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CIRCUIT COURT
DANE COUNTY, WI
2023CV003275

STATE OF WISCONSIN DANE COUNTY BRANCH 8
CIRCUIT COURT

WISCONSIN MANUFACTURERS
AND COMMERCE INC.,

Plaintiff,

v. Case No. 23-CV-3275

WISCONSIN DEPARTMENT
OF JUSTICE,

Defendant.

PLAINTIFF'S SUR-REPLY TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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ARGUMENT

I. DOJ unlawfully withheld emails.

A. DOJ unlawfully withheld file-sharing emails.

WMC argued that this Court should declare that "WMC is legally entitled to [the file-sharing] emails and DOJ had no legal basis for initially withholding them." (R. 51:6.) DOJ does not address these emails in reply. (*See* R. 52.) "Unrefuted arguments are deemed conceded." *State v. Verhagen*, 2013 WI App 16, ¶ 38, 346 Wis. 2d 196, 827 N.W.2d 891. DOJ thus tacitly concedes that it unlawfully withheld these file-sharing emails and that WMC is entitled to a judicial declaration to this effect.

B. DOJ unlawfully withheld emails containing "small talk."

WMC argued that DOJ is unlawfully withholding "emails containing 'small talk,' such as discussions of 'flannel Fridays.'" (R. 51:6.) DOJ addresses these emails just in a one-sentence footnote at the end of its reply brief. (R. 52:15 n.4.) The entirety of DOJ's argument on these emails is: "DOJ asserts that the 'small talk' emails would be rendered meaningless after redaction." (R. 52:15 n.4.)

Wisconsin courts "do not consider undeveloped arguments," *State v. O'Connell*, 179 Wis. 2d 598, 609, 508 N.W.2d 23 (Ct. App. 1993), including "an argument mentioned only in a footnote," *State v. Santana-Lopez*, 2000 WI App 122, ¶ 6 n.4, 237 Wis. 2d 332, 613 N.W.2d 918 (citation omitted).

This Court should decline to consider DOJ's one-sentence footnote on the small-talk emails because it is undeveloped. DOJ does not explain why the small-talk emails would be rendered meaningless if some of their contents were redacted.

In any event, DOJ's one-sentence argument has no merit because, under DOJ's own concession, these emails have nothing to redact. As WMC has noted, "DOJ conceded these emails are *not* 'protected by attorney client privilege or attorney work product.'" (R. 51:7 (quoting R. 41:4).) Because these emails are indisputably not privileged, DOJ has no basis for redacting any of their contents. DOJ thus has no basis for arguing they would be meaningless *after redaction*.

In short, this Court should (1) declare that DOJ violated the public records law by withholding the small-talk emails, and (2) order DOJ to release them to WMC.

C. DOJ unlawfully withheld emails about a press release and a public records request.

DOJ does not dispute that the emails about a press release and a public records request are subject to disclosure to the extent they are not privileged. Instead, DOJ just asserts they are privileged. (R. 52:7–10.) If DOJ is suggesting that privileged documents are never capable of partial redactions (*see* R. 52:10), it is wrong (*see* R. 51:25). This Court may determine during *in camera* review whether or to what extent these emails are privileged or redactable.

D. DOJ unlawfully withheld emails about Microsoft Teams meetings and out-of-office replies.

In reply, DOJ argues that the Microsoft Teams meeting emails and the out-of-office emails have a privileged "subject line" and that redaction would be meaningless. (R. 52:10–11.) WMC has already disputed those assertions. (R. 51:11.) It has nothing more to add. This Court may determine during *in camera* review whether or to what extent these emails are privileged or redactable.

E. Regarding the withheld emails generally, DOJ failed to carry its burden of proving they are privileged.

1. DOJ failed to establish that all the withheld emails fall within the narrow attorney-client privilege.

DOJ notes that WMC cited some non-Wisconsin cases. (R. 52:3–4.) But cases arising under the federal Freedom of Information Act are persuasive authority when resolving issues under Wisconsin's public records law. (R. 51:18 n.5.) WMC cited FOIA cases for the simple notion that a communication is not confidential if it is too widely shared within an agency. (R. 51:14–15.) This Court should keep that principle in mind during its *in camera* review.

