

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. Jeremy Thiesfeldt
Room 16 West
State Capitol
P.O. Box 8953
Madison, WI 53708

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

Rep. Thiesfeldt -

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: brendan fischer <brendan@prwatch.org>
Sent: Tuesday, September 11, 2012 5:06 PM
To: Rep.Thiesfeldt
Subject: open records request

Please see attached.

--

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

From: **Hutkowski, Hariah** Hariah.Hutkowski@legis.wisconsin.gov
Sent: Wed, Sep 12, 2012 at 9:04 AM
To: brendan fischer <brendan@prwatch.org>, "Thiesfeldt, Jeremy" <Jeremy.Thiesfeldt@legis.wisconsin.gov>
Subject: open records request

Brendan, After a 30 minute search in all possible email folders there are no records per your request from the official emails of "Rep.Thiesfeldt@legis.wi.gov or Jeremy.Thiesfeldt@legis.wi.gov or any documents on our allocated hard drives in regards to ALEC for the period of Dec. 1, 2011 - Sept. 5th, 2012. I did not find any ALEC related items on our calendar either. Your request has been completed. I look forward to your next annual request.

Thank You and Sincerely!

Hariah Hutkowski
Legislative Assistant
Rep. Thiesfeldt's office
[1-888-529-0052](tel:1-888-529-0052)
FAX: [608-282-3652](tel:608-282-3652)

From: brendan fischer <brendan@prwatch.org>,
Sent: Wednesday, September 12, 2012 9:12 AM
To: Hutkowski, Hariah
Cc: Thiesfeldt, Jeremy
Subject: Re: open records request

Hi Hariah

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. 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!

--

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

From: **Hutkowski, Hariah** Hariah.Hutkowski@legis.wisconsin.gov
Sent: Wed, Sep 12, 2012 at 4:11 PM
To: brendan fischer <brendan@prwatch.org>, "Thiesfeldt, Jeremy" <Jeremy.Thiesfeldt@legis.wisconsin.gov>
Subject: open records request

Brendan,

Thanks for pointing out the compliance guide, especially the definition of "record." Based on point ii below from the guide I checked my account for records as well. I understood the request to be for Rep. Thiesfeldt only and did not include my "Hariah.Hutkowski@legis.wi.gov" email communications in my original search. I apologize for the confusion as the request was extremely vague on seeking staff's records in addition to Rep. Thiesfeldt's records.

Upon learning of my oversight, I turned up one record and it is attached. Also, I discovered some printed materials on a back shelf from ALEC sent to our office that I missed in my initial discovery process. These records (4 publications) are not easily scan-able so I will send them to the Assembly Chief Clerk to photocopy, mail, and bill to you.

Upon reading the guide, taking an additional 2 hours of my time, I can attest that this request is now complete (once you are mailed the records) and accurate to the best of my ability.

3. "Record" includes:
 - a. Handwritten, typed, or printed documents.
 - b. Maps and charts.

- c. Photographs, films, and tape recordings.
- d. Computer tapes and printouts, CDs and optical discs.
- e. Electronic records and communications.

i. Information regarding government business kept or received by an elected official on her website, "Making Salem Better," more likely than not constitutes a record. OAG I-06-09, at 2-3.

ii. E-mail sent or received on an authority's computer system is a record. This includes personal e-mail sent by officers or employees of the authority. *Schill*, 2010 WI 86, ¶ 152, 327 Wis. 2d 572, ¶ 152, 786 N.W.2d 177, ¶ 152 (Bradley, J., concurring); *Id.*, ¶ 173 (Gableman, J., concurring); *Id.*, ¶ 188 (Roggensack, J., dissenting).

iii. 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.

Sincerely,
Hariah Hutkowski
Legislative Assistant
Rep. Thiesfeldt's office
1-888-529-0052
FAX: 608-282-3652

From: brendan fischer <brendan@prwatch.org>,
Sent: Wednesday, September 12, 2012 4:50 PM
To: Hutkowski, Hariah
Cc: Thiesfeldt, Jeremy; Nick Surgey
Subject: Re: open records request

Hi Hariah,

Thank you for spending the time reviewing the compliance guide and searching your records. I appreciate that you complied with part (ii) of the compliance guide pasted below, but please also see part (iii), which I also excerpted in my email to you this morning.

As you are aware, a "record" includes all emails sent and received on Rep. Thiesfeldt's personal account, whenever that account is used for official business -- which certainly includes the requested ALEC-related communications. Because this request was directed at Rep. Thiesfeldt and asked not only for all emails sent and received on his official account but also "any other email accounts that have been used for official business," there can be no ambiguity that this request is intended to encompass his personal email accounts.

For additional proof of this, 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).

Finally, I am sure you know that an authority may not destroy a record after receipt of a request for that record until at least sixty days after denial or until related litigation is completed. Wis. Stat. § 19.35(5).

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

From: **Hutkowski, Hariah** Hariah.Hutkowski@legis.wisconsin.gov
Sent: Wed, Sep 12, 2012 at 4:59 PM
To: brendan fischer <brendan@prwatch.org>, "Thiesfeldt, Jeremy" <Jeremy.Thiesfeldt@legis.wisconsin.gov>
Subject: open records request

Brendan,

He has no records per part iii. I double checked too. Thanks for the additional clarification.

Sincerely,

Hariah Hutkowski
Legislative Assistant
Rep. Thiesfeldt's office
[1-888-529-0052](tel:1-888-529-0052)
FAX: [608-282-3652](tel:608-282-3652)

From: brendan fischer <brendan@prwatch.org>,
Sent: Wednesday, September 12, 2012 5:25 PM
To: Hutkowski, Hariah
Cc: Thiesfeldt, Jeremy; Nick Surgey
Subject: Re: open records request

I just want to confirm that, per our original request, you did a search for all emails sent and received on Rep. Thiesfeldt's personal email accounts for any

and all records containing the words "ALEC" and/or "American Legislative Exchange Council," including any records in the "trash" folder of those accounts.

I ask because the one record you have released shows that since June of last year all ALEC-related emails are going to his personal accounts. I also ask because you said it took 30 minutes to search his official email accounts but in less than nine minutes you apparently managed to search and double check -- his personal account and then send me an email.

--

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

From: **Hutkowski, Hariah** Hariah.Hutkowski@legis.wisconsin.gov
Sent: Thu, Sep 13, 2012 at 8:16 AM
To: brendan fischer <brendan@prwatch.org>, "Thiesfeldt, Jeremy" <Jeremy.Thiesfeldt@legis.wisconsin.gov>
Subject: open records request

I have complied with your request.
Thanks,

Hariah Hutkowski
Legislative Assistant
Rep. Thiesfeldt's office
[1-888-529-0052](tel:1-888-529-0052)
FAX: [608-282-3652](tel:608-282-3652)

From: brendan fischer <brendan@prwatch.org>,
Sent: Thursday, Sep 13, 2012 at 11:13 AM
To: Hutkowski, Hariah
Cc: Thiesfeldt, Jeremy; Nick Surgey
Subject: Re: open records request

Mr. Hutkowski

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).

--

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

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>
Date: Mon, Sep 17, 2012 at 11:16 AM
Subject: Re: open records request
To: "Hutkowski, Hariah" <Hariah.Hutkowski@legis.wisconsin.gov>
Cc: "Thiesfeldt, Jeremy" <Jeremy.Thiesfeldt@legis.wisconsin.gov>, Nick Surgey <NSurgey@commoncause.org>

Mr. Thiesfeldt --

Please let us know the status of this request.

--

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