

Wisconsin Supreme Court Finds That Personal Emails of Government Employees are Not Always Subject to Disclosure Under the Wisconsin Public Records Law

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In a much-awaited but complex, divisive and inconclusive decision, the Wisconsin Supreme Court found that personal, nonwork-related email communications of government employees were not disclosable under the Wisconsin's Open Records Law. In *Schill v. Wisconsin Rapids School District*, 2010 WI 86, the three-member Lead Opinion of the Court and one concurring Justice concluded that a records custodian should not release the content of an email that is purely personal and evinces no violation of law or policy. The law regarding whether a purely personal email communication made using government resources is a record subject to disclosure under the Open Records Law is not clear as a result of the *Schill* decision. Instead, the following is clear:

- Four Justices determined that a records custodian should not release the content of an employee's email that is purely personal and evinces no violation of law or policy.
- Only three Justices found that personal email communications made by an employee using government equipment are not "records" as defined under the Open Records Law.
- The remaining four Justices found that personal email communications made by employees using government equipment are "records" and are subject to the requirements of the Open Records Law. The two concurring Justices and two dissenting Justices, however, were split as to whether they would order release of the personal email records.
- All seven Justices were in agreement that the content of personal emails could render a particular personal email as a record subject to disclosure under the Open Records Law. The Lead Opinion and Dissent noted that personal emails used as evidence in an internal investigation or to investigate the misuse of government resources would make those records subject to disclosure under the law. They also reaffirmed the public's interest in monitoring how government resources are used by government employees and in reviewing the conduct of disciplinary investigations. This public interest would favor disclosure of personal email communications pertaining to the investigation of allegations of misconduct.

This decision provides little legal guidance as this Court very well could reach an entirely different decision if personal email communications in dispute involved potential misconduct by the government employee or been evidence pertaining to an investigation by the employer.

Regardless of the complexities of how the Court reached its decision, there are several important issues that government employers and public-sector management personnel must understand. First, the Court explicitly stated that this decision has no impact on management's right to "monitor, review, or have access to the personal emails of public employees [on] the government's email system." Management should continue to implement and enforce policies regarding management of the employer's network and information systems.

Second, the decision reaffirms the Court's expectation that records custodians will review each email correspondence in response to an open records request to evaluate whether that email constitutes a record subject to disclosure and then whether the record should be disclosed in part or in full. This decision has no bearing on non-personal email communications that pertain to government business, and those work-related email communications can be treated as records subject to disclosure under the Open Records Law.

Third and of significant importance, the Court emphasized the employer's network use policy and placed importance on government employers maintaining well-crafted policies. As a result of the Court's analysis, government employers should review and update policies and procedures regarding electronic communications, use of employer property, and policies regarding standards of conduct. Employers should also instruct employees to never commingle the content of email communications by including both personal matters and matters involving government business. Further, employees should be instructed that personal email, while not always subject to disclosure under the Open Records Law, is still subject to review and monitoring by the employer as well as discovery in litigation and access through other measures including by criminal investigating authorities. For employees who do not want their personal email communications read by the municipal employer, the public or any other party, then they should not make that personal email communication at all.

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