**STATE OF MICHIGAN**
**IN THE COURT OF APPEALS**

HOWELL EDUCATION ASSOCIATION, MEA/NEA, DOUG NORTON, JEFF HUGHEY, JOHNSON McDOWELL, and BARBARA CAMERON,

Plaintiffs/Appellants,

v.

HOWELL BOARD OF EDUCATION, and the HOWELL PUBLIC SCHOOLS,

Defendants/Appellees,

and

CHETLY ZARKO, an individual,

Intervenor/Counter-Plaintiff/Counter-Appellant,

v

HOWELL EDUCATION ASSOCIATION, MEA/NEA, DOUG NORTON, JEFF HUGHEY, JOHNSON McDOWELL, and BARBARA CAMERON,

Plaintiffs/Counter-Defendants/Counter-Appellees.

Court of Appeals No. 288977
Circuit Court No. 07-22850-CK

**INTERVENOR-APPELLEE CHETLY ZARKO'S MOTION FOR RECONSIDERATION**





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**INTERVENOR-APPELLEE CHETLY ZARKO'S MOTION FOR RECONSIDERATION**

This case is a "reverse" Freedom of Information ("FOIA") MCL 15.231, *et seq.* lawsuit. Under MCR 2.119(F) and 7.215(I), Intervenor-Appellee Chetly Zarko respectfully requests that this Court reconsider its Opinion in favor of Appellants, Howell Education Association ("HEA" or Union"), Doug Norton, Jeff Hughey, Johnson McDowell and Barbara Cameron (collectively, "Plaintiffs"). **Exhibit 1**. Zarko asks this Court to reconsider its Opinion as this Court did not need to reach the issue before it and, even if it did, its holding was based on incorrect information and went beyond the question before the Court. Zarko asks this Court to vacate its Opinion of January 26, 2010 and substitute an amended opinion affirming the Circuit Court below that holds that Plaintiffs had no standing and that e-mails sent and retained on public computers, on public time, when there was no expectation of privacy are "public documents" under FOIA.

On March 27, 2007, Intervenor-Appellee Chetly Zarko filed a FOIA request with Defendant-Appellee Howell Board of Education seeking copies of e-mails exchanged between teachers and officials of the HEA and HEA's state affiliate that were in the custody of the Howell School District and Howell Public Schools ("District"). In response to the FOIA request, HEA filed a lawsuit in Livingston County Circuit Court seeking a declaratory judgment to prevent the District from releasing the e-mails to Zarko. Zarko intervened. The Trial Court ruled in favor of the Defendant District and Intervenor Zarko. HEA appealed. This Court granted the appeal, reversed the Court below and remanded the case to the Circuit Court (Ex. 1).

Intervenor Zarko asks this Court to reconsider its decision because during oral argument, the District answered a question posed by the Court concerning e-mails sent from private laptops via a Wi-Fi system which answer Zarko believes was both factually and legally incorrect.

It appears this Court based its Opinion on that answer. The legitimate privacy and private-record ownership interests this Court expressed in its Wi-Fi example can be protected with a ruling that more narrowly focuses on the facts of this case and the definition of public records without creating such a broad precedent. Second, Zarko seeks reconsideration of the Court's holding that the Legislature would have treated union e-mails differently from other forms of communication had it considered it. The clear language of the statute includes all communications a public body comes into possession of during the course of its duties. Third, the Court appears to have not addressed the question of whether the Union had standing to bring the case in the first place. It did not and that should have disposed of the case without reaching the broader holding of the Court's Opinion.



**Standard of Review**

Motions for reconsideration are subject to MCR 2.119(F)(3), per MCR 7.215(I(1). "Without restricting the discretion of the court," the rule sets forth a general policy against granting motions that merely repeat arguments already argued. Generally, the moving party should "demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error." But MCR 2.119(F)(3) does not limit a court's discretion to particular categories of error. *Brown v Northville Regional Psychiatric Hosp*, 153 Mich App 300, 308 (1986); *Smith v Sinai Hosp of Detroit*, 152 Mich App 716, 722-23 (1986). In fact, in *Smith*, the Court of Appeals explained that:

> "[i]f a trial court wants to give a 'second chance' to a motion it has previously denied, it has every right to do so, and this court rule does nothing to prevent this exercise of discretion. All this rule does is provide the trial court with some guidance on when it may wish to deny motions for rehearing."

*Smith*, 152 Mich App at 722-23. The same applies to this Court, which has unfettered discretion to reconsider a prior ruling when it is persuaded that a different result is warranted. In this case, reconsideration is particularly ripe, since the Intervenor did not participate in oral argument and the Court can benefit from Intervenor's perspective.

**WiFi E-mails Are Not Comparable To E-mails On A Government System**

This Court noted that, at oral argument, the District "would not concede that employees' personal e-mails would not be subject to FOIA ... if they sent them on their personal laptop computers [using] a government wireless system [because] the e-mails were captured and retained." Opinion at 5, fn 6. ***That is not the position of Intervenor-Appelle Zarko who, unlike the Defendant-Appellee District, is a private citizen who has his own concerns of government intrusion into private matters and seeks to find a reasonable middle ground.*** In his brief on appeal, Zarko clearly stated his position: "If the e-mails in this case had been sent on non-District computers and the users had not used non-District e-mail accounts, then arguably the e-mails might not be subject to FOIA." Zarko's Brief on Appeal at 10.

The District's answer and the Court's conclusion were incorrect. Had a teacher used a private laptop to send an e-mail over a wireless network provided by the District, such activity might violate school policy and may subject a teacher to discipline if done on school time, Zarko does not contend that it is subject to FOIA because the WiFi e–mail is not created with school resources and, most importantly, is not stored or retained by the school district. Furthermore, Wi-Fi systems do not routinely record communications[1] and, therefore, are not subject to FOIA requests under Michigan law.

