no Wisconsin cases which require that courts give the legislature the same deference on questions pertaining to public records as on questions

pertaining to open meetings. See *Des. Moines Register and Tribute Company v. Dwyer*, 542 N.W.2d 491 (Iowa 1996). At first blush, it would appear that because the purposes of the Open Meetings law and the Public Records law are so closely aligned, *Ozanne* would require this court to adopt a similar "hands off" approach. There is, however, one significant difference.

The legislature specifically provided that in the context of the Open Meetings law, which had been on the books for six years before passage of the Open Records law, the rules of the Senate prevail. Wis. Stat. § 19.87(2), Provides:

> No provision of this subchapter which conflicts with a rule of the senate or assembly or joint rule of the legislature shall apply to a meeting conducted in compliance with such rule.

Although the legislature enacted a number of exceptions to the Public Records law, it chose not to exempt records withheld pursuant to Senate rules when said rules conflicted with the statute. See *State ex. rel Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 46, 271 Wis.2d 633, 681 N.W.2d 110, (construction of related statutes.) If the legislature considered itself exempt from the Sunshine laws under Article IV, § 8 of the Wisconsin Constitution, there would have been no need to enact a specific exception under Wis. Stat. § 19.87(2). More importantly, if the legislature had intended that its rules supersede application of the Open Records law, it would have said so, as it did for the Open Meetings law.

This is not to say that *Ozanne* and the separation of powers doctrine do not allow for deference to be accorded to Senator Erpanbach and his application of the balancing test. For example, Senator Erpenbach submitted evidence that the e-mails were screened for a pattern of abuse by any individual employee, that assessment is entitled to substantial deference. *Seifert v. School Dist. of Sheboygan Falls*, 2007 WI App 207, ¶ 63, 305 Wis.2d 582, 740 N.W.2d 177. However, partly because plaintiffs were able to determine from the content of some e-mails that they had been sent from government computers there arises a question as to whether all of the e-

mails would qualify as purely personal pursuant to *Schill*. Under these circumstances, the Senator's "blanket" position that all of the e-mails represent allowable occasional personal use of government computers is suspect given the presumption of disclosure which guides application of the Open Records law. See *Schill* at ¶ 224, Roggensack J., dissenting. Further discussion in this regard is necessary, although it is noted that Wis. Stat. § 19.68 treats some information pertaining to addresses different than other personally identifiable information.

DECLARATION OF POLICY

Wis. Stat. § 19.31, states:

> 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.

CASE LAW

Shill v. Wisconsin Rapids School District, 327 Wis.2d 572, is the seminal case on the applicability of the public records law to e-mails. Chief Justice Shirley Abrahamson wrote:

> ¶ 2 Open records and open meetings laws, that is, "Sunshine Laws," "are first and foremost a powerful tool for everyday people to keep track of what their government is up to.... The right of the people to monitor the people's business is one of the core principles of democracy."
>
> ¶ 3 The legislature states the importance of open government and open records this way: "[I]t is ... 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 government officers and employees.
>
> ...

¶ 22 In determining whether a document is a record under Wis. Stat. § 19.32(2), the focus is on the content of the document. To be a record under § 19.32(2), the content of the document must have a connection to a government function.

...

¶ 23 The contents of personal e-mails could, however, be records under the Public Records Law under certain circumstances. For example, if 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 under the Wis. Stat. § 19.32(2). A connection would then exist between the contents of the e-mails and a government function, namely the investigations.

...

¶ 79 The clear and explicit statement of legislative intent, policy, and purpose in the Public Records Law supports the Teachers' argument that the content of a document must have a connection to a government function to constitute a record within the meaning of Wis. Stat. § 19.32(2).

...

¶ 85 Forbidding employees from using work e-mail accounts for any personal communications, or making such communications automatically subject to public review, would create a perverse incentive for employees to use more time-consuming means of personal communication during the workday. Stripping a public employee of his or her privacy in the contents of personal e-mails simply because he or she works for the government might hamper productivity, negatively impact employee morale, and undermine recruiting and retention of government employees.

...

¶ 101 The statutory history, the case law and the attorney general opinions demonstrate that whether a document is a public record depends on the nature and purpose of the document's contents and that the existence of a document within a public office does not in and of itself make that document a public record. As the court recognized in *Panknin,* not everything a government official or employee creates is a public record.

