STATE OF WISCONSIN CIRCUIT COURT BRANCH 16 DANE COUNTY

BILL LUEDERS,

Plaintiff,

v.

Case No. 16-CV-2189

SCOTT KRUG,

Defendant.

DECISION AND ORDER

This case involves access to records under Wisconsin's public or open records law. Plaintiff Bill Lueders ("Lueders") requested that Defendant Representative Scott Krug ("Krug") produce copies of certain electronic records in an electronic format. Defendant offered the public records as printed paper copies, and contends that the law requires no more of him. The issue before this Court is what a records custodian is required to produce when a requester asks for copies of electronic records "in electronic form" under the Public Records Law. Both parties have filed motions for summary judgment, and Plaintiff has moved the court for a writ of mandamus.

STATEMENT OF FACTS

The material facts are not in dispute. In June of 2016, Plaintiff Bill Lueders, a journalist, through the open records law asked Defendant Representative Scott Krug's office for copies of "citizen correspondence" on certain water policy topics. PUF ¶ 8. A search turned up a long list of records, including electronic correspondence. PUF ¶ 13;

PUF ¶ 15. Defendant's staff produced over 1,500 pages when they printed the responsive records. PUF ¶ 13; PUF ¶ 15. Defendant made the printed records available for Plaintiff's review, and offered him hard copies on a price-per-page basis. PUF ¶ 15-16.

Preferring not to purchase the entire paper record, Plaintiff submitted a second request under the open records law. On July 21, he asked "not for printed copies of these records," but for "the records in electronic form, as an email folder, or on a flash drive or CD." PUF ¶ 3. Narrowing his scope, Plaintiff requested "emails received by your office i[n] response to proposed changes to the state's water laws." PUF ¶ 18.

When an open records request is received, the Assembly's policy is to coordinate records request responses through the Assembly Chief Clerk. PUF ¶ 26-27. After Plaintiff's request for the record in an electronic form, Defendant consulted with the Chief Clerk about how to answer the request, then contacted Plaintiff. PUF ¶ 21; PUF ¶ 5. "[W]e have provided you with access to review the records you have requested and the ability to receive copies of those records that are substantially as readable as the original," was Defendant's response, referring to the printouts his office previously produced. PUF ¶ 5. "We now consider your request closed." *Id.* Construing this correspondence as a refusal to produce records under the open records law, Plaintiff brought this action for mandamus.

STANDARD OF REVIEW

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a

judgment as a matter of law." Wis. Stat. § 802.08(2). Inferences drawn from the facts must be viewed in the light most favorable to the parties opposing the motion for summary judgment. *Novell v. Migliaccio*, 2008 WI 44, ¶ 23, 309 Wis. 2d 132, 749 N.W.2d 544. "A factual issue is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Physicians Plus Ins. Corp. v. Midwest Mut. Ins. Co.*, 2002 WI 80, ¶ 18, 254 Wis. 2d 77, 646 N.W.2d 777.

DISCUSSION

A "presumption of complete public access, consistent with the conduct of governmental business" is at the heart of Wisconsin's open records law. *Schill v. Wisconsin Rapids Sch. Dist.,* 2010 WI 86, ¶ 82, 327 Wis. 2d 572, 786 N.W.2d 177 (quoting Wis. Stat. § 19.31). Open records laws "are first and foremost a powerful tool for everyday people to keep track of what their government is up to . . . the right of the people to monitor the people's business is one of the core principles of democracy." *Id.* at ¶ 2. With this policy in mind, this Court makes the following decision and order.

A. A requester has a right to receive a copy of emails that are public records.

Under the open records law, "any requester has a right to inspect a record and to make or receive a copy of a record." Wis. Stat. § 19.35(1)(b). The definition of records includes electronic records like electronic mail. *Schill v. Wisconsin Rapids Sch. Dist.*, 2010 WI 86, ¶ 56, 327 Wis. 2d 572, 786 N.W.2d 177; Wis. Dep't of Justice, *Wisconsin Public Records Law Compliance Guide* at 3 (Nov. 2015)[1]. In particular, emails sent by

[1] *Available at* https://www.doj.state.wi.us/sites/default/files/dls/2015-PRL-Guide.pdf.

constituents to a public official for the purpose of influencing policy are public records. *John K. MacIver Inst. for Pub. Policy, Inc. v. Erpenbach*, 2014 WI App 49, ¶ 18, 354 Wis. 2d 61, 848 N.W.2d 862.

