

STATE OF WISCONSIN

CIRCUIT COURT

GRANT COUNTY

THE JOHN K. MACIVER INSTITUTE
FOR PUBLIC POLICY, INC. and
BRIAN FRALEY,
444 East Mifflin Street, Suite 201
Madison, WI 53703,

Plaintiffs,

v.

Unclassified
Case Code: 30703
Case No. 12-CV-

JON ERPENBACH,
Room 104 South
State Capitol
PO Box 7882
Madison, WI 53707,

Defendant.

SUMMONS

THE STATE OF WISCONSIN

To each person named above as a Defendant:

You are hereby notified that the Plaintiff named above has filed a lawsuit or other legal action against you. The Complaint, which is attached, states the nature and basis of the legal action.

Within 45 days of receiving this Summons, you must respond with a written answer, as that term is used in Chapter 802 of the Wisconsin Statutes, to the Complaint. The court may reject or disregard an answer that does not follow the requirements of the statutes. The answer must be sent or delivered to the court, whose address is: **Clerk of Circuit Court, Grant County Courthouse, 130 West Maple Street, Lancaster, WI 53813**, and to Wisconsin Institute for Law & Liberty, Inc., plaintiff's attorney, whose address is: 225 E. Mason Street, Suite 300, Milwaukee, WI 53202.

You may have an attorney help or represent you.

If you do not provide a proper answer within 45 days, the court may grant judgment against you for the award of money or other legal action requested in the Complaint, and you may lose your right to object to anything that is or may be incorrect in the Complaint. A judgment may be enforced as provided by law. A judgment awarding money may become a lien against any real estate you own now or in the future, and may also be enforced by garnishment or seizure of property.

Dated this 8th day of February, 2012.

Respectfully submitted,
WISCONSIN INSTITUTE FOR LAW & LIBERTY, Inc.
Attorneys for Plaintiffs



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COMPLAINT – OPEN RECORDS

This is an action to enforce Wisconsin's Open Records Law, Wis. Stat. §19.31-19.39. State law declares it the public policy of this state that every citizen is presumptively entitled to complete access to the records of state and local government.

Plaintiffs, The John K. MacIver Institute for Public Policy, Inc. (hereinafter "MacIver Institute") and Brian Fraley, by their attorneys, Wisconsin Institute for Law & Liberty, Inc., allege and show to the court as follows:

FACTUAL ALLEGATIONS

1. Plaintiff, MacIver Institute, is a non-profit corporation organized under the laws of the State of Wisconsin, engaged in news gathering, research, and public education with respect to free markets, individual freedom, personal responsibility, and limited government. MacIver is located at 44 East Mifflin Street, Suite 201, Madison, WI 53703.

2. Plaintiff, Brian Fraley, is an adult resident of the State of Wisconsin. He is the Communications Director of MacIver.

3. Defendant, Jon Erpenbach, elected State Senator with offices at Room 104 South State Capitol, PO Box 7882, Madison, WI 53707, is an authority within the meaning of § 19.32(1), Wis. Stats.

4. Defendant, Senator Erpenbach, as an elected official, is also the “legal custodian” of one or more of the records at issue in this action under Wis. Stat. §19.33 and as that term is used in the Open Records Law.

5. Venue is properly lodged in this Court pursuant to §801.50(3)(a), Wis. Stats because the sole defendant is a state officer and Plaintiffs hereby designate Grant County as the venue for this action.

6. On March 24, 2011, the MacIver Institute and Fraley (collectively, “MacIver”) requested, in writing, that Senator Erpenbach produce for inspection and copying, all correspondence sent or received “regarding the subject of changes to Wisconsin’s collective bargaining law for public employees.” A true and correct copy of the records request is attached as Exhibit A.

7. In response, on April 4, 2011, Senator Erpenbach sent a response requesting clarification of the request. A true and correct copy of that request is attached as Exhibit B.

8. MacIver responded to this request on April 12, 2011. A true and correct copy of MacIver’s response is attached hereto as Exhibit C.

9. On April 18, 2011, Senator Erpenbach sent an initial (and partial) response to MacIver’s record request. In that response, Senator Erpenbach stated that he would redact the “last name, personal contact information or other personally identifiable information of the sender...” of the requested correspondence. A copy of that response is attached as Exhibit D.

