

The Center for Media and Democracy

520 University Avenue, Suite 260

Madison, Wisconsin 53703

Phone: 608-260-9713 • Fax: 608-260-9714



September 11, 2012

Rep. Tyler August
Room 119 West
State Capitol
P.O. Box 8952
Madison, WI 53708

Re: Open Records Request, Wis. Stat. §§ 19.31-19.39

Rep. August -

Pursuant to the state open records law, Wis. Stat. §§ 19.31-19.39, I request access to and a copy of all records containing the words "American Legislative Exchange Council" and/or "ALEC," including but not limited to correspondence, emails sent and received, memoranda, informational materials, agendas, financial records (including receipts and expense reports), and other records, for the period December 1, 2011 through September 5, 2012. Please note that this request includes all emails sent and received on official email accounts as well as any other email accounts that have been used for official business, and also applies to records that may be in the "trash" folder of these email accounts. Also please note that this request applies to all files or documents downloaded to any computer or hard drive that has been used for official business, including records in the "trash" folder on these computers.

Please produce copies of the records in the most expedient and cost-effective manner possible. If electronic copies on a CD or by email can be produced at a lower cost than paper copies, please provide the copies in such an electronic format.

Please also be aware that the Open Records law "shall be construed in every instance with the presumption of complete public access consistent with the conduct of governmental business. The denial of access generally is contrary to the public interest and only in exceptional cases can access be denied." If you deny this request, or any part of this request, the law requires you to do so in writing and state what part of the law you believe entitles you to deny this request, or any part of this request. Wis. Stat. § 2219.35(4)(a).

As you know, the law requires you to respond to this request "as soon as practicable and without delay." Please confirm receipt of this request. Thank you for your time and consideration.

Sincerely,

Brendan Fischer
Staff Counsel
Center for Media and Democracy

Nick Surgey
Staff Counsel
Common Cause

From: Nick Surgey
[mailto:NSurgey@commoncause.org<NSurgey@commoncause.org>]
Sent: Tuesday, September 11, 2012 5:44 PM
To: Rep.August
Subject: Open Records Request- ALEC
Importance: High

Please see attached.

Nick Surgey

Staff Counsel, Common Cause
152 W.Johnson St., Suite 212, Madison, WI 53703
Cell. 202-713-8869
Commoncause.org | Facebook/CommonCause | @NickSurgeyCC

From: Bacher, Luke <Luke.Bacher@legis.wisconsin.gov>
Date: Wednesday, September 12, 2012 1:01 PM
To: Nick Surgey nsurgey@commoncause.org
Cc: "Rep.August" Rep.August@legis.wisconsin.gov
Subject: RE: Open Records Request- ALEC

Mr. Surgey

We have received your open records request and our search came up with no results. Please consider this request completed.

Sincerely,

Luke

Luke Bacher
Legislative Assistant
State Representative Tyler August
608-266-1190
luke.bacher@legis.wi.gov
http://repaugust.com

From: Nick Surgey
[mailto:NSurgey@commoncause.org<NSurgey@commoncause.org>]
Sent: Wednesday, September 12, 2012 1:16 PM
To: Bacher, Luke
Cc: Rep.August; brendan@prwatch.org
Subject: Re: Open Records Request- ALEC
Importance:High

Dear Luke-

Thank you for for your response. I will remind you that the request was for all emails sent and received on both official email accounts and any other email accounts used for official business. Can you please confirm that your search included all email accounts, including personal email accounts used by Rep. August. If you see page three of Attorney General Van Hollen's recently-released open records compliance guide

http://www.doj.state.wi.us/dls/OMPR/2012OMCG-PRO/2012_Pub_Rec_Outline.pdf you will note that: "E-mail conducting government business sent or received on the personal e-mail account of an authority's officer or employee also constitutes a record."

Thank you.

Nick Surgey

Staff Counsel, Common Cause

152 W.Johnson St., Suite 212, Madison, WI 53703

Cell. [202-713-8869](tel:202-713-8869)

CommonCause.org | [Facebook/CommonCause](#) | [@NickSurgeyCC](#)

From: Bacher, Luke Luke.Bacher@legis.wisconsin.gov
Date: Wednesday, September 12, 2012 1:25 PM
To: Nick Surgey nsurgey@commoncause.org
Cc: "Rep.August" Rep.August@legis.wisconsin.gov
Subject: RE: Open Records Request- ALEC

Mr. Surgey,

Our office has no records.

