



Retention and Disclosure of Electronic Communications

Communications involving district business are now generated electronically more frequently than ever. Typical forms of such electronic communications include email, web sites, voicemail, text and instant messages. This technology allows district employees and board members to generate and transmit information about the district's affairs in a format other than a traditional paper record. The differing formats and the vast volume of electronic communications raise issues about whether they need to be retained and, if so, for how long, and whether they have to be disclosed under the Wisconsin Public Records Law (WPRL), and, if so, in what format. This *Legal Comment* will address the status of electronic communications under the WPRL and the length of time and the manner in which they must be retained and/or disclosed by districts.

■ Status as a Record

The WPRL is premised on the proposition that people are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them.¹ With this policy in mind, districts are required to construe the WPRL with a presumption of complete public access to public records. In order to be a record, material must be created or kept by the district. The WPRL defines a "record" broadly so as to encompass any conceivable means of conveying information. In general, the content of the material determines whether a document is a record, rather than the medium, format, or location of

the material. Electronic communications to and from district employees and board members about district matters are records and may have to be disclosed upon request.

Disclosure is only required if a "record" has been created or kept by an authority.² An "authority" is, in turn, defined as any "state or local office, elected official, agency, board, commission, committee, council, department or public body corporate and politic created by the constitution, or by any law, ordinance, rule or order" having custody of a record.³ Board members, as "elected officials," are "authorities" within the meaning of the law. A school-related record retained by a board member on a personal electronic device may be a record under the WPRL, unless the record falls into one of the exceptions to the definition of "record." Board members who create or receive items on their personal electronic devices regarding district matters, including any district-related email received on a personal account, should consider routing such items to the district for proper retention.

The intermingling of personal and district electronic communications on a district network or device or on a personal device raises legal and practical issues. In a case dealing with a request for electronic records, the Wisconsin Supreme Court held that the contents of emails that were sent or received by teachers on government email accounts that had no connection to a government function were not records under the WPLR.⁴ The Wisconsin Attorney General has subsequently advised that legal custodians responsible for

responding to public records requests must screen emails that fall within the scope of a request to determine whether, in fact, the contents are purely personal and need not be released, or whether any aspect of the email sheds light on governmental functions and responsibilities.⁵ If a document contains both personal and non-personal content, a legal custodian may redact portions of the document so that the purely personal information is not released.

Currently, there are no judicial or Attorney General Opinions about whether text or instant messages qualify as "records" under the WPRL. However, because it is the content of the communication that determines whether a communication is a record, rather than the medium, format, or location, it is commonly understood that text and instant messages used to communicate district business that are created or kept by an authority are records and, therefore, are subject to potential disclosure under the WPLR.

■ Form of Disclosure

If an electronic communication is subject to disclosure and the requester does not specifically request access to an electronic record in its original format, a sufficient response to a records request is to provide a copy of an electronic document that is "substantially as good" as the original. In one case, the Wisconsin Supreme Court found that an authority's provision of the requested information in the format of portable document files (PDFs) satisfied the request for records in an "electronic digital format," even

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though it did not provide access to the computerized database, which would have allowed the requester to manipulate the electronic data.⁶

In another case, however, where the requester sought access to an original digital audio tape (DAT) recording of a 911 telephone call, the Supreme Court held that the City of Milwaukee was required to produce the DAT recording for examination and copying. It concluded that providing an analog cassette tape copy of the calls, although substantially as audible as the original, did not allow the requester to detect and enhance background voices on the recording. The Court noted that “material used as input for a computer program or the material produced as a product of the computer program is subject to the right of examination and copying.”⁷ At a minimum, this case stands for the proposition that a requestor may be granted access to an electronic record in its original format in some instances.

The Wisconsin Attorney General has advised that legal custodians should state a sufficient reason for denying access to a copy of a record in the particular format requested. However, if a requester seeks information stored in a database, and requests a data run to obtain the requested information, a legal custodian is not required to create a new record by extracting information from an existing record and compiling the information in a new format.