10. After review of this initial response and the documents produced in connection with it, MacIver determined that the response was inadequate. By letter of counsel dated August 15, 2011, MacIver renewed their request and said that they would accept redacted contact and personal information in the communications in question except when the communications were sent from a government e-mail account. A true and correct copy of that request is attached as Exhibit E.

11. By e-mail to counsel dated August 29, 2011, Senator Erpenbach acknowledged this request and promised to respond. A true and correct copy of that e-mail is attached as Exhibit F.

12. On October 3, 2011, Senator Erpenbach requested clarification of MacIver's request and MacIver, through counsel, responded on October 4, 2011. True and correct copies of the request for clarification and MacIver's response are attached as Exhibits G and H respectively.

13. When no response from Senator Erpenbach was forthcoming, MacIver, through counsel, requested a final response on November 2, 2011. A true and accurate copy of that request is attached as Exhibit I.

14. On November 13, 2011, Senator Erpenbach responded with what he regarded as the full response to MacIver's March 24 request. A true and correct copy of that response is attached as Exhibit J.

15. The documents produced in response to MacIver's request, both included with Senator Erpenbach's April 18, 2011 letter and his November 13, 2011 letter, contain redactions of personally identifying information of many correspondents, including their names and e-mail addresses.

16. In particular, Senator Erpenbach rejected plaintiffs' offer to accept production of unredacted communications sent from a state or local government e-mail accounts.

CLAIM – VIOLATION OF § 19.35(1)

17. The preceding paragraphs are hereby incorporated and realleged as if fully stated herein.

18. Under Wis. Stats. §19.31, it is the declared public policy of this state that every citizen is entitled to the greatest possible information regarding the affairs of government. The statute provides that "[t]he denial of public access generally is contrary to the public interest, and

only in an exceptional case may access be denied, establishing a presumption of complete public access to government records, consistent with the conduct of governmental business.

19. Wis. Stats. § 19.35(1)(a) and (b) provide that “any requester has a right to inspect any record” and “to make or receive a copy of a record.”

20. Subject to certain qualifications irrelevant to this action, Wis. Stats. §19.32(2) defines a record as “any material on which written, drawn, printed, spoken, visual or electromagnetic information is recorded or preserved, regardless of physical form or characteristics, which has been created or kept by an authority.”

21. Emails kept by authorities are “records” under the Open Records Law. *See Schill v. Wisconsin Rapids School District*, 2010 WI 86, 327 Wis. 2d 572, 786 N.W.2d 177.

22. More specifically, the Open Records Law contains no exception for personally identifying information of citizens who communicate with their legislators.

23. While the law does require the balancing of the public interest in disclosure against any public interest in non-disclosure, that balance cannot justify public disclosure where, as here, the use of state resources for political purposes may violate state policy, applicable work rules, and even the criminal law. *See id.* The public has a strong and overriding interest in knowing whether state resources have been misused in this way.

24. Therefore, Senator Erpenbach has violated the Open Records Law and Wis. Stats. §19.35(1) by redacting the requested records.

25. Defendant’s actions have caused and will continue to cause injury to the Plaintiffs in that they deprive the Plaintiffs and the rest of the public of their rights under the Open Records Law.

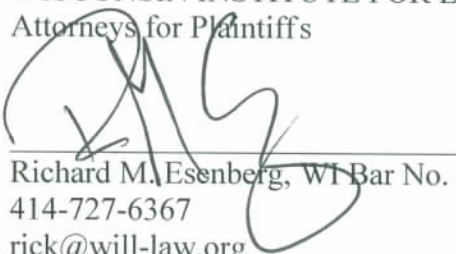
RELIEF REQUESTED

WHEREFORE, the Plaintiffs demand a judgment of mandamus against the Defendant under Wis. Stats. §19.37(1):

1. Compelling the Defendant to permit the Plaintiffs forthwith to inspect and copy the unredacted requested records, i.e. any and all responsive documents originating from a state or local government e-mail account;
2. Declaring the Plaintiffs' rights and limiting the Defendant's conduct with respect to the requested records;
3. Awarding the Plaintiffs their reasonable attorneys' fees, actual costs and damages under Wis. Stats. §19.37(2), and;
4. Awarding such other relief as the Court deems appropriate.