[1] The typical Wi-Fi™ system does not record communications that transit across it. Even if a public body did record e-mails, the 1986 Electronic Communication Privacy Act prohibits "communications common carriers," which a public body operating a Wi-Fi would become, from disclosing "intercepted" e-mails. If a Wi-Fi sender segregated his or her e-mails and sent

Short of hacking into private transmissions (which would either be illegal or subject a school to federal common-carrier law), the school district would have no access to such e-mails. In addition, even in this case if the Union had used the District's computers but accessed their own private services' e-mail accounts (e.g., "google e-mail" or "yahoo" and the Union admitted it had a yahoo group account for "truly private" communications) it likely would have been impossible for the District to attempt to collect and store such e-mails. This is a significant difference which the District's answer at oral argument and the Court's Opinion misunderstood.

In this case, the Union and its members chose to use the government's facilities, server and account. They chose to permit the employer to collect and store such information. The warning each teacher received when logging into the District's e-mail system stated that all e-mails are owned by the District, subject to subpoena and subject to general public disclosure.[2] The teachers knew that third parties could have access to those e-mails and therefore they were not private. If not private, then the alternative must be that these documents are public.[3]



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them from a private laptop there would be no public records "created" or "retained" in the performance of an official function. In this case, no private laptops were involved and no e-mails were ever requested from private e-mail accounts.

[2] In order to log onto the system, the user must "consent to the [] terms and conditions of use." One such term is that "[a]ll data contained on any school computer system is *owned* by Howell Public Schools, and may be monitored, intercepted, recorded, read, copied or captured in any manner. . . ." Furthermore, "E-mail is not considered private communication. It may be re-posted. It may be accessed by others and is subject to subpoena." (Emphasis added).

[3] As discussed below, this threshold issue of these documents being public does not render any and all information therein subject to public scrutiny. MCL 15.243(1)(a) provides that a government body may choose to withhold "[i]nformation of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy." However, that does not allow a blanket rule that allows all e-mails to be withheld without review, which is the impact of this Court's Opinion.

The impact of this Court's ruling is that, to comport with FOIA's goals of openness, every public body would have to explicitly tell their employees that electronic communications were subject to "FOIA." That is not required by the FOIA statute as to any form of communication. There is no reason to apply it to electronic communications. If they did not include such a notification, public records would thereby become "personal," creating a loophole of enormous proportions contrary to the intent of the statute that the workings of government and government employees be open to the public.

Intervenor Zarko does not believe it was this Court's intent to create such a FOIA notification burden upon public bodies without Legislative action, but such is the effect of the Court's ruling. On these grounds, Intervenor Zarko asks the Court to reconsider.

**Union E-mails Are Not Per Se "Personal"**

This Court appeared to erroneously categorize union e-mails in a different category from other forms of communication. While the Court does not explicitly state that this is a union exemption, it does hold that the union e-mails are not public records. Opinion at 10. Creating a category that defines all union-related e-mails as non-public is not necessary to protect privacy interests, because if such e-mails were private or personal, FOIA would allow their exemption under MCL 15.243(1)(a).

If the e-mails in this case were treated like all other e-mails, they would be – unless subject to the privacy exemption -- clearly subject to FOIA. There is neither anything in the statute that creates special exemptions for unions nor any reason to suppose the Legislature would have done so with respect to union related e-mails.

In its opinion, this Court stated that "based on the statute adopted in 1977, the technology that existed at that time and the case law available to us, we conclude that the trial court erred in its conclusion." When the FOIA statute was written, it was clearly designed to include any type of written communication. The statute states

> "'Writing' means handwriting, typewriting, printing, photostating, photographing, photocopying, ***and every other means of recording***, and includes letters, words, pictures, sounds, or symbols, or combinations thereof, and papers, maps, magnetic or paper tapes, photographic films or prints, microfilm, microfiche, magnetic or punched cards, discs, drums, or other means of recording or retaining meaningful content."

MCL 15.232(f)(Emphasis added).

Use of the phrase "every other means of recording" clearly includes e-mails, since it is a means of recording, as is the laundry list of communication types written into the statute. It is clear from the quoted list of communication methods that the Legislature intended its definition to be as broad as possible. Furthermore by including the phrase, "every other means of recording" it clearly intended to recognize that as technology changed so to would means of communication, and the FOIA should apply to new or evolving means of communication.

The first e-mail was sent in 1971, and while by 1977 that specific term was not in the popular lexicon, the idea of text communication via network was already taking shape. The Legislature's expression that it considered "magnetic tapes" and all "other means" is evidence of the clarity of its intent.

Furthermore, by 1997 the Legislature was well aware of mail and its by-then common usage. In that year, FOIA was amended to explicitly permit individuals to use e-mail to make FOIA requests.

> "'Written request' means a writing that asks for information, and includes a writing transmitted by facsimile, ***electronic mail***, or other electronic means."

MCL 15.232(i) (Emphasis added). Therefore, there is no dispute that e-mails can be public records. This Court does not exempt all e-mails from FOIA. The State of Michigan recognizes that local governmental e-mails are subject to FOIA. *See* "State of Michigan Records Management Services: Frequently Asked Questions About E-mail Retention" attached as **Exhibit 2**. Such "retention" policies also provide further "official function" justification for a public body retaining such records – they must to comply with State laws requiring retention, and this itself is an official act of public bodies. However, by characterizing e-mails from teachers to union officials and officer as *per se* non-public, it implicitly carves out a special exemption that in all likelihood applies only to unions.

It is nonsensical to treat e-mails sent between government employees (teachers) and other government employees (teachers who are union officers) and union officials about public matters (collective bargaining that impacts upon the taxpayers and students) as being exempt from FOIA when the e-mails were written and sent and retained on government time and on government property (school computers and using school e-mail servers). Intervenor-Appellee Zarko is a citizen-journalist who seeks the requested documents to determine how much time teachers (government employees) were spending on school time, using school property (the computers), to encourage parents to lobby the Howell Board of Education and to influence the then-upcoming election. This request is clearly a matter of public interest. There is no reason to assume that the Legislature would have exempted such communications from FOIA and, in fact, it chose not to exempt such records.

