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STATE OF WISCONSIN | CIRCUIT COURT BRANCH 1 | GRANT COUNTY

THE JOHN K. MACIVER INSTITUTE
FOR PUBLIC POLICY, INC. and
BRIAN FRALEY,

Plaintiffs,

v.

Case No. 12 CV 063
Case Code: 30703

JON ERPENBACH,

Defendant.

ANSWER

Defendant, Jon Erpenbach ("Senator Erpenbach"), by his attorneys, Thomas M. Pyper and Cynthia L. Buchko of Whyte Hirschboeck Dudek S.C., answers Plaintiffs' Complaint as follows:

FACTUAL ALLEGATIONS

1. Lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph No. 1 of the Complaint.

2. Lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph No. 2 of the Complaint.

3. Answering Paragraph No. 3 of the Complaint, assets that whether Senator Erpenbach is an authority for purposes of Wis. Stat. § 19.32(1) is a conclusion of law requiring no response, puts Plaintiffs to their proof thereof, and admits the remaining allegations set forth therein.

4. Answering Paragraph No. 4 of the Complaint, asserts that whether Senator Erpenbach is a legal custodian pursuant to Wis. Stat. § 19.33 is a conclusion of law requiring no response, puts Plaintiffs to their proof thereof, and admits that Senator Erpenbach is an elected official.

5. Denies that venue is "properly lodged" in Grant County for reasons alleged in Paragraph No. 5 of the Complaint, asserts that the allegations set forth therein are conclusions of law requiring no response, puts Plaintiffs to their proof thereof, and denies that this Court or any Court has jurisdiction over the non-justiciable political issues raised by the Complaint.

6. Answering Paragraph No. 6 of the Complaint, admits receiving an open records request from Plaintiffs by letter dated March 24, 2011 (hereinafter the "Original Request"), asserts that the March 24, 2011 letter attached to the Complaint as Exhibit A speaks for itself, and denies any allegations inconsistent with Exhibit A.

7. Answering Paragraph No. 7 of the Complaint, admits sending a response to the Original Request on April 4, 2011, seeking clarification, asserts that the April 4, 2011 letter attached to the Complaint as Exhibit B speaks for itself and denies any allegations inconsistent with Exhibit B.

8. Answering Paragraph No. 8 of the Complaint, admits receiving an April 12, 2011 email from Plaintiffs, asserts that the April 12, 2011 email attached to the Complaint as Exhibit C speaks for itself and denies any allegations inconsistent with Exhibit C.

9. Answering Paragraph No. 9 of the Complaint, admits that he sent an April 18, 2011 letter to Plaintiffs, asserts that the April 18, 2011 letter attached to the Complaint as Exhibit D speaks for itself and denies any allegations inconsistent with Exhibit D.

10. Answering Paragraph No. 10 of the Complaint, lacks knowledge or information sufficient to form a belief as to the truth of the allegations set forth in the first sentence thereof, denies that the April 18, 2011 letter attached to the Complaint as Exhibit D was an "inadequate" response, admits that he received an August 15, 2011 letter from Plaintiffs that revised their open records request ("Revised Request"), asserts that the August 15, 2011 Revised Request attached to the Complaint as Exhibit E speaks for itself and denies any allegations inconsistent with Exhibit E.

11. Answering Paragraph No. 11 of the Complaint, admits that he sent an August 29, 2011 email to Plaintiffs, asserts that the August 29, 2011 email attached to the Complaint as Exhibit F speaks for itself and denies any allegations inconsistent with Exhibit F.

12. Answering Paragraph No. 12 of the Complaint, admits that he sent an October 3, 2011 email to Plaintiffs and that he received an October 4, 2011 email response from Plaintiffs' counsel, assets that the October 3, 2011 and October 4, 2011 emails attached to the Complaint as Exhibits G and H, respectively, speak for themselves and denies any allegations inconsistent with Exhibits G and H.

13. Answering Paragraph No. 13 of the Complaint, admits that he received a November 2, 2011 letter from Plaintiffs' counsel, lacks knowledge or information sufficient to form a belief as to the truth of the allegation as to why such letter was sent, asserts that the November 2, 2011 letter attached to the Complaint as Exhibit I speaks for itself and denies any allegations inconsistent with Exhibit I.

