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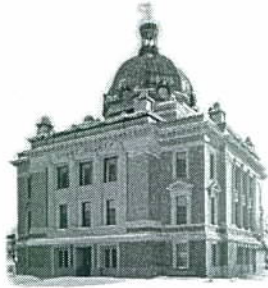

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Grant County Circuit Court
HONORABLE ROBERT P. VANDEHEY
CIRCUIT JUDGE
BRANCH I

April 12, 2013

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Re: *The John K. MacIver Institute for Public Policy,Inc. et al v. Jon Erpenbach*
Grant County Case no. 12-CV-63

Counsel:

Enclosed please find a copy of the court's Decision and Order in regard to the above-entitled matter.

Thank you.

Sincerely,

Tina McDonald
Judicial Assistant, Branch I

Enc.
cc: Clerk of Court

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

Background

This action arose during the heated political debate surrounding Governor Scott Walker's proposal to substantially limit collective bargaining rights for most government workers. The MacIver Institute filed an open records request to obtain copies of e-mails sent to Senator Jon Erpenbach during this tumultuous time. It later amended the request to include only copies of e-mails sent from government-owned computers. The stated purpose of the request was to facilitate an investigation into whether government workers had been engaged in political activity using government resources. Senator Erpenbach disclosed the e-mails but redacted information which would have identified who sent the e-mails, citing his constituents' right of confidentiality and the need to protect them from possible retaliation.

In Camera Inspection

The court has now had an opportunity to review the almost 2,000 e-mails that Senator Erpenbach produced for an *in camera* inspection pursuant to order dated January 31, 2013. The contents of the e-mails were previously known to the plaintiffs so it should come as no surprise that they consist primarily of expressions of support for the Senator's opposition to Act 10, the Budget Repair Bill. Not all e-mails were supportive of the Senator's position. While some e-

mails were fairly extensive, many were just forwarded copies of other e-mails. What follows is a sampling of a few of the shorter ones:

> #00663: I urge you to remember that there are more than 5 million folks in this state - - and perhaps only 20,000 of those are in the Capitol. Keep the Budget Repair Bill as is!
>
> #00360: I have never been so proud of the Democrats as when they took this brilliant step to move out of state rather than pass that heinous bill. I am particularly proud because you are my State Senator. Thanks for all you do and thanks for standing up to the Governor. And, don't take this the wrong way, but please stay away!
>
> #00362: Thank you for your courageous walk out. I know what it is like to stand up for what I believe in and be called cowardly. I am e-mailing you to give you my support and to make the attack on all of you by the Republicans and Governor a little easier to deal with. Thanks for you commitment to the people of Wisconsin. Stay Strong and On Wisconsin!
>
> #00363: We appreciate the historic stand you are taking for workers rights in our district.
>
> #00365: I just wanted to take a moment to personally thank you all for doing your jobs and representing the people of Wisconsin. I am not alone when I say that what you did means a lot to us. Thank you!
>
> #00567: I went to a meeting with some Republican friends in Middleton yesterday, and we are excited about recalling you in 2012. Please stay away as long as possible to make our jobs easier.

Discussion

The Supreme Court's decision in *Schill v. Wisconsin Rapids Sch. Dist.,* 2010 WI 86, 327 Wis. 2d 572, 786 N.W.2d 177, is an important starting point because it recognizes that allowing the occasional use of publicly owned resources for personal matters allows for an efficiency that eventually benefits the public. Of course, public employees should be attending to the people's business while at work. However, if an employee uses a government provided office phone for a personal call, and there is no expense to the employer, and the use is minimal, then the impact on the employer is no different than if the employee uses a personal cell phone while sitting at his or her work station.

In many situations e-mail has replaced the telephone as the favored method of communicating. Assuming a public employee's use of e-mail results in no additional burden upon employers in terms of cost or employee time, *Schill* holds that the public has no interest in discovering that an employee may have sent a purely personal e-mail. Implicit in the ruling is the recognition that even while at work public employees are allowed some personal time.