Dated this 8th day of February, 2012.

Respectfully submitted,
WISCONSIN INSTITUTE FOR LAW & LIBERTY, Inc.
Attorneys for Plaintiffs



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Wisconsin Institute for Law & Liberty, Inc.
225 E. Mason Street, Suite 300
Milwaukee, WI 53202

414-727-9455

FAX: 414-727-6385



March 24, 2011

Senator Jon Erpenbach
Room 106 South
State Capitol
P.O. Box 7882
Madison, WI 53707-7882

Dear Sen. Erpenbach:

This letter is to request the following records, under the state's Open Records Law (19.31-39, Wisconsin Statutes):

Copies of all correspondence you have received or sent, (including, but not limited to, letters, emails, voice mails, records of phone calls, and logs of in-person meetings) regarding the subject of changes to Wisconsin's collective bargaining laws for public employees. This request covers such correspondence received or sent between January 1, 2011 and March 23, 2011.

Included in this request are communications specifically pertaining to 2011 SSSB11, 2011 SSAB11, and 2011 Wis. Act 10 as well as the issue generally.

Please be aware that the Open Records law defines "record" to include information that is maintained on paper as well as electronically, such as data files and unprinted emails. Wis. Stat. § 19.32(2).

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 my request, the law requires you to do so in writing and state what part of the law you believe entitles you to deny my request. Wis. Stat. § 19.35(4)(a).

The Open Records law states that you may charge for "the actual, necessary and direct cost" of locating records, if this exceeds \$50, and for photocopies. The Wisconsin Department of Justice advises that copying fees under the Open Records law should be "around 15 cents per page and that anything in excess of 25 cents may be suspect." Please advise me before processing this request if the total cost will exceed \$50. Where the documents are available electronically, they can be sent to the following address:
bfraley@maciverinstitute.com.

As you know, the law requires you to respond to this request "as soon as practicable and without delay."

If you are not the records custodian for this information, please forward this request to the appropriate person. Also, please let me know if I can clarify or refine this request.

Sincerely,

Brian Fraley
The John K. MacIver Institute for Public Policy

EX.A



JON ERPENBACH

STATE SENATOR

April 4, 2011

[sent to Brian Fraley at MacIver Institute; bfraley@maciverinstitute.com]

Mr. Fraley:

This is to acknowledge receipt of your open records request to Sen. Erpenbach, dated March 24, 2011. You have requested all correspondence received or sent "regarding the subject of changes to Wisconsin's collective bargaining laws for public employees", in all formats currently held in the office for the dates between January 1 and March 23, 2011.

As currently written, this is a very broad request, which will require my staff to search through a considerable number of e-mail and other contact (a rough estimate is at least 25,000 contacts received and kept, many may have more than one page to be copied). Before we can provide a cost estimate, it would be helpful to have the following items clarified:

1. Is your request for contacts only to myself (the Senator) or my staff as well?
2. Is your request to include contacts both sent and received?
3. Does your request include internal communication within this office?
4. Is your request just constituent contact? Or does it include all contact on the subject matter?
5. Is your key search word "collective bargaining" or are there other key words you would like to include in the search?

Please provide the requested clarifications so that I may respond with a cost estimate. Note that prepayment will be required for both estimated staff search time and copies. Thank you for the offer of a "portable electronic device", however it is not within the law to create a new record in response to an open records request, as that action would. Additionally, open records requests are responded to in paper form to preserve the integrity of the records and to allow for proper redaction.

Feel free to call or write if you have any questions. This office will not fulfill your open records request until further contact is received.

Sincerely,

JON ERPENBACH
State Senator
27th District

Ex.B

----- Forwarded message -----

From: **Fraley - MacIver Institute** <bfraley@maciverinstitute.com>

Date: Tue, Apr 12, 2011 at 12:54 PM

Subject: Re: follow up to requested clarification

To: "Sen.Erpenbach" <Sen.Erpenbach@legis.wisconsin.gov>

The MacIver Institute restates our original request for the information, including constituent communications.