DOJ argues "the State" is the client and "it is properly represented by attorneys from DOJ and high-level agency staff from the State's Departments of Natural Resources and Health Services." (R. 52:3.) DOJ is wrong if it is suggesting that every DOJ lawyer on the withheld emails is "the client's representative" under Wis. Stat. § 905.03(2). High-level DOJ officials might embody the State as the client. But DOJ staff attorneys are not the client; they are the client's attorneys. Who is the attorney and who is the client matters, because communications *from a lawyer* are less protected than communications *from a client*. (R. 51:12–13.) This Court should consider this distinction when conducting *in camera* review.

The Court should also consider that communications are not attorney-client privileged to the extent they contain requests for or provision of *non*-legal advice, such as political advice. (*See* R. 52:16–17.) DOJ contends that WMC's argument on this point "is duplicative of its argument that the emails concerning the press release and public records request are not covered by the privilege." (R. 52:5.) Not so. WMC

used those specific emails as an "example." (R. 51:17.) This limitation on the attorney-client privilege applies to any withheld email that involves non-legal advice.

2. DOJ also failed to establish that all the withheld emails are attorney work product.

DOJ argues that "the mere existence of anticipated PFAS contamination litigation is sufficient for the work product doctrine to apply here." (R. 52:6.) That view is too broad because DOJ "attorneys almost always anticipate litigation in some general sense." *ACLU of N. California v. United States Dep't of Just.*, 880 F.3d 473, 487 (9th Cir. 2018). To be attorney work product, the withheld emails must focus "upon specific events and a specific possible violation by a specific party." (R. 51:19 (quoting *Bagwell v. U.S. Dep't of Just.*, 588 F. Supp. 3d 58, 73–74 (D.D.C. 2022)).) This Court should consider the work-product doctrine's particularity requirement during its *in camera* review. (*See* R. 51:18–20.)

II. DOJ unlawfully withheld email attachments.

DOJ argues that the withheld email attachments are privileged "due to the underlying emails being covered by one or both of the privileges." (R. 52:11.) DOJ has not persuasively refuted WMC's argument that emails and email attachments are separately assessed for privilege. (*See* R. 51:21; 52:12–13.) An email is a separate record, *see Lueders v. Krug*, 2019 WI App 36, ¶ 16, 388 Wis. 2d 147, 931 N.W.2d 898, and "privilege must ordinarily be raised as to each record sought to allow the court to rule with specificity," *Juneau Cnty. Star-Times v. Juneau Cnty.*, 2011 WI App 150, ¶ 46, 337 Wis. 2d 710, 807 N.W.2d 655 (citation omitted), *aff'd*, 2013 WI 4, 345 Wis. 2d 122, 824 N.W.2d 457. The public records law does not allow a custodian to treat

separate records "as a unitary package." *See Wisconsin State Journal v. Blazel*, 2023 WI App 18, ¶ 60, 407 Wis. 2d 472, 991 N.W.2d 450. This Court should separately determine whether the emails and the email attachments are privileged.

III. If any of the requested records are privileged in part, DOJ violated its duty to separate the privileged information from the non-privileged information.

A. DOJ cannot assert a new "meaninglessness" defense.

The *Breier* rule forecloses DOJ from relying on "meaninglessness" as a new ground for withholding the requested records. (R. 51:23–24.) DOJ argues the *Breier* rule does not apply here because DOJ is not asserting meaninglessness "as a reason *for withholding responsive records*." (R. 52:14.) That argument fails for three reasons.

First, DOJ *is* asserting meaninglessness as a ground for withholding records. Instead of releasing partially redacted records, DOJ is *withholding* records in their entirety. And it asserts meaninglessness as a reason for doing so.

Second, contrary to DOJ's suggestion, WMC did *not* raise a "legal claim in its mandamus complaint *for allegedly not redacting*." (R. 52:14.) WMC's complaint mentioned the duty to redact only once, as a general statement of the law. (R. 2:11.) The complaint does not raise a failure-to-redact claim.