The MacIver Institute correctly maintains that it is entitled to discover whether government employees may have used government computers while on government time to engage in political activity. Its secondary premise, that merely sending an e-mail in support or in opposition to a particular piece of legislation constitutes inappropriate political activity, is not so self-evident. Because Act 10 personally affected all government employees, it was necessary to review the e-mails to determine if they could be considered nondisclosable under *Schill.*

The e-mails have now been reviewed and none appear to evince the type of conduct that would warrant discipline, let alone prosecution. The court concurs with Senator Erpenbach that no single employee appears to have spent an unreasonable amount of time sending e-mails. Admittedly, it is impossible to know from reviewing any particular e-mail whether or not it was sent while an employee was on personal time. Even assuming the worst case scenario, the e-mails indicate NCAA office pool level conduct and certainly nothing approaching caucus scandal level conduct. It must be remembered that *Schill* recognizes merely because an employee is at work and using a work computer does not necessarily render a communication subject to disclosure.

In this case, government employees who sent e-mails either by smart phone, or by work computer but used a private e-mail account, are not at risk of disclosure.

Complicating the issue is the lack of a clear line between what may be considered personal and what may be considered political activity when personal interests are concerned.

Putting Act 10 aside, would an e-mail from a government employee to Governor Walker urging him to declare Saint Patrick's Day a paid holiday be considered inappropriate political activity? It could be viewed as personal and political. The only thing that is clear is that it would be the better practice to send such an e-mail while the employee was not at work. Ironically, e-mails sent by a government employee while at work but by use of smart phone, or from government computer by use of a private e-mail account, are not subject to plaintiffs' demand.

Reasons to Disclose

In addition to the strong public policy favoring disclosure, the lack of an expectation of privacy by government workers using their government computers supports the plaintiffs' position. While one might expect a phone conversation to be private, government workers should be aware that their computer use may be monitored. Furthermore, regardless of what computer is used, senders must realize that the recipient of an e-mail may print, forward, or otherwise disclose the contents of the communication, unless otherwise privileged. Finally, Senator Erpenbach's concern that disclosure in this case would have a chilling effect on constituent participation is suspect because disclosure would not discourage participation so much as discourage the use of government-owned computers for this type of communication.

Reasons not to Disclose

The Supreme Court has held that deference is to be accorded decisions made by custodians of public records. As the Court of Appeals wrote in *Seifert v. School Dist. of Sheboygan Falls,* 2007 WI App 207, 305 Wis.2d 582, 740 N.W.2d 177:

> ¶ 15 Wisconsin's Open Records Law represents the legislature's policy of favoring the broadest practical access to government. *Hempel v. City of Baraboo,* 2005 WI 120, ¶ 22, 284 Wis.2d 162, 699 N.W.2d 551. The general presumption is that public records shall be open to the public unless there is a clear statutory exception, a limitation under the common law, or an overriding public interest in keeping the public record confidential. *Wisconsin Newspress, Inc. v. School Dist. of Sheboygan Falls,* 199 Wis.2d 768, 776, 546 N.W.2d 143 (1996). . . .

> ¶ 30 If no statutory or common-law exceptions apply, a records custodian is permitted to engage in a balancing test to decide whether the strong presumption favoring disclosure is overcome by some even stronger public policy favoring limited access or nondisclosure. . . .
>
> ¶ 31 . . . *Hempel* teaches that an open records analysis under WIS. STAT. § 19.35(1)(a) must be approached on a case-by-case basis. *Hempel,* 284 Wis.2d 162, ¶ 62, 699 N.W.2d 551. To that we add that a custodian is not expected to examine a request under § 19.35(1)(a) in a vacuum. Rather, the statute contemplates an examination of all the relevant factors, considered in the context of the particular circumstances. *Hempel,* 284 Wis.2d 162, ¶ 63, 699 N.W.2d 551. The custodian must determine whether the surrounding factual circumstances create an "exceptional case" not governed by the strong presumption of openness. *Id.; see* WIS. STAT. § 19.31. ("The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.") An exceptional case is one in which, despite the strong presumption favoring disclosure, "the facts are such that the public policy interests favoring nondisclosure outweigh the public policy interests favoring disclosure." *Hempel,* 284 Wis.2d 162, ¶ 63, 699 N.W.2d 551. While reiterating that custodians must remain mindful of the presumption of openness, *Hempel* also stresses that each request entails a fact-intensive inquiry such that "the legislature entrusted [custodians] with substantial discretion" in performing a disclosure analysis. *Id.,* ¶ 62.