B. A copy of an electronic record must be "substantially as good" as the original record.

The open records law creates standards for evaluating the sufficiency of records produced by custodians. Wis. Stat. § 19.35(1)(b), (c), and (d). The legislature has not yet promulgated a standard specific to electronic records. In determining the appropriate standard to apply here, the *Wisconsin Public Record Compliance Guide* provides guidance:

> Wisconsin Stat. § 19.35(1)(b), (c), and (d) require that copies of written documents be "substantially as readable," audiotapes be "substantially as audible," and copies of videotapes be "substantially as good" as the originals. . . . By analogy, providing a copy of an electronic document that is "substantially as good" as the original is a sufficient response where the requester does not specifically request access in the original format.

Compliance Guide at 56.

The alternative to a "substantially as good" standard for electronic record copies would be to hold custodians to a "substantially as readable" standard, as suggested by the Defendant. However, whether a document is "readable" in electronic form is only a fraction of the analysis of whether Defendant complied with the records request as submitted. It is undisputed that words on a printed page consist of only a small part of what an electronic document actually contains, and reading those words with the naked

eye is far from the only way to meaningfully access an electronic record.[2] The Public Records Law guarantees access to public *records*, and is not limited to the content that would be reproduced in hard copy or copy that is simply "readable." *See* Wis. Stat. § 19.32(2) (the definition of "record" includes any "material [or] medium on which electronically generated or stored data is recorded or preserved").

In the instant case, "a short email from one constituent contained over 2,000 bytes of human-readable text, only 10% of which was text that would appear in a printed copy of the email message." PUF ¶ 44. Electronic records are also likely to possess functionalities beyond those of a printed document. Some types of textual analysis are impossible to perform on printed documents, while others are much less efficient.

The Public Records Law's Declaration of Policy mandates that the statutes "shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business." Wis. Stat. § 19.31. "This statement of public policy . . . is one of the strongest declarations of policy to be found in the Wisconsin statutes." *Zellner v. Cedarburg Sch. Dist.*, 2007 WI 53, ¶ 49, 300 Wis. 2d 290, 731 N.W.2d 240. "A potent open records law must remain open to technological advances so that its statutory terms remain true to the law's intent." *State ex rel. Milwaukee Police Ass'n v. Jones*, 2000 WI App 146, ¶ 19, 237 Wis. 2d 840, 615 N.W.2d 190.

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[2] Plaintiff submitted an affidavit from a journalist who states that "documents provided in electronic format . . . facilitate his access to government information. For example, information in databases can be sorted in any number of ways, making it possible to identify trends. Electronic documents can be searched for key words to help locate information within the record, something that is especially helpful when requests yield large numbers of documents."

C. To produce a copy "substantially as good" as the original, the custodian must take into account any information given by the requester regarding how to best facilitate access.

Determining whether a given copy of an electronic record is "substantially as good" as the original is complicated by the fact that a requester might not have access to a computer, or to the software necessary to open the file. For such a requester, a printout might actually be superior to a digital file, even though the printout would not contain all of the information present in the original. *See* Wis. Stat. § 19.35(1)(e) ("any requester has a right to receive from an authority having custody of a record which is not in a readily comprehensible form a copy of the information contained in the record assembled and reduced to written form on paper").

Courts have recognized that custodians should therefore take into account whether the requester's needs would be best met by a hard copy or an electronic copy. In *State ex rel. Milwaukee Police Ass'n v. Jones*, the requester first asked for a copy of a digital audio record, without elaboration. When the custodian produced an analog copy of the file, the court held that the request was satisfied because the copy was "substantially as audible" as the original file. *Jones*, 2000 WI App 146, ¶ 12; Wis. Stat. § 19.35(1)(c). The requester then submitted a second "enhanced" request for access to the *original* digital audio tape record. *Jones*, 2000 WI App 146, ¶ 4. The court held that the analog tape copy was *not* responsive to the second request, because the law permits "access to the source 'material' and the opportunity for 'examination and copying.'" *Jones*, 2000 WI App 146, ¶ 17; Wis. Stat. § 19.36(4). A requester ultimately has a right to the entirety of a digital

record, but the requester also has the responsibility to put the custodian on notice as to their requirements.