This gets complicated, however, if a response to a WPRL request requires redaction of portions of the electronic record. This could involve manipulating the electronic database to extract certain data, which in effect creates a new electronic record. In that situation, a legal custodian must still delete or redact confidential information contained in a record to provide access to the parts of the record that are subject to disclosure. The Attorney General has advised that an authority use a “rule of reason” when determining whether retrieving electronically stored data involves the creation of a new record, taking into account the time, expense, and difficulty of

extracting the data requested and whether the agency itself ever looks at the data in the format requested.

■ Retention

Districts are required to keep all public records for not less than seven years, unless a shorter time period is fixed by the Public Records Board (PRB).⁸ Districts, however, are also permitted to destroy “obsolete school records.”⁹ The PRB defines “public records” as things “made or received by [any governmental employee] in connection with the transaction of public business.”¹⁰ Electronic communications that are made or received by a district employee in connection with the transaction of public business are “public records” subject to statutory retention requirements. As with the WPRL, the content, rather than the form, determines whether an electronic communication is a “public record” subject to retention requirements.

■ Length of Retention

There are several exceptions to the general seven-year retention rule. First, it does not apply to any document that is a pupil record within the meaning of WPRL.¹¹

Second, the PRB has the authority under state law to permit the destruction of records in less than seven years and has approved records retention schedules that include shorter retention periods that districts may utilize.¹² The PRB approved the “General Records Schedule: Common Records in Wisconsin State Agencies and Local Units of Government” (GRS) for adoption and use by local government units, including school districts.¹³ The GRS permits the destruction of certain records when they are no longer needed and permits the destruction of low-value documents that are frequently generated by districts in the course of business. The schedule specifically addresses production reports, scheduling records, suspense files, tracking and control records, indexes and finding aids, mailing address lists, and, importantly, transitory files.

A large segment of district electronic communications will likely

qualify as “transitory correspondence and other related records” under the GRS, which are defined as “correspondence and other related records of short-term interest which have no documentary or evidentiary value.”¹⁴ They include things like routine requests for information that require no policy decision, special compilation, or research. Transitory messages exclude messages that set policy, establish guidelines or procedures, document a transaction, or become a receipt. For districts which have affirmatively adopted the GRS, such transitory records may be destroyed immediately when no longer needed.

However, no record may be disposed of if it is subject to an audit or a request for inspection or subpoena, nor may a record be destroyed if the record is likely to be relevant to any pending or threatened litigation, regardless of whether or not the destruction of the record is called for by a retention schedule. Furthermore, prior to the destruction of obsolete school records, the district is obligated to provide the State Historical Society (SHS) at least 60 days written notice to allow the SHS to determine whether the district records are of historical interest and should be preserved.¹⁵

Specifically, with respect to district records, the Department of Public Instruction (DPI) has established the Wisconsin Records Retention Schedule for School Districts (SDRRS). This schedule has been approved by the PRB and is listed on both the PRB and DPI websites.¹⁶ The SDRRS establishes a retention schedule for most district records and was created by a task force which recommended retention periods based upon sound managerial practices and legal requirements so that districts would not be forced to individually undertake the task of drafting their own retention schedules.

In order to adopt the SDRRS, districts must complete a notification form and forward the form to the SHS in accordance with the instructions found on the form. A district cannot receive the legal benefit of the SDRRS simply by resolving to adopt it; the procedures found on the notification form must be properly followed.

A district can adopt all or part of the SDRRS and may make modifications to the schedule if it informs the SHS and the PRB of the change.

Boards that have adopted the SDRRS may wish to review their records retention schedule to ensure that the version of the SDRRS adopted is current and pragmatic in light of the district's managerial practices, technological limitations, and changes in the law. From an operational perspective, boards should ensure that the categories found in their SDRRS adequately describe all of the types of documents retained by the district.

■ Form of Retention

Districts must maintain electronic records stored exclusively in an electronic format in a manner that ensures they are accessible, accurate, authentic, reliable, legible, and readable through the record life cycle.¹⁷ The governing regulations regarding electronic records retention do not require that a public record that originates in electronic form be maintained in electronic form.¹⁸ However, it is possible that records created in electronic form may contain unique information in their original format that would be lost by transferring the record to another format. For example, email documents typically contain routing data that is not visible on screen to the sender or receiver and is not shown if the document is printed on paper. Therefore, when retaining an email in either an electronic format or a paper format, it is important that the record includes the transmission data that identifies the sender and the recipient(s), including all parties on a distribution list, and the date and time the message was sent and/or received.