Nothing in this Court's decision prevents the District from having full access to the Union's e-mails. The District can read all of the Union's strategy plans. Only the public is left out. Surely this was not the Legislature's intent. This Court should reverse its decision, since the e-mails were public and there is no evidence that the Legislature would have – much less did – create a union exception. In any event, e-mails with information of a personal nature are not sought by Zarko. If, *arguendo,* any private e-mails are involved, those privacy interests can and should be protected by requiring an exemption review, just as the Circuit Court did. Finally, the teachers could have avoided being subject to FOIA had they used another, non-district account, but they chose not to do so.

**The Union Does Not Satisfy The Reverse-FOIA Test For Standing**

This Court's Opinion notes that the case before it is a "reverse FOIA" claim. However, before reaching the merits of this case, this Court did not examine the Plaintiffs' standing to bring such an action. Normally, standing is reviewed as a prerequisite before reaching the merits. In this case, the Court failed to note long standing Michigan Supreme Court precedent that:

> "in a reverse FOIA case, where a person seeks to prevent disclosure of public records under the FOIA, the absence of any provisions in the statute allowing third parties such as these plaintiffs to bring an action to compel nondisclosure is persuasive evidence that the FOIA did not create such rights. ***Any asserted right by third parties to prohibit disclosure must have a basis independent of the FOIA.***"

*Tobin v Michigan Civil Service Com'n*, 416 Mich 661, 669 (Mich 1982) (emphasis added). Plaintiffs have not cited a single independent basis to prohibit disclosure. The District never asserted that the e-mails were not public documents; that assertion was made by the Plaintiffs. Without the requisite standing, this Court should never have reached the underlying merits. In addition, the policy ramifications of ruling for a "reverse FOIA" plaintiff without standing are

that such "reverse FOIA" lawsuits may be incentivized and this ruling may usher in a new era and flood of third party lawsuits against public bodies and pose additional unnecessary and disclosure-chilling legal burdens to public bodies. As such, reverse FOIA's should be granted only where standing exists and an explicit right to prohibit disclosure is demonstrated – none of which is present in this case.

**FOR ALL OF THESE REASONS**, Chetly Zarko requests that the Court reconsider and reverse its Opinion in this case, affirming the Circuit Court below.

Respectfully submitted,

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Dated: February 12, 2009

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# STATE OF MICHIGAN

# COURT OF APPEALS

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HOWELL EDUCATION ASSOCIATION MEA/NEA, DOUG NORTON, JEFF HUGHEY, JOHNSON MCDOWELL, and BARBARA CAMERON,

Plaintiffs/Counter-Defendants/Appellants,

v

HOWELL BOARD OF EDUCATION and HOWELL PUBLIC SCHOOLS,

Defendants/Appellees

and

CHETLY ZARKO

Intervenor/Counter-Plaintiff/Appellee.

FOR PUBLICATION
January 26, 2010
9:05 a.m.

No. 288977
Livingston Circuit Court
LC No. 07-22850-CK

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Before: Cavanagh, P.J., and Fitzgerald and Shapiro, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's grant of summary disposition to defendants and dismissal of their "reverse"[1] Freedom of Information Act (FOIA), MCL 15.231 *et seq.*, action. We reverse and remand for further proceedings consistent with this opinion. While we believe this question is one that must be resolved by the Legislature, and we call upon the Legislature to address it, we conclude that under the FOIA statute the individual plaintiffs' personal emails were not rendered public records solely because they were captured in the email system's digital memory. Additionally, we conclude that mere violation of an acceptable use

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[1] A "reverse FOIA" claim is one where a party "seek[s] to prevent disclosure of public records under the FOIA." *Bradley v Saranac Community Bd of Ed*, 455 Mich 285, 290; 565 NW2d 650 (1997).

policy barring personal use of the email system—at least one that does not expressly provide that emails are subject to FOIA—does not render personal emails public records subject to FOIA.

## I. Factual and Procedural Background

In March 2007, intervenor Chetly Zarko began submitting a series of FOIA requests to defendant Howell Public Schools (HPS), including requests for all email beginning January 1, 2007 sent to and from three HPS teachers: plaintiffs Doug Norton, Jeff Hughey, and Johnson McDowell. During that time, each of these teachers was also a member and official for plaintiff Howell Education Association, MEA/NEA (HEA); Norton was president, Hughey was vice president for bargaining, and McDowell was vice president for grievances. Subsequent to the filing of this lawsuit, Zarko also requested all email sent to or from plaintiff Barbara Cameron that was to or from Norton, McDowell and Hughey. Cameron is the UniServ Director employed by the Michigan Education Association to provide representational services to HEA. The requests were apparently made in the context of heated negotiations for a new collective bargaining agreement that were being reported in the local media.

HEA objected to having to release union communications sent between HEA leaders or between HEA leaders and HEA members and took the position that to the extent the emails addressed union matters, those emails were not "public records" as defined under FOIA. HEA asked counsel for HPS to confirm whether the internal union communications of Norton, Hughey and McDowell would be treated as non-disclosable. Counsel for HPS notes that there was no reported caselaw regarding whether personal emails or internal union communications maintained on the computer system of a public body were public records subject to disclosure under FOIA and suggested a "friendly lawsuit" to determine the applicability of FOIA to the email requests made by Zarko.

