

# Wisconsin Court of Appeals Requires Disclosure of E-Mail Listserv Maintained by Public School District Used for Community Outreach

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On December 7, 2022, the Wisconsin Court of Appeals ordered the Mequon-Thiensville School District (“MTSD”) to release a parent e-mail list to a public records requestor.<sup>1</sup>

## **Background**

MTSD collected parent e-mail addresses for the purpose of communicating with parents about student-focused matters (school closures, bus routing, enrollment reminders, etc.). In addition, MTSD also used the email distribution list to communicate on “community outreach” matters that “may stray from what traditionally would be considered school related.”

A local resident, Mark Gierl, requested the parent e-mail list used by MTSD in a June 24, 2020 communication. The June 24, 2020 MTSD e-mail contained information on a webinar on the topic of “privilege and race,” among other topics related to race and racism.

## **The District’s Response to the Records Request**

In response to the records request, MTSD provided staff e-mail addresses to which the invitation was sent, but refused to provide parent e-mail addresses stating, “the District does not believe that there is a statute or case explicitly requiring or prohibiting disclosure of the list of parent email addresses, and as such, we have decided to respectfully decline your request for parent email addresses.”

## **Public Records Law**

Wisconsin maintains a strong presumption of complete openness with regard to public records. The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.

MTSD, in the process of denying the request for records, relied upon the “balancing test” and concluded that the harm to the public interest outweighed the public’s strong interest in disclosure.

### **Applying the Balancing Test to Parent E-Mail Lists**

The balancing test requires that the custodian “weigh the competing interests involved and determine whether permitting inspection would result in harm to the public interest which outweighs the legislative policy recognizing the public interest in allowing inspection.” The burden is on the custodian to show specific public interests favoring secrecy that outweigh those public interests favoring disclosure. Access is only to be denied in an exceptional case.

In applying the balancing test, MTSD relied on an Attorney General’s opinion from 2010 and argued release of the parent e-mail addresses would have a chilling effect on parents’ willingness to provide email addresses to the District and, in turn, the District’s ability to communicate with parents would be stifled. MTSD also claimed release of the e-mail addresses would subject parents to unwanted e-mails inquiring about their political ideology. MTSD argued the public had a strong interest in avoiding such outcomes.

Both the Circuit Court and the Court of Appeals rejected MTSD’s position that there would be a chilling effect on parent-District communications. The Court of Appeals found that MTSD disclosed an email list in 2015 to the Mayor of Mequon that resulted in no chilling effect. The Court also noted that getting unwanted email is a daily reality in 2022, and a lot has changed since 2010 (the date of the Attorney General opinion).

The Court paid particular attention to the community outreach and advocacy nature of MTSD’s communications, insofar as they transitioned from communicating about school-student related matters toward larger social issues. These community outreach and advocacy messages greatly eroded MTSD’s argument that nondisclosure was required to shield parents from outside inquiries into their political ideologies. The Court of Appeals expressed concern with the nature of MTSD’s community outreach email communications and its subsequent attempt to shield others from contacting parents about similar topics, noting that the balancing test “does not tolerate utilizing taxpayer resources for an ideological or political monopoly.”

### **Conclusion**

This case highlights two distinct and important concepts. First, the presumption of openness of public records is well-established under Wisconsin law. Only very narrow exceptions support nondisclosure, including the balancing test that was relied upon by MTSD. Custodians must be prepared to demonstrate actual, not speculative, harm to the public interest if the custodian believes the balance tips in favor of nondisclosure.

Second, the nature of communications matter greatly, especially where government is engaging in community outreach and political and ideological advocacy which will no doubt be scrutinized by the courts. Wisconsin law was already clear that if an individual is contacting government for the purpose of influencing government on policy matters, then their identity and contact information is subject to disclosure. The courts hold government to a similar standard when government is trying to influence the public. In this case, the Court of Appeals noted that if MTSD’s communications were exclusively related to student or school matters, such as bus schedules and school office closures, then it is likely the balancing test could have tilted toward nondisclosure.

It is critical that all public entities, not just school districts, understand the impact of this Court of Appeals decision due to the frequency with which public entities address certain social issues and solicit public feedback on policy matters. If a citizen chooses to participate and provide feedback, then it is likely their identity, their email address, and their response will be subject to disclosure. The collated list of contacts relied on by the government entity is also subject to public release. Public entities should approach these situations with care and be explicit when soliciting feedback that information provided in response may be subject to public disclosure.

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<sup>1</sup> *Gierl v. Mequon-Thiensville Sch. Dist.*, 2021AP2190, 2022 WL 17479915 (Wis. Ct. App. Dec. 7, 2022).

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