

MUNICIPAL LAW NEWSLETTER

BOARDMAN^{LLP}
LAW • FIRM

Volume 14, Issue 3, May/June, 2009

IN THIS ISSUE

- *Wisconsin Supreme Court to Decide Open Records Status of Personal E-mails*
- *Wisconsin Supreme Court Adopts Expansive Rules for Insurance Coverage In Asbestos Exposure Case*
- *City Actions Do Not Entitle Taxpayer to Property Tax Relief*
- *Utility's Express Easement Allows Construction of Additional Lines*
- *Speakers Forum*
- *Supreme Court Refuses Certification of Issues Regarding Nonconforming Use Standards*
- *Sale of Land as Part of a Complex Corporate Sale Does Not Constitute an Arm's Length Sale for Property Assessment Purposes*
- *Waukesha Asked To Pay Clean Wisconsin's Costs To Intervene In Waukesha's Water Rate Case*
- *Use of Property May Be Considered In Area Variance Application*

Read us online at
[boardmanlawfirm.com/
readingroom.](http://boardmanlawfirm.com/readingroom)

Wisconsin Supreme Court to Decide Open Records Status of Personal E-mails

The Wisconsin Court of Appeals recently certified an appeal to the Wisconsin Supreme to decide whether personal emails of a public employee sent through a school district network and composed on a district computer are subject to disclosure under Wisconsin's Open Records Law. *Schill v. Wisconsin Rapids School District, Appeal No. 2008AP967-AC.*

The Wisconsin Rapids School District has a computer use policy which permits employees to use district email accounts for occasional personal use. The policy provides that the District owns the email accounts and any material composed and/or sent on district computers or through its network are district property and contain no expectation of privacy.

The District received an open records request from a citizen seeking copies of emails from five District employees from school computers during a six week period. The admitted "fishing expedition" had the purported purpose of examining whether the employees were comporting with the "occasional use" policy or whether the extent of personal emailing was excessive.

The District advised the employees that it intended to comply with the request. The employees had no objection to the release of work-related email, but filed this action to preclude the release of their private emails. The case raises an issue

of great significance to municipal employers and employees who are permitted to use municipal computers and networks for personal uses. It was for this reason that the Court of Appeals referred the case directly to the Wisconsin Supreme Court for appellate review.

Under the analysis required by the Wisconsin Open Records Law ("Law"), the first step is to determine whether the Law applies to the requested records. A record is defined to include emails which are kept by an "authority." A record does not include "drafts, notes, preliminary computations and like materials prepared for the originator's personal use..." One of the issues before the Supreme Court is whether this personal use exemption applies to personal emails. The District contends that since the personal emails are not "drafts, notes (or) preliminary computations" that they do not fall within the exemption. Even if the emails were initially considered to fall within this exemption, the Supreme Court must still decide the scope of the term "personal use" in the exemption; *i.e.*, is it governed by the subject matter of the communication, the parties involved in the communication or both?

In construing the Law, the Supreme Court must analyze it under the stated purpose of providing the public the greatest possible

Continued on page 2

Wisconsin Supreme Court Adopts Expansive Rules for Insurance Coverage In Asbestos Exposure Case

The Wisconsin Supreme Court recently addressed a number of important issues relating to insurance coverage in the context of "long-tailed" asbestos exposure. In *Plastics Engineering Company v. Liberty Mutual Insurance Company*, the Court gave expansive meaning to the concept of an "occurrence" for purposes of triggering insurance coverage. The Court also rejected pro-rata allocation of damages where exposure to asbestos continued after the term of a policy expired.

Wisconsin Supreme Court to Decide Open Records Status of Personal E-mails *(continued from front page)*

information regarding "the affairs of government and the official acts of those officers and employees who represent them. Wis. Stat. §19.31. The question presented by this request is whether it deals with the affairs of government and the official acts of the District employees. A broad view of the request would suggest that how the employees utilize their paid time is precisely what the law permits inquiry into, while a narrower view would conclude that the personal emails are not related to official municipal action and, therefore, not within the statute's contemplation of a record which must be disclosed.

If the Supreme Court were to conclude that the emails constitute a record under the Law, then it must engage in a balancing test. On one side is the public's interest in disclosure, which carries a presumption in favoring disclosure. On the other side is the public's interest in protecting its employees' privacy, which is distinguished from the employees' personal interest in protecting their privacy. As the Court of Appeals noted, the issue is complicated in this case because while the emails are of a private nature, they involve a public issue related to the employees' conduct during their paid time.

Most employers permit their employees to use business email systems for limited personal use, just as employees have been allowed to use company telephones for personal use. However, the use of emails by employees has given rise to a host of employment problems, including confidentiality, harassment, labor law and privacy issues. This case represents another issue, which specifically impacts municipal employers and employees, and which could have a significant impact on the ability or desire of municipal employees to use public email systems for personal communications.

— Steven C. Zach

~~The *Plastics Engineering* case involved claims by multiple individuals alleging that they were injured by their first exposure to asbestos manufactured and sold by an insured of Liberty Mutual Insurance Company. The claimants alleged that asbestos-related injuries did not become manifest until long after their initial exposure to asbestos. The claimants' exposures, moreover, allegedly occurred at different times and at different geographical locations.~~

Liberty Mutual argued that the manufacturer's sale of asbestos-containing products without warning constituted one occurrence regardless of the number of people injured. This construction of the term "occurrence" would potentially limit the insurer's liability exposure because there would be fewer occurrences subject to the policy limits for each occurrence. The standard policy at issue provided \$500,000 of coverage per occurrence, which the policy defined as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured."

The Supreme Court concluded from the policy language that an "occurrence" in the case of asbestos exposure is the repeated exposure to asbestos-containing products. The Court relied on the policy language that an occurrence is the "continuous or repeated exposure" to harmful conditions. Multiple occurrences arise, according to the Court, because each individual's injury stems from his or her own repeated exposure to asbestos-containing products.

The Supreme Court further concluded that once policy coverage is triggered by an occurrence, then an insurer must fully defend a lawsuit in its entirety and pay for all sums up to the policy limits that the insured is obligated to pay because of the injury. The policy language, according to the Court, does not support a pro-rata allocation of damages between the insurer and the insured for periods after expiration of the policy at issue. Liberty Mutual had argued, on the other hand, that the insurer need not defend nor indemnify for injury that takes place outside the policy period.

In refusing to allocate asbestos-related damages, the Supreme Court noted that Wisconsin has adopted the continuous trigger theory of liability whereby all policies are triggered from the time of exposure until manifestation of injury. Once a policy is triggered, the policy then requires the insurer, according to the provisions at issue, "to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages."

The Supreme Court rejected Liberty Mutual's argument that if the insured did not purchase a policy for

Continued on next page