Plaintiffs filed their complaint in May 2007 against HPS and defendant Howell Board of Education requesting a declaratory judgment that: (1) personal emails and emails pertaining to union business are not "public records" as defined by FOIA; (2) that the collective bargaining emails were exempt pursuant to MCL 15.243(1)(m); and (3) that emails containing legal advice were exempt pursuant to MCL 15.243(1)(g). Plaintiffs also requested an injunction to prevent the release of the documents until the issues could be determined. A temporary restraining order (TRO) was issued on May 7, 2007. Following a show cause hearing, Zarko was permitted to intervene as an intervening defendant and counter-plaintiff, the TRO was extended "until further notice," and the parties agreed to organize all of the emails for an in camera review. The parties were directed to release all uncontested emails and to deliver to the court all emails they contended were either not public records, or were subject to an exemption under FOIA.

The trial court appointed a special master to review approximately 5,500 emails.[2] At the same time, plaintiffs informed the trial court that they were withdrawing their request to defendants that an exemption under MCL 15.243(1)(m) be asserted regarding emails sent

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[2] None of these were emails to or from Hughey. On May 2, 2007, prior to suit being filed, the review of these emails was completed and defendants released the emails to Zarko.

between one or more plaintiffs and the school administration. Defendants then released those emails to Zarko.

Defendants moved for summary disposition in July 2008, arguing that plaintiffs lacked standing to prevent disclosure because all of the documents were public records and only defendants had the authority to assert the exemption provisions of MCL 15.232. Defendants also argued that the trial court could not grant relief to Hughey given that his emails had already been released and could not grant relief as to any emails from the other plaintiffs to which Hughey was a party because those emails were already "no longer secret." Defendants argued that any exemption under MCL 15.232(1)(m) was inapplicable because the collective bargaining agreement had already been reached. Thus, there could be no harm to the collective bargaining negotiations, as the negotiations had concluded. Finally, defendants argued that plaintiffs were not entitled to injunctive relief because they could not show irreparable harm.

The trial court held a hearing on defendants' motion for summary disposition. As to the injunction, the trial court concluded that plaintiffs' lacked standing to assert the claim. As to the claimed exemptions, the trial court concluded that those issues were moot "because the disputed emails have been released to the intervener [sic]," resulting in a lack of an actual controversy. Finally, the trial court concluded that "any emails generated through the Court's [sic school's] email system that are retained or stored by the district, are indeed public records subject to FOIA." Plaintiffs now appeal.

## II. Standard of Review

The issue before us is one of statutory interpretation and arises in the context of a summary disposition motion. We review de novo both issues of statutory interpretation and a trial court's decision to grant summary disposition. *Michigan Federation of Teachers v Univ of Michigan*, 481 Mich 657, 664; 753 NW2d 28 (2008).

## III. Analysis

The issue before us requires us to consider the application of the FOIA statute, adopted in 1977 and last amended in 1997, in the context of today's ubiquitous email technology. This is a challenging question and one which, as we noted at the outset, we believe is best left to the Legislature as it is plainly an issue of social policy. Unfortunately, until the Legislature makes its intention clear by adopting statutory language that takes this technology into account, we must attempt to discern, as best we can and given the tools available to us, what the intent of the Legislature would have been under the circumstances of this technology that it could not have foreseen. Cf. *Denver Publishing Co v Bd of Co Comm'rs of Arapahoe Co*, 121 P3d 190, 191-192 (Colo, 2005). We find ourselves in the situation akin to that of a court being asked to apply the laws governing transportation adopted in a horse and buggy world to the world of automobiles and air transport.

"Consistent with the legislatively stated public purpose supporting the act, the Michigan FOIA requires disclosure of the 'public record[s]' of a 'public body' to persons who request to inspect, copy, or receive copies of those requested public records." *Michigan Federation of Teachers*, 481 Mich at 664-665. It is undisputed that defendants are a public body. MCL 15.232(d)(*iii*). A "public record" is "a writing prepared, owned, used, in the possession of, or

retained by a public body in the performance of an official function, from the time it is created."[3] MCL 15.232(e). Plaintiffs have specifically limited their appeal to whether the trial court properly concluded that all emails generated through defendants' email system that are retained or stored by defendants are public records subject to FOIA.[4]

The trial court determined that personal emails are public records because they are "in the possession of, or retained by" defendants. See MCL 15.232(e). However, "mere possession of a record by a public body" does not render the record a public document. *Detroit News, Inc v Detroit*, 204 Mich App 720, 724-725; 516 NW2d 151 (1994). Rather, the use or retention of the document must be "in the performance of an official function." See *id.* at 725; MCL 15.232(e). For the emails at issue to be public records, they must have been stored or retained by defendants in the performance of an official function.

Defendants argue that retention of electronic data is an official function where it is required for the operation of an educational institution, citing *Kestenbaum v Michigan State Univ*, 414 Mich 510; 327 NW2d 783 (1982).[5] However, the lead opinion in *Kestenbaum* "accept[ed] without deciding" that the electronic data at issue was a public record. *Id.* at 522 (Fitzgerald, J.). Only Justice Ryan's opinion addressed the issue of "an official function." *Id.* at 538-539 (Ryan, J.). Justice Ryan concluded that the magnetic tape involved, which was the school's purposefully created and retained record of student names and addresses, was, in fact, "prepared, owned, used, processed, and retained by the defendant public body 'in the performance of an official function'" because the university could not have functioned "'without such a list of students.'" *Id.* at 539.

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[3] Although unnecessary for the resolution to this case, we wish to address the amicus's suggestion that the "it" in the clause "from the time it is created" refers to the public body. The amicus asserts that interpreting the "it" as a writing would cause the overruling of *Detroit News, Inc v Detroit*, 204 Mich App 720; 516 NW2d 151 (1994). However, this ignores that *Detroit News* explicitly interpreted the "it" as meaning a writing:

> The city relies on the statutory clause "from the time it is created" found in the definition of public record. We do not construe this clause as requiring that a writing be 'owned, used, in the possession of, or retained by a public body in the performance of an official function' from the time the writing is created in order to be a public record. A writing can become a public record after its creation. We understand the phrase "from the time it is created" to mean that the ownership, use, possession, or retention by the public body can be at any point from creation of the record onward. [*Id.* at 725.]