14. Answering Paragraph No. 14 of the Complaint, admits that he sent a November 13, 2011 letter to Plaintiffs with a valid response to Plaintiffs' Original Request and Revised Request, asserts that the November 13, 2011 letter attached to the Complaint as Exhibit J speaks

for itself, denies any allegations inconsistent with Exhibit J and affirmatively asserts that the documents made available pursuant to the November 13, 2011 letter response have never been retrieved by Plaintiffs.

15. Answering Paragraph No. 15 of the Complaint, admits that the documents produced pursuant to the April 18, 2011 and November 13, 2011 responses to Plaintiffs' Original Request and Revised Request have the redactions described in such letters, denies any allegations inconsistent with the redactions described in such letters and asserts that the redactions fully comply with the Wisconsin Public Records Law.

16. Denies the allegations set forth in Paragraph No. 16 of the Complaint and affirmatively asserts that Plaintiffs did not make an "offer to accept production of unredacted communications sent from a state or local government e-mail accounts" and instead asserts that Plaintiffs' August 15, 2011 letter constituted a Revised Request to which Senator Erpenbach has fully and appropriately responded.

CLAIM – VIOLATION OF § 19.35(1)

17. Answering Paragraph No. 17 of the Complaint, restates and incorporates herein fully by reference the responses set forth in Paragraph Nos. 1-16 above.

18. Answering Paragraph No. 18 of the Complaint, asserts that the statements set forth therein constitute conclusions of law requiring no response, puts Plaintiffs to their proof thereof and asserts that the quotation included therein is subject to numerous statutory, constitutional and other legal qualifications, exceptions and defenses as more fully described in the Affirmative Defenses set forth below.

19. Answering Paragraph No. 19 of the Complaint, asserts that the statements set forth therein constitute conclusions of law requiring no response, puts Plaintiffs to their proof

thereof and asserts that the quotations included therein is subject to numerous statutory, constitutional and other legal qualifications, exceptions and defenses as more fully described in the Affirmative Defenses set forth below.

20. Answering Paragraph No. 20 of the Complaint, asserts that the statements set forth therein constitute conclusions of law requiring no response, puts Plaintiffs to their proof thereof and asserts that the quotation included therein is subject to numerous statutory, constitutional and other legal qualifications, exceptions and defenses as more fully described in the Affirmative Defenses set forth below.

21. Answering Paragraph No. 21 of the Complaint, asserts that the statements set forth therein constitute conclusions of law requiring no response, puts Plaintiffs to their proof thereof and asserts that the legal conclusion included therein is subject to numerous statutory, constitutional and other legal qualifications, exceptions and defenses, such as the *Schilling* Court's holding that purely personal emails are not documents required to be produced under the Wisconsin Public Records Law, as more fully alleged in the Affirmative Defenses set forth below.

22. Denies the allegations set forth in Paragraph No. 22 of the Complaint.

23. Answering Paragraph No. 23 of the Complaint, asserts that the statements set forth therein constitute conclusions of law requiring no response, puts Plaintiffs to their proof thereof, asserts that the legal conclusion included therein is subject to numerous statutory, constitutional and other legal qualifications, exceptions and defenses as more fully described in the Affirmative Defenses set forth below, admits "that the balance cannot justify public disclosure" with regard to the redactions made to the documents produced in response to the Original Request and Revised Request and asserts that the Plaintiffs did not request the

documents to further any purpose of the public in "a strong and overriding interest in knowing whether state resources had been misused in this way" but rather purely for political purposes aimed at obtaining the identities of Senator Erpenbach's constituents who had raised valid, personal concerns with regard to the changes to Wisconsin's collective bargaining law for public employees so that the information could be used to the political advantage of persons who supported such changes and to the personal disadvantage of Senator Erpenbach's constituents who raised their personal concerns with him.

24. Denies the allegations set forth in Paragraph No. 24 of the Complaint.

25. Denies the allegations set forth in Paragraph No. 25 of the Complaint.

GENERAL DENIAL

To the extent any allegations set forth in the Complaint are not otherwise specifically admitted or denied or to which full and proper responses have not otherwise been provided, they are specifically and expressly denied.

AFFIRMATIVE DEFENSES

1. Plaintiffs' claim fails to state a claim upon which relief may be granted.

2. Grant County is either not a proper venue or the venue should be changed in the interest of justice or for the convenience of the parties or witnesses.

3. The redacted information from the documents produced does not constitute a record for purposes of Wis. Stat. § 19.32(2) because, among other reasons, the information redacted has no connection to a government function.