In her concurring opinion, Justice Ann Walsh Bradley stated the following:

¶ 148 Lest there be any doubt, however, a clear rule has emerged: a custodian should not release the content of an e-mail that is purely personal and evinces no violation of law or policy.

In his concurring opinion, Justice Michael J. Gableman also stated:

¶ 182 The purpose of the open records law is to open a window into the affairs of government, not to open a window into the private lives of government

employees. Therefore, where e-mails, either individually or cumulatively, are of a purely personal nature and reflect no violation of law or policy, the public has no interest in such e-mails, and the public interest in nondisclosure will always outweigh the public interest in disclosure.

Finally, in her dissent, Justice Patience Drake Roggensack stated:

¶ 224 This balancing involves weighing "the public interest in disclosure against the public interest in non-disclosure." *Id.*, ¶ 55. In balancing these interests, there generally are no " 'blanket exceptions from release.' " *Id.*, ¶ 56 (quoting *Linzmeyer,* 254 Wis.2d 306, ¶ 10, 646 N.W.2d 811). Furthermore, there is a strong legislatively established presumption in favor of disclosure. *Hempel v. City of Baraboo,* 2005 WI 120, ¶ 63, 284 Wis.2d 162, 699 N.W.2d 551. Only in an "exceptional case" will nondisclosure be appropriate. *Id.* This presumption of disclosure is one of the strongest in the Wisconsin statutes. *Zellner,* 300 Wis.2d 290, ¶ 49, 731 N.W.2d 240. To overcome this presumption, the person opposing disclosure has the burden to show a compelling public interest in nondisclosure. *Local 2489, AFSCME, AFL–CIO v. Rock Cnty.,* 2004 WI App 210, ¶ 27, 277 Wis.2d 208, 689 N.W.2d 644.

DISCUSSION

In *Youmans v. Owens*, 28 Wis.2d at 679, the court held that for a record to be subject to the Open Records law, it must be "created or kept" in connection with the "official purpose or function" of the custodian. See *Schill* at ¶ 101. Therefore, it appears the "Legal Custodian" of the e-mails under Wis. Stat. § 19.33(4), would have to be the recipient defendant and not the sender government employee.[1] Thus, for the purposes of this decision, the court assumes that the e-mails are public records, not because the senders "created or kept" them in connection with their public duties, but rather because the defendant kept them in connection with his. Indeed, had the senders been acting for an "official purpose or function" and not personally, the plaintiffs would not be seeking the e-mails to investigate "violations of policy or law". Likewise, if the

[1] At the most recent Judicial Conference, court system employees were instructed that they have no obligation to retain or disclose an e-mail that is purely personal with no demonstrable connection to the employee's public duties. This is consistent with the court system's policy of allowing incidental and occasional use of computers for personal use, and with Chief Justice Abrahamson's lead opinion in *Schill*. It would appear to be inconsistent with a majority of the court who opined that e-mails sent from government computers, even if purely personal, are public records and therefore subject to retention and, depending upon application of the balancing test, disclosure.

senders were acting personally in contacting an elected official, and such incidental personal use is allowed, as it generally is, *Schill* would support a finding that the e-mails would not be subject to disclosure.

It should be noted that the plaintiffs' motivation in seeking the e-mail senders' addresses is irrelevant. In the *Schill* case the requester was admittedly on a "fishing mission". *Schill v. Wisconsin Rapids School District*, 2009 WL 1154920 (WI APP). Likewise, the plaintiffs seek access to the senders' e-mail addresses to investigate possible abuses by public employees, but because a requester's motivation is irrelevant, the fact that plaintiffs may be on a fishing mission is of no consequence. Wis. Stat. § 19.35(1)(i). *Kraemer Brothers Inc. v. Dane County,* 229 Wis.2d 86, 102, 599 N.W.2d 75 (Ct. App. 1999) (requester's identity or motivation not part of balancing test).

Having said that, the plaintiffs correctly note on page 16 of their brief, that the "public's interest in disclosure is even stronger when communications involve a misuse of public resources." At page 13 it is stated that "this case also implicates...discovering potential violations of law and employer policy by Government workers." Likewise, at page 14, plaintiffs state "political communications made by Government employees on their work computers almost certainly constitute misuse of public resources."

Moreover, the plaintiffs are certainly correct when stating the following at page 15, "(t)here 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." Plaintiffs cite *Zellner v. Cedarburg School District*, 2007 WI 53, ¶ 52, 300 Wis.2d 290, 731 N.W.2d 240, to the effect that the public has absolutely no cognizable interest in preventing harm that may come to an individual as a natural consequence of their

improper actions. Compare *State v. Linzmeyer v. Forcey,* 2002 WI 84, ¶ 31, 254 Wis.2d 306, 646 N.W.2d 811 (concern is not person's interest in privacy, but the public's interest in maintaining that person's privacy).

