STATE OF WISCONSIN
COURT OF APPEALS
Appeal No. 2018AP431

BILL LUEDERS,

Plaintiff-Respondent,

v.

SCOTT KRUG,

Defendant-Appellant.

ON APPEAL FROM THE JANUARY 19, 2018, DECISION AND ORDER OF THE DANE COUNTY CIRCUIT COURT, CASE NO. 16-CV-2189, THE HONORABLE RHONDA L. LANFORD, PRESIDING

BRIEF OF *AMICI CURIAE*, WISCONSIN INSTITUTE FOR LAW & LIBERTY, WISCONSIN FREEDOM OF INFORMATION COUNCIL, JOHN K. MACIVER INSTITUTE FOR PUBLIC POLICY, BADGER INSTITUTE, AND AMERICANS FOR PROSPERITY-WISCONSIN, IN SUPPORT OF PLAINTIFF-RESPONDENT

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INTEREST OF *AMICI*

Amicus Wisconsin Institute for Law & Liberty is a nonprofit, public interest law and policy center dedicated to promoting the public interest in free markets, limited government, individual liberty, and a robust civil society. It frequently files record requests on its own behalf, helps clients draft record requests and obtain records from uncooperative custodians, and educates the public about open records law. When necessary, it litigates to enforce the open records law.

Amicus Wisconsin Freedom of Information Council is a nonprofit organization that seeks to safeguard access to information that citizens must have to act responsibly in a free and democratic society. It provides open records resources to requesters and custodians, communicates publicly about open record issues, including a monthly column, "Your Right to Know," and encourages and facilitates cooperation between many individuals and organizations dedicated to government transparency.

Amicus John K. MacIver Institute for Public Policy is a Wisconsin-based think tank that promotes free markets, individual freedom, personal responsibility, and limited government. It regularly relies on open record requests for its policy research, investigative reporting, and opinion pieces. It was the successful plaintiff in a 2014 Wisconsin Court of Appeals case ruling that state representatives could not redact the identities of people who emailed them about Act 10. *The John K. MacIver Institute for Public*

Policy, Inc. v. Erpenbach, 2014 WI App 49, 354 Wis. 2d 61, 848 N.W.2d 862.

Amicus Badger Institute, formerly the Wisconsin Policy Research Institute, is a nonpartisan, not-for-profit institute established in 1987 working to engage and energize Wisconsinites and others in discussions and timely action on key public policy issues critical to the state's future, growth, and prosperity. The Badger Institute uses the open records laws for its in-depth research and analysis in areas such as education and transportation.

Amicus Americans for Prosperity-Wisconsin ("AFP") is a state chapter of Americans for Prosperity, Inc., a nonprofit corporation incorporated under District of Columbia law, and a tax-exempt social welfare organization qualified under Section 501(c)(4) of the Internal Revenue Code. As a grassroots organization with over 3.2 million activists nationwide, AFP is a leading advocate of federalism and the philosophy of limited government manifested in the U.S. Constitution where governmental power is restricted by law. AFP firmly supports robust open records laws that promote government transparency and responsiveness to the citizenry that government exists to serve.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE OPEN RECORDS LAW PREVENTS CUSTODIANS FROM ALTERING THE FORMAT OF A RECORD IN A WAY THAT CHANGES THE SUBSTANCE OF THE RECORD

This is not a case, as Defendant-Appellant Representative Krug styles it, about whether record requesters can demand a record be produced in any format they want. This case raises a far simpler question – whether a record that exists in a particular format must be produced in that format. Plaintiff-Respondent Bill Lueders is not asking Krug to change the format the record is in – rather, he is asking to be provided the record the way it is currently stored. He does not want Krug to change the format of the record, he wants to stop Krug from changing the format of the record.

Krug is right that if a requester asked for a record maintained in Format A to be provided in Format B, that could create unnecessary work for the custodian. The Open Records Law does not require such a transformation. So if a custodian has a paper document, a requester cannot insist that it be electronically scanned and emailed.