Arguably, a heightened deference should be accorded an official of one of the other two separate but equal branches of government.

The Senator's concern that his constituents might face retaliation must be considered in light of the nuclear environment that existed when he made the decision to redact e-mail addresses.[1] When the Senator balanced the minor or nonexistent misconduct shown by the e-mails with the passion exhibited by individuals on both sides of the issue, he was within his discretion to conclude that the exceptional times made for an "exceptional case," and release only the contents of the e-mails. In reaching this conclusion, the following information from Julie Laundrie's affidavit of March 1, 2013, ¶ 2, is significant:

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[1] The emotions ran high for both supporters and opponents of Act 10. As previously mentioned, supporters of Governor Walker had reasons to post the names and addresses of the signors of the recall petition on-line, and those probably did not include a desire to reward the signators for their participation in the political process. Likewise, some opponents of Act 10 openly called for boycotts of businesses owned or operated by supporters of Governor Walker.

> By reviewing an e-mail, it is not possible to determine whether the e-mail was sent from a government-owned computer or, for example, an individual's personal home computer, blackberry or other device. In many circumstances it is also not possible to determine whether an e-mail was sent by a government employee or, for example, by a student or retiree. . . .
>
> Even if an individual self-identifies as a government employee, it is also not possible to determine whether the e-mail was sent during the designated work hours or during personal time (*e.g.*, lunch, breaks, or after hours), nor is it possible to determine whether sending an e-mail to Senator Erpenbach either during or outside of working hours would violate a work place policy.

The plaintiff previously cited to *Zellner v. Cedarburg Sch. Dist.,* 2007 WI 53, ¶ 52, 300 Wis. 2d 290, 731 N.W.2d 240, for the proposition that the public has no interest in shielding individuals from the consequences of their wrongful conduct. This policy would likely override the Senator's substantial discretion if the e-mails more clearly evinced wrongful conduct, or would likely lead to the uncovering of significant misconduct.

Conclusion

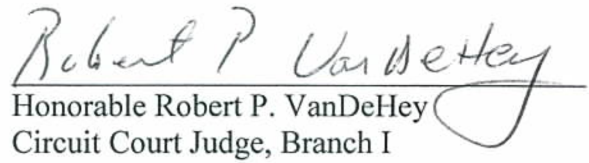
In summary, the MacIver Institute attempts to equate the sending of these e-mails with wrongful conduct, but that conclusion is questionable on this record. However, because the senders of the e-mails had no expectation that the e-mails would remain private, it is difficult to consider them as purely personal under *Schill.* "Personal" connotes private, and both of these terms are oxymoronic with sending an e-mail to a public official concerning a public matter. Regardless of whether the e-mails are personal or part personal and part political, Senator Erpenbach's concern with possible retaliation was a proper factor to be used when he applied the balancing test. His decision to not disclose the addresses of the senders of the e-mails cannot be said to be an improper exercise of the "substantial discretion" afforded to him as custodian of the records. While this court may not have arrived at the same conclusion as did Senator Erpenbach, it is required by case law to accord deference to his judgment.

Order

The plaintiffs' request for a writ of mandamus is therefore denied. In the future, public employees would be well advised to contact their political leaders using their personal computers and while not at work.

Dated: April 12, 2013

BY THE COURT



Honorable Robert P. VanDeHey
Circuit Court Judge, Branch I