Accordingly, we reject the suggested interpretation.

[4] Thus, we are not ruling on whether any exemptions apply or who has the standing to argue them.

[5] *Kestenbaum* was a 3-3 decision and has no majority opinion.

In the present case, defendants can function without the personal emails. There is nothing about the personal emails, given that by their very definition they have nothing to do with the operation of the schools, which indicates that they are required for the operation of an educational institution. Thus, we decline to conclude that they are equivalent to the student information at issue in *Kestenbaum*. Furthermore, "unofficial private writings belonging solely to an individual should not be subject to public disclosure merely because that individual is a state employee." *Id.* We believe the same is true for all public body employees. Absent specific legislative direction to do so, we are unwilling to judicially convert every email ever sent or received by public body employees into a public record subject to FOIA.

Defendants offer a simple solution approach to this puzzle which is to simply say that anything on the school's computer system is "retained" by the school and therefore subject to FOIA. However, the school district does not assert that its back-up system was purposely designed to retain and store personal emails or that those emails have some official function. It appears that the system is intended to retain and store emails relating to official function, but that it is simply easier technologically to capture all the emails on the system rather than have some mechanism to distinguish them. We do not think that because the technological net used to capture public record emails also automatically captures other emails we must conclude that the other emails are public records.[6] To rule as defendants request would essentially render all personal emails sent by governmental employees while at work subject to public release upon request. We conclude that this was not the intent of the Legislature when it passed FOIA.

Emails have in essence replaced mailboxes and paper memos in government offices. Schools have traditionally, as part of their function, provided teachers with mailboxes in the school's main office. However, we have never held nor has it even been suggested that during the time those letters are "retained" in those school mailboxes that they are automatically subject to FOIA. Now, instead of physical mailboxes, we have email. However, the nature of the technology is such that even after the email letter has been "removed from the mailbox" by its recipient, a digital memory of it remains, possibly in perpetuity. This effect is due solely to a change in technology and, absent some showing that the retention of these emails has some official function other than the retention itself, we decline to so drastically expand the scope of FOIA. We do not suggest that a change in technology cannot be part of the circumstances that would result in a significant change in the scope of a statute. However, where the change in technology is the sole factor, we should be very cautious in expanding the scope of the law.

This position is consistent with federal cases interpreting whether an item is an "agency record" under the federal FOIA.[7] In *Bloomberg, LP v SEC*, 357 F Supp 2d 156 (DDC, 2004), the

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[6] Indeed, we should not presume that the question would even end with personal emails sent on government computers. At oral argument, the defendants would not concede that employees' personal emails would not be subject to FOIA even if they sent them on their personal laptop computers if, because the laptops used a government wireless system, the emails were captured and retained.

[7] "Federal court decisions regarding whether an item is an 'agency record' under the federal
(continued...)

Court determined that the electronic calendar for the chairman of the SEC was not an "agency record." *Id.* at 164. This was true even though the calendar included both personal and business appointments and "the calendar was maintained on the agency computer system and backed-up every thirty days." *Id.* The plaintiff had argued that the back-up process integrated the calendar into the agency record system. *Id.* The SEC countered that employees were "permitted 'limited use of office equipment for personal needs'" and that the routine back-up system did "not distinguish between personal and SEC business-related documents." *Id.* In making its determination, the Court reiterated that "'employing agency resources, standing alone, is not sufficient to render a document an 'agency record.'" *Id.* (citation omitted).[8]

The emails in the present case are analogous to the electronic calendar and other personal uses of SEC office equipment. Defendants' storage and retention of personal emails is a byproduct of the fact that all emails are electronically retained, regardless of whether they were personal or business-related. We are not persuaded that personal emails are rendered "public records" under FOIA merely by use of a public body's computer system to send or receive those emails or by the automatic back-up system that causes the public body to "retain" those emails.

Contrary to Zarko's position, our determination that personal emails are not public records does not render MCL 15.243(1)(a) nugatory. MCL 15.243(1)(a) provides that public records may be exempt from disclosure where they contain "[i]nformation of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy." As Justice Ryan noted in his opinion in *Kestenbaum*, 414 Mich at 539 n 6, "[t]he question whether a writing is a 'public document' or a private one not involved 'in the performance of an official function' is separate and distinct from the question whether the document falls within the so-called 'privacy exemption.'" Implicit in this statement is that some documents are not public records because they are private while other documents are public records but will fall within the privacy exemption.

For example, personal information that falls within this exclusion includes home addresses and telephone numbers. *Michigan Federation of Teachers*, 481 Mich at 677. Thus,

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(...continued)

FOIA are persuasive in determining whether a record is a 'public record' under the Michigan FOIA." *MacKenzie v Wales Twp*, 247 Mich App 124, 130 n 1; 635 NW2d 335 (2001).

[8] We note that the United States Supreme Court has granted certiorari in the case of *City of Ontario v Quon*, ___ US ___ (December 14, 2009, Docket No. 08-1332). While that case involves an issue of privacy raised by new communications technology, it is unlikely to have any bearing on this case. In *Quon*, the city had an informal policy of allowing its employees to use their city-supplied pagers for personal text messaging provided the employee paid the extra cost of service. *Quon* v Arch Wireless Operating Co. Inc, 529 F2d 892, 897 (2008). Despite assurances that the city would not review the contents of the personal text messages, the city did so and an employee brought an action claiming violation of his Fourth Amendment rights to be protected against unreasonable search and seizure. *Id.* at 897-898. Since *Quon* involves the Fourth Amendment and not FOIA, it is unlikely to answer the question now before us.

when someone makes a FOIA request for an employee's personnel file, the personnel file is a public record, *Bradley v Saranac Community Bd of Ed*, 455 Mich 285, 288-289; 565 NW2d 650 (1997), but the employee's home address and telephone number may be redacted because they are subject to the privacy exclusion in MCL 15.243(1)(a). The employee's home address and telephone number are examples of private information contained within a public record. In contrast, an email sent by a teacher to a family member or friend that involves an entirely private matter such as carpooling, childcare, lunch or dinner plans, or other personal matters, is wholly unrelated to the public body's official function. Such emails simply are not public records.