We believe your assessments based on staff time and photocopying are not within the spirit of Wisconsin's open records law, are unnecessary and are exorbitant.

We believe it is in the public interest that you follow the precedent in this case, <http://www.thedailypage.com/daily/article.php?article=32765>, and make this information available in electronic format.

The settlement calls for the defendants, Gov. Scott Walker and his office, to produce a disc containing these emails next Tuesday, March 22, at or after 4 p.m. It is agreed that the governor will produce emails "in the folders in which they are stored at the time of production."

In exchange for this access, the media requesters have agreed not to use the names of individuals who have sent emails to the governor in cases where there is reason for withholding them, as when they contain personal medical or financial information or raise a concern about retribution. The requesters also agreed not to use, publish or disclose any home addresses, email addresses, telephone numbers or Social Security numbers that may be contained in these emails.

Similarly, we would agree to the same terms as the requesters in the case mentioned above.

Brian Fraley
The MacIver Institute

EX. C



JON ERPENBACH

STATE SENATOR

April 18, 2011

MacIver Institute
c/o Brian Fraley
44 E Mifflin Suite 201
Madison, WI 53703

Dear Mr. Fraley:

This letter is an initial fulfillment response to your public records request dated March 24th, 2011. My office is working diligently to satisfy your request, balancing the need to prepare a response to your request against the demands of my other public duties in the Legislature. As you are aware, I asked you to narrow your request in order to provide for a quicker response. You refused to do so.

At this time, a portion one of your request is ready for you to pick up at the Senate Chief Clerk's office, Room B-20 Southeast, State Capitol. I have instructed the Senate Chief Clerk to release these records to you upon payment in full of the fee for this portion of the request. Please remit a check, payable to "State of Wisconsin," to the Senate Chief Clerk. The fee for this portion of your request is \$1,820.80, which covers the cost of the 18,208 copies at \$.10 per page. Because of how this portion of your request is organized in my office, the labor cost of locating the requested records is less than \$50 and is therefore waived. PLEASE NOTE: the second phase of your request will have significant location costs; I estimate 10-20 hours. I did not charge you for any costs incurred for time spent reviewing these voluminous records for application of the required balancing test. I also did not charge redaction costs, although staff spent hours redacting information from these records.

Please note that the vast majority of the records deal with correspondence to and from specific private citizens. You will see that, rather than deny you access to entire records that contain such information, I have chosen to provide you with the content of the record, redacting only the last name, personal contact information or other personally identifiable information of the citizen (the "personal citizen information"). Also, I have disclosed personal citizen information if there is a clear intention by the citizen to have their information shared publicly. In addition, I have not redacted official contact information related to public officials or lobbyists.

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:

Ex.D

- 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 Public Records Law.
- Any attempt to obtain the personal citizen information you seek also constitutes an undue interference with that citizen's U.S. Const. Amend. I and Wis. Const. Art. I, Sec. 4 rights to petition his government. 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 Public 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 Public Records Law.
- Finally, some of the requested records included the personal email addresses of state employees. I have redacted this information pursuant to the public records law balancing test. In addition to the reasons stated above, I have redacted this information because releasing these private email addresses would violate the privacy rights of the individuals involved, could subject them to unwarranted harassment, and would hinder the government's ability to maintain an efficient public workplace. Given the existence of other publicly available means through which state offices may be contacted, I have determined that the public interest in avoiding potential disruption to the personal lives of state employees outweighs any public interest in disclosure of this information. Finally, I would note that the law, in s. 19.36 (10) (a), Stats., recognizes the need to protect the privacy of this information.

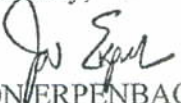
Furthermore, even if this personal citizen information was subject to the Public Records Law, it would be my opinion that the public interest in disclosing this personal citizen information is outweighed by the public interest in protecting the confidentiality of that information. Citizens must have 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 me for assistance or to provide me with their viewpoints.

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. Sec. 19.35(1)(a), Wis. Stats.

I realize, based upon your last correspondence, that you prefer copies in electronic format. Due to the need to redact, it is more efficient to provide you with the paper copies. It is also our practice to provide paper copies of records, rather than electronic copies, to help ensure and protect the integrity of the record.

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 a district attorney or the Attorney General.

