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EMPLOYMENT, LABOR
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In this Legal Update

Concurrences of Justices Bradley and Gabelman ... P. 2

Conclusion ... P. 3

About the Employment, Labor & Benefits Team ... P. 4

Employment, Labor & Benefits Attorneys ... P. 4

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July 22, 2010

Wisconsin Supreme Court Rules That Personal E-mails are Not Subject to the Public Records Law

In Schill v. Wisconsin Rapids School District, 2010 WI 86, the Wisconsin Supreme Court found in a 5-2 decision that the contents of purely personal e-mails of teachers are not subject to production through the Wisconsin Public Records Law.

In this case, a record requestor submitted an open records request for the period of March 1, 2007, through April 13, 2007, "from the computers [the Teachers] used during their school work day." The request was made in an attempt to determine whether teachers were working during the school day. After analyzing the request and notifying the teachers who were subject to the request, the District planned on producing all e-mails within that time period to the record requestor. The teachers did not object to the production of any e-mails that were connected to school district affairs or their official actions as public employees. However, the teachers did object to the production of purely personal e-mails. When the District indicated that it intended to produce all of the e-mails within the relevant time period, including purely personal e-mails, the teachers filed an action in Wood County Circuit Court to enjoin the production of the purely personal e-mails.

Judge Pollex of the Wood County Circuit Court determined that the teachers' personal e-mails were records under the Public Records Law. He applied the balancing test and concluded that personal e-mails should be disclosed. The teachers appealed the case, arguing that purely personal e-mails are not "records" under the Public Records Law, and, even if they are "records," purely personal e-mails are not part of government business and should not be disclosed. The case was then directly certified to the Wisconsin Supreme Court.

MAJORITY OPINION OF JUSTICE ABRAHAMSON

Chief Justice Shirley Abrahamson drafted the majority opinion. The majority first analyzed the legislative history of the Public Records Law to determine whether purely personal e-mails are "records" under the statute. The majority acknowledged that the legislature has declared that "all persons are entitled to the greatest possible information regarding the affairs of government" and that the Public Records Law

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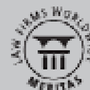

"shall be construed in every instance with a presumption of complete access, consistent with the conduct of government business." (Emphasis added.) The majority opinion found that the e-mails were not records, because the content of the document must have a connection to a government function in order to constitute a "record" under the Public Records Law.

The majority opinion also found that there are public policy reasons for denial of the request. First, the Court was concerned with a categorical disclosure of all personal communication by public employees. Disclosure of personal e-mails does not keep the electorate informed of the conduct of government business. Second, the Court acknowledged that some personal use of technology during a work day is more efficient than other using, more time-consuming methods of personal communication. Full disclosure of all communications of public employees "might hamper productivity, negatively impact employee morale, and undermine recruiting and retention of government employees."

However, the majority opinion found that personal e-mails can 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" and, therefore, discoverable by the public. "If the content of the e-mail is personal in part and has a connection with the government function in part, then the custodian may need to redact the personal content and release the portion connected to the government function."

CONCURRENCES OF JUSTICES BRADLEY AND GABELMAN

Both Justices Bradley and Gableman authored independent concurring opinions. Justice Bradley found that the e-mails were "records." However, Justice Bradley found that disclosure of the contents of personal e-mails does not keep the electorate informed about "official acts" and "the affairs of government." Thus, there is no furtherance of public policy by disclosing personal e-mail. "[T]here is little public interest in disclosure of the content of emails when that content is purely personal and evinces no violation of law or policy." There is a public interest in nondisclosure, as the erosion of some level of privacy would negatively impact employee morale.

Justice Gableman found that "an e-mail sent by a government employee from a government computer using a government e-mail account and stored on a government server is a 'record.'" Justice Gableman found that:

[T]he public interest extends only to records that reasonably bear upon public affairs. Accordingly, the public would normally have no interest in records relating to purely personal matters. This is not to say the public never has an interest in records relating only to personal matters. Such 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. This accords with the purpose of sunshine laws – to ensure that government is behaving itself and spending our tax dollars legally and wisely… 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.

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DISSENT OF JUSTICE ROGGENSACK

Justice Roggensack drafted the dissenting opinion, which Justice Ziegler joined. The dissent first found that the personal e-mails were "records" under the Public Records Law. The dissenters then applied the balancing test and found that the public interest was best served if the records were made public. The dissent found that "[g]iven the significant role that teachers play in our society, the public has a very strong interest in all of their activities in the workplace." The dissent noted that the majority opinion grants government employees a broad exception for e-mails that teachers create in school district e-mail accounts, on school district computers, that are maintained by school district servers. The dissent was not persuaded by the teachers' privacy argument and noted that the teachers were informed by District policy that they had no expectation of privacy when using the District's computers. Moreover, the dissent found that the teachers' privacy interests are not stronger than the public's interest in disclosure of public employees activities in the workplace.

CONCLUSION

In conclusion, the lead opinion holds that if the content of an e-mail is solely personal, it is not a record under the Public Records Law and the e-mail cannot be released. This decision has many things that should concern public employers and their employees. First, four of the seven justices found that purely personal e-mails are "records" and, therefore, are subject to the balancing test. While applied in a way that prevented disclosure in this case, the balancing test is inherently subjective and may be applied unevenly in the future. Second, all justices acknowledged the fact that there are certain circumstances when purely private e-mails must be produced. For example, if an e-mail is used in the disciplinary process or if an e-mail contains both work-related and personal information, the employer must redact the purely personal information. Third, as Justice Gableman notes, if there is a dispute about whether an e-mail contains purely private information, the e-mails can be reviewed by the court in camera. Thus, there is a heavy burden on employers to sift through e-mail to determine whether they must be produced to the public.

If you have questions regarding the above, please contact Chris Toner, the author of this article, or any of the attorneys in the Employment, Labor & Benefits Practice Group of Ruder Ware: Ron Rutlin, Dean

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Attorneys in the group regularly represent public and private sector employers in collective bargaining, negotiations, union elections, unfair labor practices, and grievance arbitration matters in addition to guiding nonunion clients on maintaining their union-free status.

Actively involved in organizations with human resource professionals as the primary member base, our attorneys are in tune with the various sensitivities and complexities of the profession. Our attorneys often present seminars and in-house training on employment law topics both across the state and nationwide.

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- Employee Benefits & Executive Compensation
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- Labor Law

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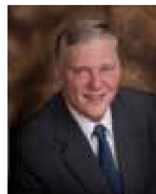

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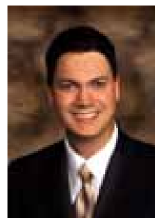

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