We recognize that the present case is distinguishable from *Bloomberg*, where limited use of the office equipment for "personal needs" was expressly permitted, because defendants' employees have no such permission. Prior to logging into defendants' computer system, users are greeted by the following statement:

> This is a Howell Public Schools computer system. Use of this system is governed by the Acceptable Use Policy which may be viewed at http://www.howellschools.com/aup.html.
>
> All data contained on any school computer system is *owned* by Howell Public Schools, and may be monitored, intercepted, recorded, read, copied, or captured in any manner by authorized school personnel. Evidence of unauthorized use may be used for administrative or criminal action.
>
> *By logging into this system, you acknowledge your consent to these terms and conditions of use*. [Emphasis added.]

Defendants' acceptable use policy provides, in relevant part:

> Howell Public Schools provides technology in furtherance of the educational goals and mission of the District. As part of the consideration for making technology available to staff and students, users agree to use this technology only for appropriate educational purposes. . . .
>
> * * *
>
> Email is not considered private communication. It may be re-posted. It may be accessed by others and is subject to subpoena. School officials reserve the right to monitor any or all activity on the district's computer system and to inspect any user's email files. *Users should not expect that their communications on the system are private.* Confidential information should not be transmitted via email.
>
> * * *
>
> Appropriate use of district technology is defined as a use to further the instructional goals and mission of the district. Members should consider any use outside these instructional goals and mission constitutes potential misuse . . . .

* * *

> Members are prohibited from . . . [u]sing technology for personal or private business, . . . or political lobbying . . . .

Defendants argue that their acceptable use policy notified users that personal emails were subject to FOIA. We disagree. Although the use policy certainly gives notice to the users that school officials may look at their email, and that the documents could be released pursuant to a subpoena, it in no way indicates that users' emails may be viewed by any member of the public who simply asks for them. Thus, we conclude that the public employees' agreement to this acceptable use policy did not render their personal emails subject to FOIA.

Furthermore, we are not persuaded that a public employee's misuse of the technology resources provided by defendants, by sending private emails, renders those emails public records. The acceptable use policy makes clear that "[a]ppropriate use of district technology is defined as a use to further the instructional goals and mission of the district." An employee's use of public body's technology resources for a private communication is clearly not in the furtherance of the instructional goals of the school. Although this is an inappropriate use that could subject the employee to sanction for violation of the policy, the violation does not transform personal communications into public records. Indeed, the fact that the communication is sent in violation of the use policy militates in favor of the conclusion that the email is not a public record because it falls expressly outside the performance of an official function, i.e. the furtherance of the instructional goals of the district.

Our reasoning is also consistent with *Walloon Lake Water System, Inc v Melrose*, 163 Mich App 726, 730; 415 NW2d 292 (1987). In *Walloon*, a letter was sent to the township supervisor that "pertained in some way to the water system provided by plaintiff to part of the township." *Id.* at 728. The letter was read aloud at the township board's regularly scheduled meeting. *Id.* at 729. The plaintiff subsequently sought a copy of the letter under FOIA, but the township refused to provide it, claiming it was not a public record. *Id.* This Court concluded that the letter was a public record because, "once the letter was read aloud and incorporated into the minutes of the meeting where the township conducted its business, it became a public record, 'used . . . in the performance of an official function.'" *Id.* at 730. Thus, the case law is clear that purely personal documents can become public documents based on how they are utilized by public bodies. However, it is their subsequent use or retention "in the performance of an official function" that rendered them so. In the present case, the retention of the emails by defendants on which the trial court relied was nothing more than a blanket saving of all information captured through a back-up system that did not distinguish between emails sent pursuant to the district's educational goals, and those sent by employees for personal reasons. The back-up system did not constitute an "official function" sufficient to render the emails public records subject to FOIA. See *Bloomberg*, 357 F Supp 2d at 164.

In reaching our decision, we have also considered two unpublished cases in which our Court has addressed issues that may be relevant. These cases are not precedential authority. However, given the limited published caselaw on the issue and the issue's significance, we have reviewed them for guidance. In *WDG Investment Co v Dep't of Mgt & Budget*, unpublished opinion per curiam of the Court of Appeals, issued November 14, 2002 (Docket No. 229950), a rejected bidder on a government project sued the state (DMB), alleging fraud in the manner in

which the bid was awarded. A second count in the action sought production, under FOIA, of the individual notes written by bid reviewing board members concerning the bids. The DMB asserted that it had no obligation to provide the notes as they were "personal" and not kept in the DMB files. This Court held that the notes were public records. We specifically noted that the defendants' use of the word "personal" was undefined and vague, stating "it is not at all clear from the record what defendants mean by 'personal' notes. We therefore decline to address this argument at this time." *Id.*, slip op p 7, n 4. Thus, the case can offer only limited guidance. However, to the degree it is helpful, it indicates that individual notes taken by a decision-maker on a governmental issue are still public records as they were taken in furtherance of an official function. This does not suggest, however, that notes sent from one governmental employee to another about a matter not in furtherance of an official function are also public records.

A similar approach was followed in *Hess v City of Saline*, unpublished opinion per curiam of the Court of Appeals, issued May 12, 2005 (Docket No. 260394), which involved the use of video cameras to record a city council meeting. At some point, the council adjourned but the video camera was not turned off and it recorded conversations among city staffers who remained in the council chambers talking for some time after the council members had left. A copy of the videotape of the staffers' post-meeting conversation was sought under FOIA. We held that "the unedited videotape was not a public record. . . . [as] no official city business was conducted during that time" despite the fact that the city retained the unedited tape. *Id.*, slip op p 2. The taping of the conversation in *Hess* was inadvertent due to human error in forgetting to turn off the recorder. The "taping" of the personal emails in this case was similarly inadvertent as, due to the nature of the capture technology, the recorder can never be turned off.