Sincerely,


JON ERPENBACH
State Senator,
27th District

JE;rm;jl

WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC.

P.O. BOX 511789
Milwaukee, WI 53203-0301

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FAX: 414-637-6385

August 15, 2011

Senator John Erpenbach
106 South, State Capitol
P.O. Box 7882
Madison, WI 53707-7882

Dear Senator Erpenbach:

We have been retained by the MacIver Institute to address your letter dated April 18, 2011 in which you justify redacting certain "personal citizen" information from e-mails produced in response to MacIver's open records request dated March 24, 2011 requesting certain documents pertaining to then-proposed changes in the laws governing collective bargaining for public employees.

While MacIver shares your concern about the privacy interests of citizens who choose to exercise their First Amendment rights (and looks forward to its consistent application across a variety of fronts), your position regarding the withholding of identifying information and, in particular, redaction of the e-mail addresses of state employees, goes farther than either the Open Records law or traditional principles governing the protection of participants in the political process would warrant.

Your letter is largely given over to the citation of legal provisions that do not support your position. In fact, these citations often have no discernible connection to the issues at hand. For example, Art. IV, sec. 1 simply vests legislative power in the Senate and Assembly and Art. IV, sec. 16 provides immunity to legislators for words spoken in debate. Art. IV, sec. 10 has to do with, among other things, the requirement that the doors of the legislature normally be open.

EX.E

Not one of these provisions confers a “right or responsibility” on legislators to receive confidential input from citizens, much less dictate that those citizens who exercise *their* – and not a legislators’ - right to petition are entitled to do so anonymously.

While Article IV, sec. 8 does provide that each house of the legislature may determine the rules of its own proceedings, that power is conferred upon the legislature as a whole and not upon individual legislators. Thus, while the legislature may exempt itself from the provisions of the Open Records law (this is among the principles confirmed by the recent *Ozanne* decision), you - or any other legislator - may not.

This is important because it is quite clear that the legislature – or any individual legislator – has no right to keep the identity of those with whom the legislature or members communicate confidential. If there are any constitutional interests at stake, they are not your own but those who have chosen to communicate with you. While the protections of the First Amendment of the United States Constitution and Article I, sections 3 and 4 of the Wisconsin Constitution might require that the state protect the anonymity of those *choosing* to petition anonymously, there is no per se rule that all petitions must be kept anonymous. From a constitutional perspective, disclosure requirements are generally subject only to “exacting scrutiny” requiring a “‘substantial relation’ between the disclosure requirement and a ‘sufficiently important’ governmental interest.” *John Doe No. 1 v. Reed*, 130 S.Ct. 2811 (2010).

Thus, anonymity may be required where there is no sufficiently important interest in disclosure, *see, e.g., McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995) or a risk that disclosure of the identity of the speaker will, with “‘reasonable probability’ . . . ‘will subject them to threats, harassment, or reprisals from either Government officials or private parties.’” *Citizens United v. Federal Election Com’n*, 130 S.Ct. 876 (2010). Neither of these circumstances would seem to be present here.

To be sure, balancing of interests under the Open Records law might not be the equivalent of constitutional analysis and how that balance is to be resolved in any particular case is highly contextual. At this point, MacIver does not wish to push the question in the case of personal e-mail accounts.

But your letter claims that you have “redacted the personal email addresses of state employees.” Unless you and your staff claim to be able to identify each of Wisconsin’s thousands of employees by name, it appears that the only way that you could have done this is through the employees’ e-mail address, i.e., that they used a state e-mail account to communicate with you. In other words, these employees did not use a personal account.

This materially alters the balancing test. State employees are generally forbidden from using their publicly provided computers and e-mail accounts for political purposes. Apart from violating governmental policy, such abuse may violate state statutes, *see, e.g.*, ss. 19.45 and 19.46, Stats., and can even arise to a criminal violation. *See* sec. 946.12, Stats. *See generally* *State v. Jensen*, 2004 WI App 89, 272 Wis.2d 707, 681 N.W.2d 230; *State v. Chvala*, 2004 WI App 45, 271 Wis.2d 115, 678 N.W.2d 880, 2004 WI App 53.

