

## ***Metadata is a Public Record: What Does this Mean for School Districts?***

The Wisconsin Court of Appeals issued a decision on June 5, 2019, *Leuders v. Krug*, No. 2018AP431, that impacts the way that school districts must respond to public records requests for electronic files.

### REVIEW OF PUBLIC RECORDS LAW

Records maintained by public school districts are subject to Wisconsin's Public Records Law. The Public Records Law permits access to certain records by the public upon request. The presumption is that any record is available to the public, unless there is a basis for nondisclosure, such as if a specific exception to disclosure applies or if application of the balancing test provides a basis for nondisclosure. Some exceptions include: records protected by attorney-client privilege, records that are confidential under federal or state law (such as the laws protecting pupil and education records), and records that are purely personal.

When a district receives a records request, the district's records custodian locates the record and determines how the district will respond to the request, including determining if the record is subject to disclosure. If only part of the record is subject to disclosure, the records custodian must redact the part of the record subject to the exception and generally must produce the remaining portion of the record. The records custodian must provide the requested record(s) to the requestor as soon as practicable and without delay. The district may charge the requestor for the cost of copying and locating the record, but may not charge the requestor for the cost of redacting the record. Any redactions or denials of written requests must be accompanied by an explanation that will be the justification in any court case if a challenge is filed, and you are limited in any court case to the reasons you state in your initial denial, so you want to be complete.

### THE CASE

Bill Leuders, editor of *The Progressive* magazine and president of the Wisconsin Freedom of Information Council, requested State Representative Scott Krug's correspondence with constituents related to water conservation. Krug's office promptly responded to the records request with printed copies of the relevant emails. Two days after viewing the email printouts, Leuders made a second request, "to receive the records in electronic form." Krug declined this request because he believed that the paper printouts previously provided fulfilled his duty under the Public Records Law. Leuders filed suit in court to order Krug to deliver an "electronic, native copy of the requested records."

The court directed Krug to deliver the native email files, as Leuders had requested. The court held that the Public Records Law required Krug to produce an actual copy of the records requested. In response to Leuders' first request for "correspondence," Krug fulfilled his duty by providing printed email copies. However, Krug failed to properly provide records in response to Leuders' second, enhanced request for the native email files. Leuders specifically stated he wanted to look at the metadata so he could see who sent emails and when. The court held that the native email files contain important metadata that is not present in printed copies, and that metadata is also a record. Accordingly, the court held that Krug must honor the request specifically for electronic files so that the metadata is accessible.

In this case, Krug did not claim that the metadata Leuders requested was not subject to nondisclosure or subject to redaction under any applicable exception or under the balancing test. However, the issue of metadata or other information potentially being subject to redaction can be crucial for school districts when complying with records requests.

## WHAT IS METADATA?

Metadata is data about data. Every electronic resource—email, text document, Google search, social media post, text message, phone call, spreadsheet, or photograph—contains metadata. As an analogy, if the text of a book is the "data," the title, author, table of contents, publisher, and index are the "metadata." There are programs available that can "scrub" the metadata from the electronic resources before it is sent to others, just as the cover and title page of a book can be torn off.

For an electronic resource, metadata is typically not physically present on a print-out of the resource, but still contains information about that resource. The metadata is accessible only from the original electronic or "native" file. For example, the metadata in a text document can include: the identity of the "owner" of the document; the dates the document was created, accessed, or modified (thus some of the information could be considered a "draft," which is usually not subject to disclosure); all "tracked changes," including the order of the changes and comments; identities of document editors; the file location; and the file size. The metadata within email files can include: the email addresses of the senders and recipients, including those Bcc'd on the email; the date and time the email was sent and received; the sender and recipient's IP addresses; the electronic "path" that the email took to go from the sender to the recipient; and if any documents were attached to the email.

## IMPLICATIONS FOR SCHOOL DISTRICTS

As just one potential example, imagine that a newspaper submits a records request for an email, in its native, electronic form, that a district sent to all students and parents. Being cognizant of student and parental privacy, the district administrator's assistant placed all the recipient's email addresses in the Bcc field so recipients would not be able to see the email addresses of the other recipients. All students in the District have personalized email addresses, which are made up of their full names (e.g., john.doe@school.edu). Student names and their school email addresses are likely personally identifiable information that generally cannot be disclosed under the Family Educational Rights and Privacy Act (FERPA) and likely the state pupil records law. If districts have identified such information as "directory information" it might be disclosable, unless parents have opted out of allowing that information to be disclosed. Absent the consent of those families, disclosing the metadata of the email to the newspaper could violate FERPA.

This common scenario will likely create challenges for districts. How should districts respond to these records requests for electronic copies of files containing metadata while maintaining their obligations under FERPA or Wisconsin law? Can just the metadata containing protected information be redacted

through scrubbing? If not, can all the metadata associated with a document be scrubbed without violating the Public Records Law? Can districts provide the metadata in a non-electronic format (such as in a screenshot) and then redact that screenshot?

Districts faced with such conundrums should consult with their IT departments to discuss exactly what kind of metadata may be available in the requested electronic files, and determine what appropriate methods may be available for redacting/scrubbing electronic metadata. They should also consult with their legal counsel to determine whether any or all of the metadata is subject to disclosure. The court did not consider these issues as they were not raised in this case. However, records custodians for public entities now have at least one additional step they must take to ensure that they do not accidentally disclose protected information and yet remain compliant with their duties under the Public Records Law.

Also of note: In May 2019 the Wisconsin Department of Justice updated its Wisconsin Public Records Law Compliance Guide and its Wisconsin Open Meetings Law Compliance Guide. These can be very valuable resources for districts who have to navigate these laws.

---

## PRIMARY AUTHORS



***Richard Verstegen***

(608) 283-7233  
RVERSTEGEN@BOARDMANCLARK.COM



***Brian Goodman***

(608) 283-1722  
BGOODMAN@BOARDMANCLARK.COM

- |                    |                |                      |                |                           |                |
|--------------------|----------------|----------------------|----------------|---------------------------|----------------|
| ■ Michael J. Julka | (608) 286-7238 | ■ Richard Verstegen  | (608) 283-7233 | ■ JoAnn M. Hart           | (608) 286-7162 |
| ■ Doug E. Witte    | (608) 283-7529 | ■ Eileen A. Brownlee | (608) 822-3251 | ■ M. Tess O'Brien-Heinzen | (608) 283-1798 |
| ■ James K. Ruhly   | (608) 283-1738 | ■ Steven C. Zach     | (608) 283-1736 | ■ Brian P. Goodman        | (608) 283-1722 |

*Disclaimer: Boardman & Clark LLP provides this material as information about legal issues. It does not offer legal advice with respect to particular situations and does not purport that this newsletter is a complete treatment of the legal issues surrounding any topic. Because your situation may differ from those described in this Newsletter, you should not rely solely on this information in making legal decisions. In addition, this material may quickly become outdated. Anyone referencing this material must update the information presented to ensure accuracy. The use of the materials does not establish an attorney-client relationship, and Boardman & Clark LLP recommends the use of legal counsel on specific matters.*