

To: Interested Parties

From: J.B. Van Hollen
Attorney General

Date: July 28, 2010

Re: Practical impact of Wisconsin Supreme Court's decision in *Schill v. Wisconsin Rapids School District* on public records custodians and public records requesters

The Wisconsin Supreme Court recently decided in *Schill v. Wisconsin Rapids School District*. The Court held 5-2 that the Public Records Law (Wis. Stat. §§ 19.31-19.39) does not require the disclosure of the contents of purely personal e-mails sent or received on government e-mail accounts. Three members of the Court reached this result by concluding that purely personal e-mails, unrelated to any government function, are not “records” under Wis. Stat. § 19.32(2). Although the remaining four members of the Court, a majority, concluded that the e-mails were “records,” two of them further concluded that such e-mails should ordinarily not be released under a proper application of the Public Records Law’s “balancing test.”

In order to comply with the holding in *Schill*, a records custodian is responsible to screen e-mails that fall within the scope of a request in order to determine whether, in fact, the contents are purely personal and evince no violation of law or policy. If so, the e-mails need not be released. In making this judgment, however, records custodians should be mindful of the policy behind the Public Records Law. It is “the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them.” Wis. Stat. § 19.31. Therefore, the “purely personal e-mail” exception to disclosure should be narrowly applied. If there is *any* aspect of the e-mail that may shed light on governmental functions and responsibilities, the relevant content must be released as any other record would be released under the Public Records Law. If a document contains both personal and non-personal content, a records custodian may redact portions of the document so that the purely personal information is not released.

Individuals who are concerned about misuse of public resources—i.e., personal use of government e-mail—should not be deterred from making public records requests that might reveal the misuse. In particular, an individual may request existing records containing statistical information, including the number of e-mails (personal and business) and the time and dates of the personal e-mails over a specified period. Moreover, if an individual has made a request and has a reasonable basis to believe that withheld e-mails were not purely personal, he or she may commence a legal action to compel release and ask the court to conduct an *in camera* review of the disputed e-mail to determine if the custodian made the proper judgment.

This memorandum is intended to provide practical guidance in the immediate aftermath of the *Schill* decision. Additional analysis of how the *Schill* case impacts the Public Records Law will be contained in the next revision of the Department of Justice's Public Records Compliance Outline, which will be published this Fall. The current version of the Public Records Compliance Outline is available at <http://www.doj.state.wi.us/site/ompr.asp>.

Compliance with the Public Records Law and fostering a policy of open government for all Wisconsin citizens is critical. Questions concerning compliance with the Public Records Law may be directed to the Department of Justice's public records hotline at (608) 266-3952.