Sincerely,

Luke Bacher

Legislative Assistant

State Representative Tyler August

608-266-1190

luke.bacher@legis.wi.gov

<http://repaugust.com>

From: Nick Surgey
[\[mailto:NSurgey@commoncause.org\]](mailto:NSurgey@commoncause.org)<NSurgey@commoncause.org>
Sent: Wednesday, September 12, 2012 1:30 PM
To: Bacher, Luke

Cc: Rep.August; brendan@prwatch.org
Subject: Re: Open Records Request- ALEC
Importance: High

Luke- I do appreciate your speedy response. So as to avoid any confusion, could you please confirm whether your search included Rep. August's personal email addresses, as is stated as is required and outlined in the AG's open records compliance guide
http://www.doj.state.wi.us/dls/OMPR/2012OMCG-PRO/2012_Pub_Rec_Outline.pdf

With thanks,

Nick

Nick Surgey

Staff Counsel, Common Cause
152 W.Johnson St., Suite 212, Madison, WI 53703
Cell. [202-713-8869](tel:202-713-8869)
CommonCause.org | [Facebook/CommonCause](https://www.facebook.com/CommonCause) | [@NickSurgeyCC](https://twitter.com/NickSurgeyCC)

From: Bacher, Luke <Luke.Bacher@legis.wisconsin.gov>
Date: Wednesday, September 12, 2012 1:34 PM
To: Nick Surgey <nsurgey@commoncause.org>
Cc: "Fuller, Patrick E." <Patrick.Fuller@legis.wisconsin.gov>, "Rep.August" <Rep.August@legis.wisconsin.gov>
Subject: RE: Open Records Request- ALEC

Mr. Surgey
Our office has no records.
Sincerely,

Luke Bacher
Legislative Assistant
State Representative Tyler August
[608-266-1190](tel:608-266-1190)
luke.bacher@legis.wi.gov
<http://repaugust.com>

From: brendan fischer <brendan@prwatch.org>
Sent: Wednesday, September 12, 2012 2:01 PM
To: Bacher, Luke
Cc: Fuller, Patrick E.; Rep.August; Nick Surgey
Subject: Re: FW: Open Records Request- ALEC

Mr. Bacher,

Please note that even if a record is not contained within the physical bounds of your office or computer system, it is still subject to the open records law. A record is anything "created or kept in connection with official purpose or function of the agency." 72 Op. Att'y Gen. 99, 101 (1983); State ex rei. Youmans v. Owens, 28 Wis. 2d 672, 679, 137 N.W.2d 470, 473 (1965). It is the content determines whether a document is a "record," not medium, format, or location. OAG 1-06-09 (December 23, 2009), at 2.1.

I will remind you that the request was for all emails sent and received on both official email accounts and any other email accounts used for official business. If you see page three of Attorney General Van Hollen's recently-released open records compliance guide http://www.doj.state.wi.us/dls/OMPR/2012OMCG-PRO/2012_Pub_Rec_Outline.pdf you will note that: "E-mail conducting government business sent or received on the personal e-mail account of an authority's officer or employee also constitutes a record." If this is a denial, the law requires you to state this in writing and declare what part of the law you believe entitles you to deny this request. Wis. Stat. § 2219.35(4)(a)

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Brendan M Fischer
Staff Counsel
Center for Media and Democracy
www.prwatch.org

On Wed, Sep 12, 2012 2:08 PM, Bacher, Luke
Luke.Bacher@legis.wisconsin.gov wrote:

Mr. Fischer -

Our office does not have any records.
Sincerely,

Luke Bacher
Legislative Assistant
State Representative Tyler August
608-266-1190
luke.bacher@legis.wi.gov
<http://repaugust.com>

From: "brendan@prwatch.org" <brendan@prwatch.org>
Date: Friday, September 14, 2012 11:49 AM
To: "Fuller, Patrick E." <Patrick.Fuller@legis.wisconsin.gov>
Cc: "BJ.Dernbach@legis.wisconsin.gov" <BJ.Dernbach@legis.wisconsin.gov>, "rep.knodl@legis.wi.gov" <rep.knodl@legis.wi.gov>, "Mark.Florian@legis.wisconsin.gov" <Mark.Florian@legis.wisconsin.gov>, "rep.larson@legis.wi.gov" <rep.larson@legis.wi.gov>, "Rep.Pridemore@legis.wisconsin.gov" <Rep.Pridemore@legis.wisconsin.gov>, "luke.bacher@legis.wi.gov" <luke.bacher@legis.wi.gov>, "Rep.August@legis.wisconsin.gov" <Rep.August@legis.wisconsin.gov>, "Rep.Strachota@legis.wisconsin.gov" <Rep.Strachota@legis.wisconsin.gov>, "Hariah.Hutkowski@legis.wisconsin.gov" <Hariah.Hutkowski@legis.wisconsin.gov>, "Thiesfeldt, Jeremy" <Jeremy.Thiesfeldt@legis.wisconsin.gov>, Nick Surgey <nsurgey@commoncause.org>
Subject: Responsibilities under Wisconsin Open Records Law

September 14, 2012

Assembly Chief Clerk Patrick Fuller
17 West Main St #401
Madison WI 53703

Mr. Fuller:

It appears that some records custodians in the Assembly are confused about their responsibilities under Wisconsin's Open Records Law. I respectfully ask that you inform all records custodians that fully complying with the Open Records Law is "an integral part of the routine duties" of their position, as declared in Wis. Stat. § 19.31.

