

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. Tom Larson
Room 18 West
State Capitol
P.O. Box 8953
Madison, WI 53708

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

Rep. Larson -

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 5:58 PM
To: Rep.Larson
Subject: Open Records Request
Importance: High

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

From: <Florian>, Mark <Mark.Florian@legis.wisconsin.gov>
Date: Wednesday, September 12, 2012 10:28 AM
To: Nick Surgey <nsurgey@commoncause.org>
Subject: RE: Open Records Request

Hello Nick,

Thank you for contacting our office. After looking through our records in order to accommodate your open records request I was unable to find any items containing the phrase "American Legislative Exchange Council" or "ALEC" for the period from December 1, 2011 through September 5, 2012. If you have any further questions please feel free to contact us.

Thanks and best,

Mark Florian
LTE
Office of Rep. Tom Larson

From: Nick Surgey [<mailto:NSurgey@commoncause.org>]
Sent: Wednesday, September 12, 2012 10:56 AM
To: Florian, Mark
Cc: brendan@prwatch.org
Subject: Re: Open Records Request
Importance: High

Dear Mark-

Thank you for looking. 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. Larson.

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."

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: <Florian>, Mark <Mark.Florian@legis.wisconsin.gov>

Date: Thursday, September 13, 2012 9:25 AM

To: Nick Surgey <nsurgey@commoncause.org>

Subject: RE: Open Records Request

Hello Nick,

Apologies for the typo on the last email, please disregard it. We have thoroughly searched our records and have complied with the open records request.

Thanks and best,

Mark Florian

LTE

Office of Rep. Tom Larson

From: brendan@prwatch.org

Sent: Thursday, September 13, 2012 10:59 AM

To: Florian, Mark

Cc: Nick Surgey

Subject: Re: FW: Open Records Request- Larson

Mr. Florian --

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. A "record" includes all emails sent and received on Rep. Larson's personal account, whenever that account is used for official business -- which certainly includes the requested ALEC-related communications. 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).

Please note that complying with the Open Records Law is "an integral part of the routine duties" of your position and that "the denial of public access generally is contrary to the public interest." Wis. Stat. § 19.31.

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).

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 that have been used for official business.

On Thu, Sep 13, 2012 at 3:09 PM, Florian, Mark <Mark.Florian@legis.wisconsin.gov> wrote:

Hello Brendan,

Thank you for the additional clarification. As stated earlier, we have complied with the open records request.

All the best,

Mark Florian
LTE
Office of Rep. Tom Larson

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@prwatch.org
Sent: Monday, September 17, 2012 11:09 AM
To: "Florian, Mark" <Mark.Florian@legis.wisconsin.gov>
Cc: Nick Surgey <NSurgey@commoncause.org>, rep.larson@legis.wi.gov
Subject: Re: FW: Open Records Request- Larson

Mr. Florian --

Please let us know the status of this request.

--

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