But that is not the proper analogy for what Lueders requested. Here, Lueders asked for records in the format in which they were stored – electronic files. It was Krug, the legal custodian, who ventured to produce the records in a changed format – in the process removing large amounts of information contained in the original file. Absent a specific legal exception

– and none is applicable here – the law does not allow a custodian to strip information out of a record before presenting it to a requester.

A. The "Record" is the Medium on Which the Electronic Data is Stored

Wis. Stat. § 19.32(2) defines "Record" as "any material on which written, drawn, printed, spoken, visual, or electromagnetic information or electronically generated or stored data is recorded or preserved, regardless of physical form or characteristics, which has been created or is being kept by an authority." The definition is expansive and focuses on the material on which the information is stored. The record is not the information itself, but rather whatever object contains the information (so long as that object was created or is being kept by an authority).

Therefore, the "record" in a case like this is actually whatever storage medium the government is using to store its electronic files. It might be an individual user's hard drive[1] located inside a computer tower or laptop shell, or a centralized government server made up of one or many connected hard drives and accessible via a local network. Regardless of which medium is used, the record is the hard drive on which that information is stored.

[1] Modern hard drives can be either hard disk drives, which use a spinning electromagnetic disk not unlike an extremely dense vinyl record player, or the newer solid state drives, which store information in flash memory chips like a USB drive. *See SSD v. HDD: What's the Difference?*, PC Mag, March 26, 2018, https://www.pcmag.com/article2/0,2817,2404258,00.asp. Both forms would be "records," though, "regardless of physical form or characteristics." *See* § 19.32(2).

For convenience, we typically talk about a "record" as being a particular file on a government computer – for example a Word document, an Excel spreadsheet, a PowerPoint presentation, a digital photograph, or an email file. That makes it easier for requesters and custodians to communicate about precisely what is being sought. But as the law is written, the record is the hard drive itself, and a requester should be able to get a copy of the relevant portion of the hard drive in a format as similar to that hard drive as is practical.

B. A "Copy" of an Electronic Record Must Be Electronic

So the question then remains – what does it mean to make a "copy" of a portion of the actual hard drive? The Open Records Law gives requesters the right to either "copy" or "receive copies" of records. Wis. Stat. § 19.35(1)(a). But what is a "copy"? The term is not defined in the statutes, but it has a simple and easily-understood meaning to native English speakers – an identical reproduction of something else. "Copying" carries connotations of creating something so similar to the original that it is not easy to detect the difference between the two. *See Stone v. Bd. of Regents of Univ. of Wis. Sys.*, 2007 WI App 223, ¶18, 305 Wis. 2d 679, 741 N.W.2d 774 ("If a 'copy' differs in some significant way . . . then it is not truly an identical copy."). A good forgery of the Mona Lisa might be a "copy," but an obvious fake would not. *See Milwaukee Journal Sentinel v. City of Milwaukee*, 2012 WI 65, ¶31, 341 Wis. 2d 607, 815 N.W.2d 367

(lead opinion) ("Inherent in this definition is the notion that the document or record is not altered, but simply copied.").

Therefore, a "copy" must contain all or virtually all of the information found in the original. Take this brief, for example. This brief has a cover page, a table of contents, a table of authorities, a main body, a signature block, and two certifications at the end. It is also a public record. *See* Wis. Stat. § 19.32(1) (defining "authority" for Open Records Law purposes to include "any court of law"). If a custodian sent only the main body text in response to an open record request, would that be a "copy" of this brief? Of course not.

In most circumstances, to convey all the same information, a copy needs to be in the same format as the original. Imagine a dash camera on a police cruiser that captures the video of a police officer pulling over a vehicle and arresting and tazing its driver. Nobody in common conversation would call a written transcript of that video a "copy" of that video; it would be something related but wholly different. The transcript would give you some of the same information, but would be lacking real and substantive details, such as the tone of people's voices, timing of the conversation, and physical location of the actors. Nor would an audio recording of a description of a photograph be a "copy" of that photograph.

Applied to this case, a printout of an electronic record cannot therefore be considered a "copy" of the original electronic record. A

substantial amount of important information is lost in the translation. *See* Wis. Stat. § 19.36(4) (noting that a computer program itself is not a record, but "the material used as input for a computer program or the material produced as a product of the computer program" is) (emphasis added).