Third, DOJ's argument misunderstands the *Breier* rule. If DOJ's logic were valid, the government's lawyers could always avoid the *Breier* rule by claiming that their new arguments were simply a response to the mandamus complaint. The *Breier* rule forecloses that logic: "[w]here inspection is denied, it is the custodian, not the attorney representing the governmental body after a mandamus action is commenced, who must give specific and sufficient reasons for denying inspection."

Journal Times v. Police & Fire Comm'rs Bd., 2015 WI 56, ¶ 65, 362 Wis. 2d 577, 866 N.W.2d 563 (citation omitted). Here, DOJ's *attorney* is asserting meaninglessness as a reason for denying inspection, but DOJ's *record custodian* did not give this reason.

A helpful contrast here is *Osborn v. Board of Regents of University of Wisconsin System*, 2002 WI 83, 254 Wis. 2d 266, 647 N.W.2d 158. In *Osborn*, the Wisconsin Supreme Court considered the government's argument for denying a record request instead of releasing partially redacted records. *Id.* ¶¶ 41–47. Applying the *Breier* rule, the court explained that it was considering this argument for non-redaction because the custodian had raised it when denying the request. *Id.* ¶¶ 16–17.

Here, unlike in *Osborn*, DOJ's record custodian did not a give reason for non-redaction when it denied WMC's record request. (R. 5:2.) *Breier* thus forecloses DOJ from advancing such a reason now.

B. Even if DOJ could assert meaninglessness now, that defense would fail on the merits for two separate reasons.

DOJ argues that the meaninglessness exception to the redaction requirement is not limited to videos, citing *Democratic Party of Wisconsin v. DOJ*, 2016 WI 100, 372 Wis. 2d 460, 888 N.W.2d 584. But *Democratic Party* involved a dispute over two videos only. *Democratic Party*, 2016 WI 100, ¶¶ 1, 3. "[A]n opinion does not establish binding precedent for an issue if that issue was neither contested nor decided." *Silver Lake Sanitary Dist. v. DNR*, 2000 WI App 19, ¶ 13, 232 Wis. 2d 217, 607 N.W.2d 50. Because *Democratic Party* did not involve text documents, any precedential value it has on meaninglessness does not extend to text documents.

DOJ seems to suggest that, under *Democratic Party*, privileged documents are not subject to redaction. (R. 52:15.) *Democratic Party* does not support that notion. In *Democratic Party*, the court applied the public policy balancing test when determining whether the videos were properly withheld. *Democratic Party*, 2016 WI 100, ¶¶ 24, 33–34. The court noted that the custodian had cited several grounds for withholding the two videos, including attorney-client privilege and work-product doctrine. *Id.* ¶ 4. But the court did not consider or even discuss those two grounds.

DOJ suggests that, although FOIA cases show that privileged documents can be redactable, those cases are not persuasive because FOIA involves information. (R. 52:15.) DOJ is wrong; FOIA cases are persuasive authority here. (R. 51:18 n.5.) DOJ's distinction between records and information fails because "[t]he obvious purpose of the open records law is to provide access to the recorded *information* in records." *Stone v. Bd. of Regents of Univ. of Wisconsin Sys.*, 2007 WI App 223, ¶ 20, 305 Wis. 2d 679, 741 N.W.2d 774. A record 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) (emphases added).

Finally, as WMC has explained, DOJ has not met its burden of showing that redactions would be meaningless here. (R. 51:25.) In reply, DOJ does not refute that argument and attempt to meet its burden. (*See* R. 52:13–15.) This Court may reject DOJ's meaninglessness argument for this reason alone.

CONCLUSION

This Court should deny DOJ's motion for summary judgment and grant summary judgment to WMC on Count 2.

Dated this 6th day of September 2024.

Electronically signed by

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CERTIFICATE OF SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Circuit Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 6th day of September 2024.

Electronically signed by

Scott E. Rosenow

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