On September 11, we submitted requests to multiple offices for all records containing the term "American Legislative Exchange Council" or the word "ALEC," including for emails sent and received on the Representatives' personal email accounts, whenever those accounts have been used for official government functions. We are not seeking any emails that are purely personal, we are only seeking communications related to ALEC, which are indisputably connected to government functions -- namely, legislation, and planning for meetings where proposed legislation will be discussed.

As you are aware, a "record" for purposes of the Open Records Law does indeed include emails sent on a legislator's personal email account, whenever that account is used for official business.

For example, on page three of Attorney General Van Hollen's recently-released open records compliance guide, you will note that:

"E-mail conducting government business sent or received on the personal e-mail account of an authority's officer or employee also constitutes a record."

The Wisconsin Supreme Court has concluded that "the policy underlying the public records law is not so ephemeral and its mandates are not so easily circumvented" as to allow a government employee to "subvert the purpose of the public records law in

seconds and with several strokes on a keyboard simply by logging onto a free personal email account." *Schill v. Wisconsin Rapids Sch. Dist.*, 2010 WI 86 ¶ 156, 327 Wis. 2d 572 ¶ 156, 786 N.W.2d 177, ¶ 156 (Bradley, J., concurring).

It is the content that determines whether a document is a "record," not medium, format, or location. OAG 1-06-09 (December 23, 2009), at 2.1. "In determining whether a document is a record under Wis. Stat. § 19.32(2), the focus is on the content of the document. To be a record under § 19.32(2), the content of the document must have a connection to a government function." *Schill v. Wisconsin Rapids Sch. Dist.*, 2010 WI 86 ¶ 140, 327 Wis. 2d 572 ¶ 140, 786 N.W.2d 177, ¶ (Abrahamson, C.J., lead opinion). A record is anything "created or kept in connection with official purpose or function of the agency." 72 Op. Att'y Gen. 99, 101 (1983); State ex rei. Youmans v. Owens, 28 Wis. 2d 672, 679, 137 N.W.2d 470, 473 (1965).

Some records custodians have asserted that they have no responsibility under Wisconsin's Open Records Law to search a Representative's personal email account for the requested official records. Others have repeatedly issued evasive responses when we have directly asked for confirmation that they conducted a search of personal email accounts. None have issued an official denial stating what part of the law they believe entitles them to deny this request, as required by Wis. Stat. § 2219.35(4)(a).

I trust that you will inform all Assembly records custodians as to their responsibilities under the Open Records Law.

I have also included those six records custodians who have evaded our requests on this email so there can be no ambiguity or confusion about what the law requires. Further denials, unnecessary delays, or evasive responses from these offices after this point will be construed as willful and intentional, and possibly arbitrary and capricious.

Please note that our next step will be to obtain a court order mandating the release of these records. If the court finds that any of their offices "acted in a willful or intentional manner" in withholding access, the office will be responsible for actual damages. Wis. Stat. § 19.37(2)(b). If the court finds that an office "has arbitrarily and capriciously denied or delayed response to a request," that office will be subject to punitive damages. § 19.37(3).

Sincerely,

Brendan Fischer
SBN 1089027

CC:

BJ Dernbach (Office of Representative Dan Knodl)
Mark Florian (Office of Representative Tom Larson)
Bill Savage (Office of Representative Don Pridemore)
Luke Bacher (Office of Representative Tyler August)
Heather Moore (Office of Representative Pat Strachota)
Hariah Hutkowski (Office of Representative Jeremy Thiesfeldt)

Nick Surgey (Common Cause)

--

Brendan M Fischer
Staff Counsel
Center for Media and Democracy
www.prwatch.org

From: brendan fischer <brendan@prwatch.org>
Sent: Monday, September 17, 2012 11:13 AM
To: Bacher, Luke
Cc: Nick Surgey; Rep.August
Subject: Re: FW: Open Records Request- ALEC

Mr. Bacher -- Please let us know the status of this request.

--

Brendan M Fischer
Staff Counsel
Center for Media and Democracy
www.prwatch.org

On Mon, Sep 17, 2012 at 1:46 PM, Bacher, Luke
Luke.Bacher@legis.wisconsin.gov wrote:

Mr. Fischer –

We have received your open records request and our search came up with no results.

Please consider this request completed.