The term "metadata" refers to electronic information stored within a file that is not immediately apparent upon merely opening the file with the appropriate program. *See What Is Metadata?* Harvard Law School, https://hls.harvard.edu/dept/its/what-is-metadata/, last accessed July 9, 2018. Metadata includes information intentionally added by a user or automatically generated by a computer program. *Id.* Because metadata is part of the "electromagnetic information" maintained by an authority, it meets the statutory definition of a record. Wis. Stat. § 19.32(2).

Metadata can include extremely valuable information about a file. For example, it can include who wrote it or altered it, when it was written or altered, tracked changes, comments, templates used, and the location of a file on a hard drive. *Id.* Metadata in an email file can show email addresses that were blind carbon copied, which would not ordinarily show up in a printout. Metadata in a spreadsheet file (such as Excel) can show what formulas were used to calculate results, not just results themselves.

Metadata has become increasingly important in litigation because of what it can reveal, and attorneys are counseled to take care to strip sensitive metadata out of electronic files before sharing them with opposing counsel.

See, e.g., Tison H. Rhine, *So, You Want to . . . Scrub Metadata from Word Files*, Wisconsin Lawyer, July 2016.[2] For example, metadata is being used to demonstrate that Paul Manafort made alterations to crucial documents himself. *See* Supp. Dec. of Brock W. Domin, *United States v. Manafort*, D.D.C., Dec. 8, 2017, Case No. 17-cr-201, *available at* https://www.politico.com/f/?id=00000160-4797-d668-ab6e-dfb72f850001. Metadata has also been used to prove that a teacher took nude photos of himself at school (using geolocation data) and to prove who took and leaked a photograph of a celebrity. *See* Katherine Noyes, *And There He Stood, with a Smoking Datum in his Hand*, Fortune, Aug. 28, 2014, available at http://fortune.com/2014/08/28/digital-forensics/.

Because it lacks metadata, a printout of an electronic file therefore cannot be a "copy" of that original electronic file. A printout of an email that contains only the date and time, sender, visible recipients, subject, and body text is like a printout of a legal brief that contains only the main argument. While the important gist of the document may be communicated, a large amount of valuable information has been withheld. The printout is effectively a heavily-redacted document and is not a "copy" of the actual email file.

[2] https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume =89&Issue=7&ArticleID=24975.

C. A Printout Is Not "as Readable" as the Original Electronic File

The Open Records Law does, in some circumstances, allow a copy to be provided that does not provide all of the same information as an original record. If a requester appears personally[3] to request a record, the custodian may choose to allow the requester to copy the record or to provide a copy "substantially as readable as the original." Wis. Stat. § 19.35(1)(b). To avoid surplusage, a "copy substantially as readable as the original" must mean something different than just "a copy". Logically, "substantially as readable" must mean something less than a perfect copy (as it cannot mean something more perfect), but the differences must be only minimal.

"Readable" is not a word that easily applies to electronic information. It cannot just mean "visible," because humans are incapable of "seeing" the electromagnetic information. We need software to translate the binary code of ones and zeros into a visual or audio output. But printing out an electronic file's primary content does not create something that can be read the same way an electronic file can be read. Instead of

[3] Lueders aptly explains why, since he did not appear personally to request a record, Krug did not have this option and also why the proper standard for an electronic record should be "substantially as good." *See* Resp. Br. 27-30. But if this Court concludes that that choice applies to all record requests and that "substantially as readable" is the proper standard, then an analysis of whether a printout is "substantially as readable" as an original electronic file is necessary.

translating the ones and zeros into what the government workers who actually use the file see, printing out a file translates it into something else.

Krug claims that "There is no dispute that the paper copies Krug provided – and Lueders inspected – were as readable as the original emails." App. Br. 9. That is false. Only a portion of the information was readable. Krug had access to far more information on the original file than what he gave to Lueders. If the custodian can open the original file and view all the data, but the requester cannot, then the requester's "copy" (if it even is that) is not "as readable as the original." To use this brief as an example again, a "copy" of pages 3-10 is not "as readable" as the entire brief.