The Wisconsin Supreme Court recently held that the balancing test weighs in favor of releasing emails sent to or from government email accounts where those emails are evidence of violation of a law or employer policy. *Schill v. Wisconsin Rapids Sch. Dist.*, 2010 WI 86, 786 N.W.2d 177, 327 Wis.2d 572. In *Schill*, 3 justices believed all government emails should be released, regardless of content, and 2 more justices believed government emails evincing a violation of law or policy (but not purely personal emails) should be released. Although that case dealt with the question of releasing entire records, its logic applies equally to releasing the name of the person who sent or received such an email. The public has an extremely strong interest in learning the names of those public servants who might have violated the law, and that interest cannot be overridden by the selfish interest of the public servants who want to hide their misdeeds from the electorate.

Certainly the balancing of interests required by sec. 19.35, Stats., does not support the withholding of information in order to protect detection of the misuse of state resources and potential violation of the law. None of the law cited in your letter – or any other of which we are aware – empowers you or any other legislator to evade the duty to disclose improper conduct by state employees. Sec. 19.35 is not warrant for a cover-up.

Perhaps we are wrong and there were no state or local employees who communicated with you using government e-mail accounts. If you are able to confirm that this is the case, we

will – in the absence of evidence to the contrary – take your word for it and consider the matter closed. However, if - as we suspect – you are unable to confirm this (because it would not be true), then we invite your explanation as to why the public is not entitled to know that the resources it provides to state employees have been used contrary to law and state policy.

Sincerely,

Richard M. Esenberg
President & General Counsel
Wisconsin Institute for Law & Liberty

From: Sen.Erpenbach [<mailto:Sen.Erpenbach@legis.wisconsin.gov>]

Sent: Monday, August 29, 2011 10:30 AM

To: Rick

Subject: initial reply to letter recieved August 18

Dear Richard Esenberg,

This note is to inform you I have received your letter dated August 15th. I am currently reviewing your correspondence on behalf of MacIver Institute and will respond.

Jon Erpenbach
State Senator,
27th District

EX. F

Stacy

From: Rick
Sent: Wednesday, November 02, 2011 4:16 PM
To: Stacy
Subject: FW: clarification requested on 10/3/2011

From: Laundrie, Julie [<mailto:Julie.Laundrie@legis.wisconsin.gov>]
Sent: Monday, October 03, 2011 12:03 PM
To: Rick
Subject: clarification requested on 10/3/2011

Richard Esenberg
On behalf of MacIver Institute
rick@will-law.org
P O Box 511789
Milwaukee, WI 53203-0301

As I prepare a response to your August 15, 2011, letter regarding my April 18, 2011, response to your March 24, 2011, public records request, I need to clarify what it is that your August 15 letter requests.

Based on the content of your August 15 letter, I understand it to seek only disclosure of email addresses for communications sent from state government email accounts. Page 1 of your letter claims that "redaction of the e-mail addresses of state employees" is not warranted under the Wisconsin Public Records Law. Page 2 of your letter states "MacIver does not wish to push the question in the case of personal e-mail accounts." Page 3 of your letter refers to "Wisconsin's thousands of employees," state e-mail accounts, state employees and state resources. Page 4 of your letter "invite[s] your explanation as to why the public is not entitled to know that the resources it provides to state employees have been used contrary to law and state policy."

Please advise me by October 13th if I have not correctly understood the additional information requested in your August 15 letter, and provide a clarified description of the additional information you are seeking. If I have not heard otherwise from you by October 13, I will interpret your lack of response to confirm my understanding of your August 15 letter and will proceed accordingly.

Thank you for your cooperation.

Sincerely,



JON ERPENBACH

State Senator,
27th District

Stacy

From: Rick
Sent: Wednesday, November 02, 2011 4:16 PM
To: Stacy
Subject: FW: clarification requested on 10/3/2011

From: Rick
Sent: Tuesday, October 04, 2011 11:47 AM
To: 'Laundrie, Julie'
Subject: RE: clarification requested on 10/3/2011

Sen. Erpenbach & Ms. Laundrie

Thank you for your inquiry. Our proposed compromise request would include not only e-mails sent from state government e-mail accounts but from those of any unit of local government including school districts and technical colleges. It would include as well any UW accounts.