Sincerely,

Luke

Luke Bacher
Legislative Assistant
State Representative Tyler August
608-266-1190
luke.bacher@legis.wi.gov
<http://repaugust.com>

From: brendan fischer <brendan@prwatch.org>
Date: Mon, Sep 17, 2012 at 1:55 PM
Subject: Re: FW: Open Records Request- ALEC
To: "Bacher, Luke" <Luke.Bacher@legis.wisconsin.gov>
Cc: "Fuller, Patrick E." <Patrick.Fuller@legis.wisconsin.gov>, Nick Surgey <NSurgey@commoncause.org>

Mr. Bacher -- As we asked on Sept 12, will you please confirm that your search included Rep. August's personal email addresses. I have no doubt that you are now aware of the precise parameters of our request and your responsibilities under the Open Records Law.

--

Brendan M Fischer
Staff Counsel
Center for Media and Democracy
www.prwatch.org



Tyler August

State Representative • 32nd Assembly District

September 18, 2012

Nick Surgey
Common Cause
152 W. Johnson St., Suite 212
Madison, WI 53703

Dear Mr. Surgey:

This letter is written in response to your open records request addressed to me, dated September 11, 2012, in which you request: a copy of all records containing the words "American Legislative Exchange Council" and/or "ALEC."

My staff and I have searched through our records and have located 14 items that are responsive to this portion of your request.

Please note that some of the records we located contained information received from constituents or other private citizens. For those records, I have redacted personally identifying information, including names, telephone numbers, and personal e-mail addresses. Please note that I am not denying you access to entire records that contain such personal citizen information. Rather, I am providing you with the content of those records, redacting only the name and personal contact information of the citizen. Further, where there is clear intent of the citizen to have information shared publicly, I have provided it.

The applicability of Wisconsin's Public Records Law to specific citizen contacts on a particular issue requires me to balance the strong public interest in disclosing the record against any applicable public interest favoring nondisclosure. Based on this assessment, and for all the reasons stated below, I have determined that personal citizen information is not required to be produced under Wisconsin's Public Records Law:

- Pursuant to Wis. Const. Art. IV, Secs. 1 and 16, legislators have not only the right but also the responsibility to receive input from citizens regarding governmental concerns and undertake whatever investigations or inquiries the legislators think are appropriate to resolve those concerns. The potential disclosure of personal citizen information would constitute undue interference with legislators' constitutional rights and responsibilities, would act as an unconstitutional barrier to free and open communication between legislators and citizens, and would chill free speech and debate in the legislative process. As a result of Wis. Const. Art. IV, Secs. 1 and 16, the personal citizen information you seek is not subject to Wisconsin's Open Records Law.

- Any attempt to obtain the personal citizen information you seek also constitutes an undue interference with that citizen's rights to petition his or her government under U.S. Const. Amend. I and Wis. Const. Art. I, Sec. 4. Such interference chills free speech and debate and operates as a prior restraint of rights. As a result, the personal citizen information you seek is not subject to Wisconsin's Open Records Law.
- Pursuant to the exercise of legislative power authorized under, and the separation of powers principles established in, the Wisconsin Constitution, each legislator may choose to withhold or release documents concerning citizens who contact him or her about issues concerning public policy. See, for example, Wis. Const. Art. IV, Sec. 10. This principle is further exemplified by the Senate Policy Manual, which was adopted pursuant to Wis. Const. Art. IV, Sec. 8, and which exempts from disclosure under the public records law any information that identifies, discusses, or refers to proposed legislation that has not been introduced into the legislative process. Furthermore, the Wisconsin Legislative Council's Legislator Briefing Book indicates that although constituent correspondence is generally a public record, in certain circumstances a legislator may redact personally identifiable information about a constituent. It is vital to the proper functioning of the legislative branch of government that each legislator has the authority to enhance citizen involvement in the process by protecting personal citizen information. As a result, the personal citizen information you seek is not subject to Wisconsin's Open Records Law.

Furthermore, even if this personal citizen information were subject to the Open Records Law, it would be my opinion that the public interest in disclosing this personal citizen information is outweighed by the public interest in protecting the confidentiality of that information. Citizens must have total freedom to contact me on issues of concern to them, without fear that their personal citizen information will be made public and that they will be put at risk of harassment, reprisal, identity theft, etc. If personal citizen information is made public, citizens will hesitate to exercise their Constitutional right to contact their elected officials for assistance.

I have a Constitutional duty to help citizens with their problems related to public policy and to hear their views concerning the issues of the day, a duty which I have taken an oath to uphold. I cannot take steps, such as disclosing their personal citizen information, which contradict my duty as an elected state legislator. For all of these reasons and the additional reasons stated above, it is my opinion that the public interest in disclosing this information is outweighed by the public interest in withholding the information. See. 19.35(1) (a), Wis. Stats

If you have any questions concerning my response, please feel free to contact me. Pursuant to s. 19.35 (4) (b), Wis. Stats., this reply is subject to review by mandamus under s. 19.37 (1), Wis. Stats., or upon application to the Attorney General or a district attorney.

Sincerely,



Tyler August
State Representative
32nd District