II. THE PROBLEMS CAUSED BY CUSTODIANS REFUSING TO PROVIDE ELECTRONIC RECORDS ARE NEITHER ISOLATED NOR INCONSEQUENTIAL

The choice of some custodians to print out records rather than sending an electronic copy is maddening. This is an unjustified waste of taxpayer resources. Printing documents wastes paper, toner, postage, and employee time – all paid for by taxpayers. Furthermore, custodians cannot legally recover the taxpayer money spent printing out electronic records. The law allows requesters to charge only reproduction costs that are "actual, necessary and direct." Wis. Stat. § 19.35(3)(a). If a custodian could have sent an electronic file, printing it is not "necessary." Because

printing is unnecessary, costs associated with printing cannot be charged to a requester.

Sending an electronic file is quicker, simpler, and cheaper than printing it out. For small files, they can be emailed to the requester. For larger requests or if the requester does not provide an email address, files can be copied to a CD or USB drive and mailed or even posted to an online file sharing website. (*See* R. 38:5 ("All that needs to be done is to enter the computer commands necessary to transfer copies of the responsive records from the electronic location where they are stored to the electronic medium that will be used to produce the records to the requester.").) Printing records is a waste of government resources.

Amici have experienced the frustration of a custodian who prints out records for no other reason than to inconvenience the requester. (*See also* R. 30:15, ¶59.) For example, an employee of the Wisconsin Institute for Law & Liberty filed a lawsuit against State Representative Jonathan Brostoff for doing exactly what Krug did here. The employee requested emails in electronic format. Instead, Brostoff printed thousands of pages and sent him an invoice for over $3,200. The employee could avoid that full cost, Brostoff explained, by traveling all the way to Madison and selecting the pages he wanted for copying (an inconvenience likely to discourage many requesters). *See* Complaint, *Roth v. Brostoff*, Dane County Case No. 18-CV-425, available at http://www.will-law.org/our-

cases/open-government/roth-v-brostoff/. Conservative talk show host Mark Belling has experienced similar issues. *See* Scott Bauer, *Democratic Lawmaker Sued over Alleged Open Records Violation*, Associated Press, Feb. 17, 2018, available at https://host.madison.com/wsj/news/local/govt-and-politics/democratic-lawmaker-sued-over-alleged-open-records-violation/article_4f47b868-8c32-5d9b-9b8e-9eab516bce6e.html.

Upholding the printing of electronic records when not necessary could lead to disastrous results. If custodians are allowed to strip out substantive information from records and send only partial copies to requesters (where no statutory or common law exception or the balancing test allows partial redaction), what principle stops them from stripping out even more information? Why couldn't a custodian provide just the body text of an email, stripping out the sender, recipient, subject, and date?

The only logical answer to the question this case poses is that a "copy" of an electronic file must be in the same, native format as the original file. And requesters are under no obligation to explain to custodians why an electronic record is necessary or useful. It is never a requester's duty to establish why they are entitled to a record (or who they are, or what they plan on doing with any record). *See Fox v. Bock*, 149 Wis. 2d 403, 417, 438 N.W.2d 589 (1989) (custodian has the burden to justify withholding a record); Wis. Stat. § 19.35(1)(i) (requesters need not identify themselves or state a purpose for their request). The fact that only

an electronic version can properly be considered a "copy" of a computer file is enough.

Therefore, although the court below's ultimate conclusion should be affirmed, its suggestion that a custodian should provide an electronic copy only if the requester explains why they want it that way (*see* R. 55:6-8), should be expressly rejected.

Dated this 9th of July, 2018.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH
RULE 809.19(8)(b) AND (c)

I hereby certify that this brief conforms to the rules contained in section 809.19(8)(b) and (c) for a brief and appendix produced with proportional serif font. This brief is 2,925 words, calculated using the Word Count function of Microsoft Word 2010.

Dated July 9, 2018

/S/ THOMAS C. KAMENICK
THOMAS C. KAMENICK

CERTIFICATE OF COMPLIANCE
WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, which complies with the requirements of section 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: July 9, 2018

/S/ THOMAS C. KAMENICK
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