Finally, technological limitations may affect a district's decision regarding the format in which records will be retained. For example, districts may wish to store records in their computer systems, particularly where the records themselves originated in electronic format. However, computer networks are not always stable, and retention of records in a

computerized format may burden the district's computer networks. Under certain circumstances, this may result in the loss of records maintained in an electronic format.

The volume of stored data can pose capacity and system management issues. Districts that are considering whether to maintain records in an electronic format should consult with their technology advisors with respect to options to back-up material on a regular basis and to convert or save records in an alternative location or format in the event of an emergency. Moreover, districts that choose to maintain documents solely in electronic format should carefully review the requirements of Wisconsin's Administrative Code, Chapter Adm 12, which apply exclusively to records retained solely in electronic form, and determine whether the district has the technological and managerial capacity to meet these requirements.

Districts can contract with private companies to provide the services for the transmission of electronic communications and also to provide storage of such communications. If so, districts should consider how records in the form of text messages or posts on social networking sites will be stored and retained. It is advisable to address these issues in any service contracts with electronic communications service providers. Text messages can be archived on a vendor's computer server, and it is important to ascertain whether and for how long such information is retained in order to ensure that the district can satisfy the requirements of the WPRL.

■ Conclusion

The continuing evolution of technology, the increasing use of electronic means of communication, and the practical limitations on district network resources present districts with the ongoing need to assess their retention practices relative to electronic communications. Districts are generally required to maintain records for a period of seven years unless a district acts to adopt reten-

tion schedules that permit the destruction of records in a shorter period of time. While the PRB has established a general retention schedule, it has approved DPI's retention schedule specifically created for district records. The SDRRS establishes a framework for districts to use in their retention analysis, which should also include consideration of the technological, legal, and logistical issues involved in determining how long and in what format records of electronic communications will be retained. ■

■ Endnotes

1. Wis. Stat. § 19.31-19.36.
2. Wis. Stat. § 19.32(2).
3. Wis. Stat. § 19.32(1).
4. *Schill v. Wis. Rapids Sch. Dist.*, 2010 WI 86, 327 Wis. 2d 572, 786 N.W.2d 177.
5. Memorandum from J.B. Van Hollen, Wisconsin Attorney General, to Interested Parties (July 28, 2010). <http://www.doj.state.wi.us/sites/default/files/dis/memo-ip-schill.pdf>
6. *WIREdata, Inc. v. Vill. of Sussex*, 2008 WI 69, ¶¶96-98, 310 Wis.2d 397, 751 N.W.2d 736.
7. *State ex. rel. Milwaukee Police Ass'n. v. Jones*, 2000 WI App. 146, 237 Wis. 2d 840, 615 N.W.2d 190.
8. Wis. Stat. § 19.21(6).
9. *Id.*
10. Wis. Stat. § 16.61(2)(b).
11. Wis. Stat. § 118.125.
12. Wis. Stat. § 16.61(3).
13. Public Records Board, General Records Schedule: Administrative and Related Records at 6 (Aug 23, 2010, rev. 2016). <http://publicrecordsboard.wi.gov/docview.asp?docid=15863&locid=165>
14. *Id.*
15. Wis. Stat. s. 19.21(6).
16. Wisconsin Department of Public Instruction, *Wisconsin Records Retention Schedule for School Districts* (2015).
17. Wis. Admin. Code Adm. § 12.05(1).
18. Wis. Admin. Code Adm. § 12.03.

This Legal Comment was written by Michael J. Julka, Steven C. Zach, and Rick Versteegen of Boardman & Clark LLP, WASB Legal Counsel. For additional information, see the following related Legal Comments in Wisconsin School News: "Electronic Communications Records and the Public Records Law" (December 2010) and "Records Retention Schedules" (October 2002).