

June 27, 2019

## Legislator Must Provide Emails in Electronic Format

On June 5, 2019, the Court of Appeals in *Bill Lueders v. Scott Krug*, Appeal No. 2018AP431, affirmed a Dane County judge's ruling that Representative Scott Krug must provide responsive records requested under the Open Records Law in the requestor's preferred electronic form. In June of 2016, a Madison journalist e-mailed Representative Krug requesting any and all citizen correspondence that his office had with constituents from January 1 – April 8 of that year, regarding certain bills pertaining to water and conservation.

In response, Representative Krug printed out the correspondence, including electronic e-mail correspondence, and made them available for the requestor's review. The requestor also paid for copies of some of these printouts, but when Bill Lueders followed-up with a specific request via e-mail for the records, specifically, identifying e-mail correspondence in its native *electronic format*, Representative Krug refused. Representative Krug argued that if the requestor appears in person, the record custodian may provide a copy substantially as readable as the original. The court said that the requestor's initial and follow-up requests were not made in person, but by e-mail.

In a similar case, the court cited to a prior ruling with the Milwaukee Police Department when the city tried to pass off an analog copy of a digital 911 call as meeting the requirements of being substantially as good as the original document. That did not allow the requestor, the Milwaukee Police Association, to analyze and enhance the 911 call and the courts agreed that the original digital version had to be provided. Similarly, it found that while the print e-mails show what was said, it did not contain metadata from the source e-mails that could help show who created the documents and when. If not appealed, it makes clear that a requestor who asks for records in electronic format via e-mail is entitled to receive records in electronic format if that is how they prefer them.

Interestingly, the Court has not yet addressed the question as to "the degree to which a requestor can specify the precise electronic format that will satisfy a record request." While a

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requestor may be entitled to electronic copies rather than hard copies of the records, the records custodian still may deny access to its systems and determine the appropriate responsive electronic copy (i.e., .pdf, Microsoft Word, Microsoft Excel, etc.) to produce. Public employers are not required to create new documents.

Public employers should pay specific notice to this new decision and review their public records policies as soon as possible. Many of the public records policies were implemented many years ago prior to many of the technological advances that are in existence today. For example, the policy could be reviewed to require payment for the time and preparation of these documents as well as charging for flash drive, etc. It is also likely that the records custodians could use some additional training on this topic.

If there are any questions, please feel free to contact any of the undersigned.

### **Related People**

#### **Luis Arroyo**

Partner

[liarroyo@michaelbest.com](mailto:liarroyo@michaelbest.com)

T 414.225.2773

#### **Robert Mulcahy**

Partner

[rwmulcahy@michaelbest.com](mailto:rwmulcahy@michaelbest.com)

T 414.225.2761

#### **Kirk Pelikan**

Partner

[kapelikan@michaelbest.com](mailto:kapelikan@michaelbest.com)

T 414.223.2529

#### **Kevin Terry**

Partner

[kterry@michaelbest.com](mailto:kterry@michaelbest.com)

T 414.270.2734