Please let me know if you have any further questions. We look forward to your response.

Rick

Richard M. Esenberg
President & General Counsel
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Adjunct Professor of Law
Marquette University Law School
1215 W. Michigan Street
Milwaukee, Wisconsin 53202
414-288-6908
richard.esenberg@marquette.edu

From: Laundrie, Julie [<mailto:Julie.Laundrie@legis.wisconsin.gov>]
Sent: Monday, October 03, 2011 12:03 PM
To: Rick
Subject: clarification requested on 10/3/2011

Richard Esenberg

WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC.

P.O. BOX 511789
Milwaukee, WI 53203-0301

Richard M. Esenberg
President & General Counsel
rick@will-law.org
414-727-WILL
414-727-6367 (Direct)
414-213-3957 (Cell)
FAX: 414-637-6385

November 2, 2011

Sen. Jon Erpenbach, 27th District
Room 104 South
State Capitol
P.O. Box 7882
Madison, WI 53707-7882

Dear Senator Erpenbach:

Please refer to our letter dated August 15, 2011. A copy of which is enclosed. You acknowledged the letter by an e-mail dated August 29, 2011 and promised to get back to us. By an e-mail dated October 3, 2011, you asked for clarification of our request no later than October 13, 2011. A copy of that e-mail is enclosed. We responded to that request on October 4, 2011 and a copy of that response is enclosed.

It has now been almost eighty days since our initial request and thirty days since our response to your request for clarification. We are mindful of the press of legislative business, but are sure that you'll agree that this delay in responding is not reasonable. We must insist that a full response be provided no later than November 11, 2011. If we have not received a response by that date, we will have no choice but to pursue further remedies.

Thank you for your attention.

Very truly yours,
WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC.



RICHARD M. ESENBERG
President & General Counsel
rick@will-law.org
/s

EX. I



JON ERPENBACH

STATE SENATOR

RECEIVED
11/14/11

November 13, 2011

Wisconsin Institute for Law and Liberty
Richard Esenberg
P O Box 511789
Milwaukee, WI 53203-0301

also sent via email to rick@will-law.org

Dear Mr. Esenberg,

I appreciate the opportunity to once again address your concerns regarding my decisions as the records custodian with regard to the MacIver Institute open records request partially fulfilled on April 18, 2011 and now fully fulfilled for pickup today from the offices of the Senate Chief Clerk. As the Senate representative of over 200,000 people in the 27th Senate District, I have a strong belief in the openness of government as well as in the privacy of an individual to contact their Legislator without fear of reprisal at work, in the community, on the internet, potentially by identity theft, or the secondary use of personally identifiable information for beyond the original intent of contact.

As you know, the events of last spring in Wisconsin were historic by all measures. The decisions of Governor Walker had a profound effect of hundreds of thousands of families in Wisconsin. The beliefs of individuals regarding their security and identity were forever changed. My office, like many others, received an overwhelming amount of correspondence. We have estimated that we received more than 125,000 contacts to the office in about a five week period.

My staff processed information any way possible and we kept around 25,000 contacts we believed to be from constituents of the 27th Senate District. Many of these contacts reflect desperation, frustration, depression and fear like no other correspondence I have received in the years I have served in Wisconsin. Since that time employment protections have become even more tenuous for many people. My duty under the Wisconsin Constitution is to serve the people of this state. They have the right to elect me and the right to remove me from office. It is their interests and their Constitutional rights that have lead me to protect their privacy of personal information.

Thus, I have redacted personal identifying information of private citizens ("personal citizen information"), such as full names, addresses, phone numbers, personal e-mail addresses, and other sensitive information. 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

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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 Public Records Law.
- Any attempt to obtain the personal citizen information you seek also constitutes an undue interference with that citizen's U.S. Const. Amend. I and Wis. Const. Art. I, Sec. 4 rights to petition his government. 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 Public 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 Public Records Law.
- Finally, some of the requested records included the personal email addresses of state employees. I have redacted this information pursuant to the public records law balancing test. In addition to the reasons state above, I have redacted this information because releasing these private email addresses would violate the privacy rights of the individuals involved, could subject them to unwarranted harassment, and would hinder the government's ability to maintain an efficient public workplace. Given the existence of other publicly available means through which state offices may be contacted, I have determined that the public interest in avoiding potential disruption to the personal lives of state employees outweighs any public interest in disclosure of this information. Finally, I would note that the law, in s. 19.36 (10) (a), Stats., recognizes the need to protect the privacy of this information.