This is *not* to say personal emails cannot become public records. For example, were a teacher to be subject to discipline for abusing the acceptable use policy and personal emails were used to support that discipline, the use of those emails would be related to one of the school's official functions—the discipline of a teacher—and, thus, the emails would become public records subject to FOIA. This is consistent with *Detroit Free Press, Inc v Detroit*, 480 Mich 1079; 744 NW2d 667 (2008). It is common knowledge that underlying the case was a wrongful termination lawsuit that resulted in a multi-million dollar verdict against the city of Detroit. During the course of the lawsuit and subsequent settlement negotiations, certain text messages became public, which had been sent between the Detroit mayor and a staff member through the staff member's city-issued mobile device. The text messages indicated that the mayor and the staff member had committed perjury. Two newspapers filed FOIA requests for the settlement agreement from the wrongful termination trial, along with various other documents. Our Supreme Court found no error in the trial court's determination that the settlement agreement was a public record subject to disclosure under FOIA. *Id.* However, the Supreme Court did *not* rule that the text messages themselves were public records. The Court's order contains no reference to text messages. Rather, the order indicated that the documents setting forth the settlement agreement were subject to FOIA. *Id.*

Having determined that personal emails are not "public records" subject to FOIA, the next question is whether emails involving "internal union communications"[9] are personal emails. We conclude that they are. Such communications do not involve teachers acting in their official capacity as public employees, but in their personal capacity as HEA members or leadership. Thus, any emails sent in that capacity are personal. This holding is consistent with the underlying policy of FOIA, which is to inform the public "regarding the affairs of government and the official acts of . . . public employees." MCL 15.231(2). See *Walloon*, 163 Mich App at 730 (Holding that the purpose of FOIA "must be considered in resolving ambiguities in the definition of public record."). The release of emails involving internal union communications would only reveal information regarding the affairs of a labor organization, which is not a public body.

## IV. Conclusion

This is a difficult question requiring that we apply a statute, whose purpose is to render government transparent, to a technology that did not exist in reality (or even in many people's imaginations) at the time the statute was enacted and which has the capacity to make "transparent" far more than the drafters of the statute could have dreamed. When the statute was adopted, personal notes between employees were simply thrown away or taken home and only writings related to the entity's public function were retained. Thus, we conclude that the statute was not intended to render all personal emails public records simply because they are captured by the computer system's storage mechanism as a matter of technological convenience.

Accelerating communications technology has greatly increased tension between the value of governmental transparency and that of personal privacy. As we stated out the outset, the ultimate decision on this important issue must be made by the Legislature and we invite it to consider the question. However, based on the statute adopted in 1977, the technology that existed at that time and the caselaw available to us, we conclude that the trial court erred in its conclusion that all emails captured in a government email computer storage system, regardless of their purpose, are rendered public records subject to FOIA.[10]

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction. No costs, a public question being involved.

/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald
/s/ Douglas B. Shapiro

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[9] We define "internal union communications" to mean those communications sent only between or among HEA members and leadership, involving union business or activities, including contract negotiation, grievance handling, and voting. Any emails involving these topics that are sent to the district are no longer purely between or among HEA members and leadership and, therefore, do not fall under this category.

[10] Although the question is not before us, we note that an email transmitted in performance of an official function would appear to be a public record under FOIA.

# 2

# State of Michigan
# Records Management Services

## Frequently Asked Questions About E-mail Retention

It is essential that government agencies manage their electronic mail (e-mail) appropriately. Like all other government records, e-mail is subject to Freedom of Information Act (FOIA) requests and litigation. Agencies can be held liable if they keep their e-mail messages too long, if their e-mail messages are not properly destroyed, or if they are destroyed too soon. Under all of these circumstances, an agency can be seriously injured by its failure to follow legally prescribed retention requirements. In addition, an agency can lose significant dollars attempting to protect itself, to produce the required records, to identify the relevant records, or to recover lost records.

**This information sheet is designed to help all government employees who use e-mail to follow existing procedures about the retention of e-mail and protect themselves and their agencies.**

**Q: What is e-mail?**

**A:** E-mail is a tool that is used to exchange messages and documents using telecommunications equipment and computers. A complete e-mail message not only includes the contents of the communication, but also the transactional information (dates and times that messages were sent, received, opened, deleted, etc.; as well as aliases and members of groups), and any attachments. E-mail is often a critical tool that facilitates government business operations.

**Q: Is e-mail a public record?**

**A:** E-mail messages are public records if they are created or received as part of performing a public employee's official duties.

**Q: Does my e-mail belong to me?**

**A:** All e-mail messages that are created, received or stored by a government agency are public property. They are not the property of employees, vendors or customers. Employees should have no expectation of privacy when using government computer resources.

**Q: What are my responsibilities as a government employee who uses e-mail?**

A: Employee responsibilities for managing e-mail messages are the same as those for other records.

- Employees are responsible for organizing their e-mail messages so they can be located and used.
- Employees are responsible for using an approved Retention and Disposal Schedule to identify how long e-mail messages must be kept.
- Employees are responsible for keeping e-mail messages for their entire retention period, and for deleting e-mail messages in accordance with an approved Retention and Disposal Schedule.

**Q: I sometimes use my home computer and personal e-mail account to conduct government business. Am I creating public records?**

A: Yes. Records created in the performance of an official function must be managed the same way as those created and received using government computer resources.

**Q: What is a Retention and Disposal Schedule?**

A: Michigan law requires that all records be listed on an approved Retention and Disposal Schedule that identifies how long the records must be kept, when they may be destroyed and when certain records can be sent to the Archives of Michigan for permanent preservation. Records cannot be destroyed unless their disposal is authorized by an approved Retention and Disposal Schedule.