While these propositions are self-evident, they do not support the conclusion that plaintiffs propose - - that the use of a government computer to contact a state senator almost necessarily represents a violation of law or policy - - in light of the Supreme Court's ruling in *Schill.*

In *Schill,* the Wisconsin Supreme Court held that while e-mails sent from government computers may be records as defined in Wis. Stat. § 19.32(2), they did not have to be disclosed if purely personal. All justices seemed to agree that if the e-mails evinced a "violation of law or policy", then they were subject to disclosure depending upon application of the balancing test. *Schill* at ¶ 148, Bradley J. concurring.

Schill does not support the plaintiffs' proffered presumption that simply because an e-mail was sent by a government employee from a government computer to a state senator, it represents a per se violation of policy or of law and must be disclosed. Accepting plaintiffs' blanket presumption of wrongdoing is contrary to the Supreme Court's ruling in *Schill* that e-mails sent from government computers are not to be released if they are purely personal. *Schill* makes it clear that it is the content of an e-mail, and not the recipient, that determines whether it's subject to disclosure. See *Hempel v. City of Baraboo*, 2005 WI 120, ¶ 66, 284 Wis.2d 162, 699 N.W.2d 557.

Absent a stipulation as to content, as in *Schill,* and because the court does not have access to the e-mails, it can not make a determination based upon the content of the e-mails. See *Schill*, 327 Wis.2d at 667, Roggensack, J. dissenting. Under *In re State ex rel Youmans v. Owens,* 28

Wis.2d 672, 682, 137 N.W.2d 470 (1965), if the content of a record is unknown, the court is directed to conduct an *in-camera* review. Similarly, while here the content of the e-mails are known, it is still necessary to know which ones were sent from government computers to determine which ones "evince(s) a violation of law or policy." *Id* at 634.

The plaintiffs cite generally to *State v. Jenson*, 2004 WI APP 89, 272 Wis.2d 707, 681 N.W.2d 230, and *State v. Chvala*, 2004 WI APP 53, 271 Wis.2d 115, 678 N.W.2d 880, which concern what has been referred to as the "caucus scandal." The plaintiffs appear to equate a government employee sending an e-mail in support of, or against, a particular bill that pertains to that employee's benefits and collective bargaining rights with the use of government resources to engage in politics. While the former may reasonably be seen as a purely personal communication, the latter would clearly be seen as a violation of policy, if not law. Without reviewing the content of the e-mails, a *Schill* analysis is not possible. Hence an *in camera* inspection is necessary. *Schill*, at ¶ 185, Justice Gableman concurring. In addition, an *in camera* inspection provides a complete record for appellate purposes.

CONCLUSION

As stated, a requester's motivation for making an open records request is irrelevant. The Senator's concern for potential retaliation is nonetheless relevant when reviewing his application of the balancing test. As we now know, supporters of Governor Walker put great effort into publicly listing all signors of the recall petition in an easily searchable format. Presumably this was not done so that these individuals could be identified and later rewarded. We also now know that when Governor Walker was served with a similar open records request for the e-mails he received during the budget debate, the request was promptly honored, apparently without redaction.

While Senator Erpenbach was justified in considering whether protecting government employees from possible harassment outweighed the public interest in disclosure, review of his decision requires viewing the content of the e-mails. If the e-mails reveal something more than purely personal use of government equipment, then the public interest in knowing whether public employees were engaged in significant political activities using government issued equipment while "on the clock" will likely outweigh the embarrassment and possible retaliation that would follow disclosure of the senders' names and e-mail addresses. If the content reveals nothing more than a purely personal use of government owned computers unrelated to the sender's "official purpose or function," the Senator's determination will likely be upheld under *Schill*.

ORDER

Therefore, the mutual requests for summary judgment are denied. The Senator is directed to provide the court, within 30 days of this order, with a complete copy of all e-mails sent from government-owned computers during the time period requested for an *in camera* inspection. This will facilitate a proper application of *Schill* and provide a complete record for appeal purposes.

Dated: Jan. 31, 2013

BY THE COURT

Robert P. VanDeHey

Honorable Robert P. VanDeHey
Circuit Court Judge, Branch I