4. Pursuant to Wis. Const. Art. IV, Sec. 8, the Senate policy of maintaining the confidentiality of personally identifiable information of constituents who contact his or her Senator constitutes a "rule of proceeding" enacted by the Senate to govern its functioning.

Senators have not only the right but also the responsibility to receive input from their constituents regarding personal concerns of the constituents with regard to the functioning of State government and to undertake whatever investigations or inquiries a Senator thinks are appropriate to resolve the personal concerns voiced by their constituents. The potential disclosure of personally identifiable information of constituents would act as an unconstitutional barrier to free and open communication between Senators and their constituents, and would chill free speech and debate in the legislative process. As a result of Wis. Const. Art. IV, Sec. 8, the personally identifiable information with regard to Senator Erpenbach's constituents, which was redacted from the produced documents, is not subject to Wisconsin's Public Records Law.

5. Pursuant to Wis. Const. Art. IV, Sec. 10, the Senate has the right to determine which of its proceedings should be secret, including proceedings involving Senator Erpenbach and his constituents. Pursuant to such Constitutional authority, the Senate has adopted a policy that allows Senators to maintain the confidentiality of personally identifiable information pertaining to constituents who contact their Senators. As a result of Wis. Const. Art. IV, Sec. 10, the personally identifiable constituent information redacted from the documents produced by Senator Erpenbach is not subject to Wisconsin's Public Records Law.

6. The Senate has adopted a rule of proceeding that allows each Senator to maintain the confidentiality of personally identifiable information pertaining to constituents who contact him or her with personal concerns about the functioning of State government, pursuant to Wis. Const. Art. IV, Secs. 8 and 10. The Senate Policy Manual, adopted pursuant to Wis. Const. Art. IV, Sec. 8, exempts from disclosure personal identification information about constituents who contact a Senator to voice personal concerns with regard to proposed legislation, such as the legislation pertaining to the change in Wisconsin's collective bargaining law. Furthermore, the

Wisconsin Legislative Council's Legislator Briefing Book provides that in certain circumstances a legislator may redact personally identifiable information about a constituent from documents produced in response to a public records request. It is vital to the proper function of the Senate that each Senator has the authority to enhance constituent involvement in the process by protecting personally identifiable constituent information. As a result, the information redacted by Senator Erpenbach from the documents produced is not subject to Wisconsin's Public Record Law.

7. Plaintiffs' claim constitutes a non-justiciable political question.

8. Plaintiffs' attempt to obtain the personally identifiable information concerning Senator Erpenbach's constituents constitutes an undue interference with those constituents' U.S. Const. Amend. I and Wis. Const. Art. I, Sec. 4 rights to petition their government. Such interference chills free speech and debate and operates as a prior restraint on the right of constituents to petition their Senator. As a result, the information redacted by Senator Erpenbach from the produced documents is not subject to Wisconsin's Public Records Law.

9. Even if the personally identifiable information concerning Senator Erpenbach's constituents was otherwise subject to Wisconsin's Public Records Law, the harm to the public interest in maintaining the confidentialityof such personally identifiable information to protect the right of constituents to petition their Senators about personal concerns with regard to the functioning of State government outweighs any public interest in requiring the disclosure of such personally identifiable information. That is particularly true in this case where Plaintiffs seek the information for purely political purposes and to use such information to the advantage of supporters of the change in Wisconsin's collective bargaining laws and to the detriment of the constituents of Senator Erpenbach who contacted him to voice personal concerns about the

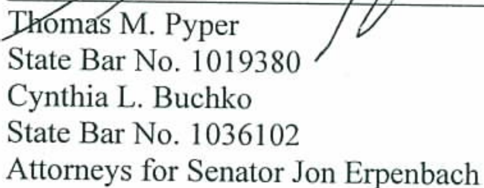
change in the collective bargaining law. The public interest in Plaintiffs' intended misuse of such information is far outweighed by the public interest in maintaining the personally identifiable information of constituents confidential so as to protect them against harassment, intimidation and reprisals from governmental officials or private parties through its misuse.

WHEREFORE, Senator Erpenbach respectfully demands judgment dismissing Plaintiffs' Complaint against him on the merits, together with an award of costs and disbursements incurred in the defense of this litigation and such other legal and equitable relief as the Court may determine just and proper.

Dated: March 30, 2012

Respectfully submitted,

WHYTE HIRSCHBOECK DUDEK S.C.



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