**Q: How are Retention and Disposal Schedules developed?**

A: Retention and Disposal Schedules for state government are developed by the Records Management Services, through consultation with an agency about its records. Local government agencies submit proposed schedules to the Records Management Services for review. All schedules are approved by the Records Management Services, the Archives of Michigan and the State Administrative Board. In addition, state government schedules are approved by the Attorney General and the Auditor General.

**Q: Does all e-mail have the same retention period?**

A: No. Just like paper records, e-mail records are used to support a variety of business processes. E-mail messages must be evaluated for their content and purpose to

determine the length of time the message must be retained in accordance with the appropriate Retention and Disposal Schedule.

**Q: Who is responsible for retaining e-mail messages, the sender or the recipient?**

**A:** Just as in the case of paper records, e-mail messages may be evidence of decisions and activities. Both senders and recipients of e-mail messages must determine if a particular message should be retained to document their role in agency activities.

**Q: My e-mail messages are automatically purged after a specified period of time. Am I still responsible for their retention?**

**A:** Yes. Some e-mail mailboxes are programmed to automatically purge e-mail messages after a specified amount of time, such as 90 days. However, these purge routines are technology-driven and are not based upon Retention and Disposal Schedules. Many e-mail messages need to be retained longer than these periods of time. Employees are responsible for ensuring that e-mail messages with longer retention periods remain accessible until the appropriate Retention and Disposal Schedule authorizes their destruction. *Note: Records, including e-mail, cannot be destroyed if they have been requested under the Freedom on Information Act (FOIA), or if they are part of on-going litigation, even if their retention period has expired, until the request is fulfilled or the case is closed.*

**Q: How long do I have to keep transitory e-mail messages?**

**A:** Transitory messages are records that have very limited administrative value and should be retained until they no longer serve a purpose. Transitory messages do not set policy, establish guidelines or procedures, document a transaction or become a receipt. For instance, an e-mail message that notifies employees of an upcoming meeting would only have value until the meeting is held. *Note: Records, including e-mail, cannot be destroyed if they have been requested under FOIA, or if they are part of on-going litigation, even if their retention period has expired, until the request is fulfilled or the case is closed.*

**Q: How should I store my e-mail?**

**A:** Agencies have many options for storing e-mail, each of which has benefits and disadvantages. Agency directors should decide which option agency staff will use. Options include: 1) retaining the message within the "live" e-mail system, 2) saving the message on a network drive in a folder that contains other electronic records that

document the business process, 3) printing the message and filing it with other paper records that document the business process, 4) storing the message in an e-mail archive that is accessed by the e-mail software, and 5) filing the message in a Records Management Application repository. Regardless of which option an agency selects, a procedure for all staff to follow should be written and distributed to affected individuals.

**Q: How should I organize my e-mail?**

**A:** E-mail messages should be organized in a way that makes them easy to find. E-mail may be organized by subject, by case number, or by another logical system. Regardless of which technique is used, e-mail folders should be coordinated with any paper or other electronic filing systems that are in place.

**Q: Could my e-mail messages be released in accordance with FOIA or during litigation (discovery)?**

**A:** Just like paper records, e-mail messages might be subject to disclosure in accordance with FOIA. They can also be subject to discovery once litigation begins. E-mail accounts are provided to employees for conducting public business. Employees should be prepared to provide access to their e-mail to their FOIA Coordinator or an attorney representing their agency under these circumstances.

**Q: Are deleted e-mail messages destroyed?**

**A:** Individual employees are responsible for deleting messages in accordance with the appropriate Retention and Disposal Schedule. However, deleted messages may be stored on backup tapes for several days, weeks or months after they are deleted. *Note: The destruction of relevant e-mail messages on servers and backup tapes must cease when an agency becomes involved in litigation or when it receives a FOIA request until the request is fulfilled or the case is closed. Agencies are responsible for notifying information technology staff about relevant e-mail.*

**Q: Will my older e-mail messages be accessible when our technology (hardware and software) is upgraded or changed?**

**A:** Many e-mail messages need to be kept longer than the original technology that was used to send and receive them. New technology is not always compatible with older technology that agencies may have used. Agencies are responsible for ensuring that older e-mail messages remain accessible as technology is upgraded or

changed. Agencies may need to inform information technology staff about the existence and location of older messages when technology upgrades and changes take place, so the messages can be migrated to the new technology.

**Q: What happens to the e-mail of former employees?**

**A:** Agencies are responsible for ensuring that the e-mail (and other records) of former employees is retained in accordance with approved Retention and Disposal Schedules.

**Questions?**

State of Michigan
Records Management Services
(517) 335-9132
http://www.michigan.gov/recordsmanagement/

**STATE OF MICHIGAN**
**IN THE COURT OF APPEALS**

HOWELL EDUCATION ASSOCIATION, MEA/NEA, DOUG NORTON, JEFF HUGHEY, JOHNSON McDOWELL, and BARBARA CAMERON,

Plaintiffs/Appellants,

Court of Appeals No. 288977
Circuit Court No. 07-22850-CK

v.

HOWELL BOARD OF EDUCATION, and the HOWELL PUBLIC SCHOOLS,

Defendants/Appellees,

and

CHETLY ZARKO, an individual,

Intervenor/Counter-Plaintiff/Counter-Appellant,

v

HOWELL EDUCATION ASSOCIATION, MEA/NEA, DOUG NORTON, JEFF HUGHEY, JOHNSON McDOWELL, and BARBARA CAMERON,

Plaintiffs/Counter-Defendants/Counter-Appellees.

_____/





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**CERTIFICATE OF SERVICE**

## CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2010 I caused service of a copy of ***Intervenor-Appellee Chetly Zarko's Motion for Reconsideration*** and this ***Certificate of Service*** upon the following counsel of record:

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Dated: February 12, 2010

Katherine Shannon