

# 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. Dan Knodl  
Room 218 North  
State Capitol  
P.O. Box 8952  
Madison, WI 53708

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

Rep. Knodl -

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>]  
**Sent:** Tuesday, September 11, 2012 5:53 PM  
**To:** Rep.Knodl  
**Subject:** Open Records Request

Please see attached.

**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](http://Commoncause.org) | [Facebook/CommonCause](https://www.facebook.com/CommonCause) | [@NickSurgeyCC](https://twitter.com/NickSurgeyCC)

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**From:** "Rep.Knodl" <[Rep.Knodl@legis.wisconsin.gov](mailto:Rep.Knodl@legis.wisconsin.gov)>  
**Date:** Wednesday, September 12, 2012 2:34 PM  
**To:** Nick Surgey <[nsurgey@commoncause.org](mailto:nsurgey@commoncause.org)>  
**Cc:** "Fuller, Patrick E." <[Patrick.Fuller@legis.wisconsin.gov](mailto:Patrick.Fuller@legis.wisconsin.gov)>  
**Subject:** RE: Open Records Request

I've attached a .zip file with all the messages pertaining to your request.

Please let me know if you have any other questions

BJ Dernbach  
Office of Representative Dan Knodl  
24th Assembly District  
[\(608\) 266-3796](tel:608-266-3796)

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**From:** Nick Surgey [<mailto:NSurgey@commoncause.org>]  
**Sent:** Wednesday, September 12, 2012 4:58 PM  
**To:** Rep.Knodl  
**Cc:** Fuller, Patrick E.; [brendan@prwatch.org](mailto:brendan@prwatch.org)  
**Subject:** Re: Open Records Request

Thank you for responding so promptly, which is appreciated.

Can you please confirm for me whether this search included 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, 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."

I understand that Rep. Knodl is an alternate member of ALEC's Health and Human Services Task Force. From open record requests that Common Cause has made to other legislators, we have received numerous communications from ALEC to all members of this task force. None of these communications appear in the materials that you provided today.

Please confirm that your search included all email accounts, including personal email accounts used by Rep. Knodl.

Thank you again for your assistance.

Regards,

Nick

**Nick Surgey**

Staff Counsel, Common Cause

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

Cell. 202-713-8869

Commoncause.org | Facebook/CommonCause | @NickSurgeyCC

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**From:** <Dernbach>, BJ <BJ.Dernbach@legis.wisconsin.gov>

**Date:** Thursday, September 13, 2012 9:09 AM

**To:** Nick Surgey <nsurgey@commoncause.org>

**Cc:** "Fuller, Patrick E." <Patrick.Fuller@legis.wisconsin.gov>

**Subject:** RE: Open Records Request

Nick,

Thank you for your email.

I did conduct another search of all the office records in the office database.

There were 9 emails that were inadvertently not included in your request. They were in our constituent folder and one calendar item.

BJ Dernbach  
Office of Representative Dan Knodl  
24th Assembly District  
(608) 266-3796

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**From:** Nick Surgey [<mailto:NSurgey@commoncause.org>]  
**Sent:** Thursday, September 13, 2012 9:18 AM  
**To:** Dernbach, BJ  
**Cc:** Fuller, Patrick E.; [brendan@prwatch.org](mailto:brendan@prwatch.org)  
**Subject:** Re: Open Records Request - Knodl

Thank you for conducting an additional search of the office database. So as to avoid any confusion, as previously requested would you please confirm that your search included personal email accounts used for government business. There is no doubt that communications from ALEC should be considered government business. Please note that 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. 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).

With thanks,

Nick

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

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**From:** <Dernbach>, BJ <[BJ.Dernbach@legis.wisconsin.gov](mailto:BJ.Dernbach@legis.wisconsin.gov)>  
**Date:** Thursday, September 13, 2012 10:25 AM  
**To:** Nick Surgey <[nsurgey@commoncause.org](mailto:nsurgey@commoncause.org)>  
**Cc:** "Fuller, Patrick E." <[Patrick.Fuller@legis.wisconsin.gov](mailto:Patrick.Fuller@legis.wisconsin.gov)>  
**Subject:** RE: Open Records Request - Knodl

The search included all records pertaining to your request.

BJ Dernbach  
Office of Representative Dan Knodl

24th Assembly District

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**From:** Nick Surgey [<mailto:NSurgey@commoncause.org>]  
**Sent:** Thursday, September 13, 2012 11:18 AM  
**To:** Dernbach, BJ  
**Cc:** Fuller, Patrick E.; [brendan@prwatch.org](mailto:brendan@prwatch.org)  
**Subject:** RE: Open Records Request - Knodl

Mr. Dernbach,

We are directly asking you to confirm that, per our request, you not only searched for the requested records on the office's official email accounts, but also any other emails accounts (including personal email accounts) that have been used for official business. You have been reminded of the specific parameters of our request and the fact that the state Open Records Law encompasses the records we are seeking.

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

Regards,

**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](http://Commoncause.org) | [Facebook/CommonCause](https://www.facebook.com/CommonCause) | [@NickSurgeyCC](https://twitter.com/NickSurgeyCC)

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**From:** <Dernbach>, BJ <[BJ.Dernbach@legis.wisconsin.gov](mailto:BJ.Dernbach@legis.wisconsin.gov)>  
**Date:** Thursday, September 13, 2012 2:22 PM  
**To:** Nick Surgey <[nsurgey@commoncause.org](mailto:nsurgey@commoncause.org)>  
**Cc:** "Fuller, Patrick E." <[Patrick.Fuller@legis.wisconsin.gov](mailto:Patrick.Fuller@legis.wisconsin.gov)>  
**Subject:** RE: Open Records Request - Knodl

The search included all records pertaining to your request.

If you have any other questions regarding this request, I would refer you to Pat Fuller.

Thanks.

BJ Dernbach  
Office of Representative Dan Knodl  
24th Assembly District  
(608) 266-3796

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**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)

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**From:** [brendan@prwatch.org](mailto:brendan@prwatch.org)  
**Date:** Monday, September 17, 2012 11:06 AM  
**To:** <Dernbach>, BJ <[BJ.Dernbach@legis.wisconsin.gov](mailto:BJ.Dernbach@legis.wisconsin.gov)>  
**Cc:** Nick Surgey <[nsurgey@commoncause.org](mailto:nsurgey@commoncause.org)>  
**Subject:** RE: Open Records Request - Knodl

Mr. Dernbach --

Please let us know the status of this request.