The Wisconsin Supreme Court has addressed this issue somewhat elliptically. In *WIREdata* the court declined to decide whether a requester is entitled to receive a record in a particular file format, but did indicate that it took the requester's preferred format into account when determining whether the open records request had been satisfied. *WIREdata, Inc. v. Vill. of Sussex*, 2008 WI 69, ¶ 93, 310 Wis. 2d 397, 751 N.W.2d 736 ("The PDF files satisfied the open records requests of WIREdata, as its initial requests were worded").

A custodian's task is complicated somewhat by the fact that an electronic file that a requester is generally entitled to access may contain information not subject to disclosure. Emails and other digital documents contain metadata, or "data about data." *Compliance Guide* at 54. There is no mandatory Wisconsin authority as to whether metadata can constitute a record. However, in the event that the requested record contains material that the requester is not entitled to access, the custodian must "provide the information that is subject to disclosure and delete the information that is not subject to disclosure from the record before release." Wis. Stat. § 19.36(6). When evaluating whether information is eligible for release, "[a]ny exceptions to the general rule of disclosure must be narrowly construed." *Voice of Wisconsin Rapids, LLC v. Wisconsin Rapids Pub. Sch. Dist.*, 2015 WI App 53, ¶ 10, 364 Wis. 2d 429, 867 N.W.2d 825.

In summary, a custodian who receives a request for an electronic record must produce a copy that is "substantially as good" as the original. Whether or not a copy is

"substantially as good" as the original depends in part on the needs and resources of the requester. If the requester indicates that his ability to access the record would be best served by a particular format of copy, the custodian should produce the copy in that format unless doing so would be so burdensome as to be inconsistent with the conduct of governmental business. *See* Wis. Stat. § 19.31 (the Public Records Law "shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business"). If the requester does not provide a format preference, the custodian should produce the record copy in a form that would be most useable to an average person without access to special technology.

D. Defendant was obligated to produce electronic copies of the requested emails.

In the case at hand, the plaintiff requested copies of a number of emails. It is undisputed that those emails were public records. Plaintiff originally requested the emails without reference to format. He was offered them in printed form. Plaintiff submitted a second request, specifying that "[the] request is not for printed copies of these records; it is for the records in electronic form, as an email folder, or on a flash drive or CD." PUF ¶ 3. Plaintiff clearly stated his preferred format.

As discussed *supra*, a custodian is obligated to produce a copy of a record "substantially as good" as the original. When determining whether the copy is "substantially as good," the custodian must take into account the needs of the requester, including any indications given as to preferred format. In the case at hand, Plaintiff clearly communicated that printed copies would not serve his needs, and he specified several electronic formats that would facilitate his ability to work with the records. Under

those circumstances, the Defendant was required to produce electronic copies of the records.

E. Plaintiff is not entitled to punitive damages.

A penalty provision of the Public Records Law provides that "[i]f a court finds that an authority or legal custodian . . . has arbitrarily and capriciously denied or delayed response to a request . . . the court may award punitive damages to the requester." Wis. Stat. § 19.37(3). "A decision is arbitrary and capricious if it lacks a rational basis or results from an unconsidered, willful and irrational choice of conduct." *Eau Claire Press Co. v. Gordon*, 176 Wis. 2d 154, 163, 499 N.W.2d 918 (Ct. App. 1993). Whether a decision to deny a public records request was arbitrary and capricious is a question of law. *Id.*

Plaintiff argues that the Defendant's conduct was arbitrary and capricious insofar as Defendant sought and accepted the advice of colleagues as to how best to respond to Plaintiff's request. PUF ¶ 20; PUF ¶ 21. Consulting experienced colleagues, including the Assembly Chief Clerk, and attempting to follow the advice of colleagues cannot be found to be arbitrary and capricious denial. There is no evidence of bad faith on Defendant's part. He should have produced the requested records in electronic form, but his actions were not arbitrary and capricious and therefore do not support an award of punitive damages.

ORDER

For the above reasons, it is ordered that:

Plaintiff's Motion for Summary Judgment is GRANTED and Defendant is ordered to produce electronic copies of the records that Plaintiff requested; Plaintiff's Request for Punitive Damages is DENIED;

Defendant's Motion for Summary Judgment is DENIED.

This is a final order for purposes of appeal.

Dated this 19th day of January, 2018.

BY THE COURT:

Honorable Rhonda L. Lanford
Dane County Circuit Court Judge
Branch 16