Furthermore, even if this personal citizen information was subject to the Public 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. [See ss. 19.36(10)(a), (11), (13), Wis. Stats.; 42 U.S.C. ss. 405(c)(2)(C)(viii)(I); 5 U.S.C. ss. 552a; and 18 U.S.C. ss 2721.] If personal citizen information is made public, citizens will hesitate to exercise their Constitutional right to contact me for assistance or to provide me with their viewpoints.

The information I redacted includes public email addresses of state employees and other public employees. If I understand, it is this redaction in particular that you dispute. I would note that, with regard to the balancing test, it is especially important in these circumstances to protect the ability of these citizens to contact their legislators without fear of reprisal, given the highly charged nature of the debate over collective bargaining. In addition, unless future contact with legislators is to be chilled, this is exactly the type of circumstance where citizens need to be protected so that they feel free to voice their public policy concerns with their legislators. Disclosing the identities of these individuals would severely chill the participation of citizens in the legislative process. And without citizen participation, the legislative process can not properly function.

You note that the Wisconsin Supreme Court has removed personal emails of public employees from the reach of the public records law, unless the emails are evidence of a violation of law or employer policy. Your letter alleges that it may be a crime for a public employee using a public computer to contact their legislator about proposed legislation. I disagree. There is nothing illegal about public employees exercising their free speech rights by contacting their legislators about an issue of public concern. To the contrary, such speech is constitutionally protected.

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 s. 19.35(1) (a), Wis. Stats.]

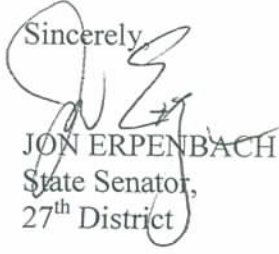
I am providing your client with access to the content of all records falling within their request, excluding only the personal citizen information previously noted. It has taken a great deal of effort and time to respond to your request. The total fee for responding to your request is \$1,004.03, which includes \$296.48 for a portion of the cost of locating the requested records and \$707.55 for the cost of the 4,717 copies at \$.15 per page (about 2,000 copies contain 3-4 records per page). I have waived all fees for redaction time. Please remit a check, payable to "State of Wisconsin," prior to pick up at the office of the Senate Chief Clerk, B20 South, State Capitol, Madison.

I am trying to be as accommodating as possible, while also protecting the rights of the citizens who may choose to participate in the legislative process and the needs of the Senate as an institution to facilitate such citizen participation. Given the massive number of records involved, this is also the most reasonable approach to get your client the information they requested as soon as practicable and without delay. I understand the potential result of striking the balance to protect the privacy of my constituents. The consequences may prove to be hard but, in my opinion, the

application of the balancing test in these circumstances is not difficult. People confide in me and my staff; I will not willingly betray that trust.

If you have any questions concerning my response, please feel free to contact me. Pursuant to s. 10.35 (4) (b) Wis. Stats., this reply is subject to review by mandamus under s. 19.37 (1), Wis. Stats., or upon application to a district attorney or the Attorney General

Sincerely,



JON ERPENBACH
State Senator,
27th District

JE:jal

Senator Erpenbach
P.O. Box 7882
Madison, WI 53707-7882

Phone: (608) 266-6670
Fax: (608) 266-2508

Public Records Request

GIVE DESCRIPTION OF REQUEST HERE

MacIver request - PHASE ONE

Bill To: Richard Esenberg
Wisconsin Institute for Law and Liberty
on behalf of MacIver Institute

Date	Description	Amount	Payment	Balance
DATE -11/14/2011	Labor	296.48		296.48
	Copies (4,717 at \$.15 a page) \$707.55			707.55
Reminder: Please make check payable to the State of Wisconsin.			Total	\$ 1,004.03

Reminder: Please make check payable to the State of Wisconsin.

Terms: Balance due upon receipt pf request.

REMITTANCE

Customer Name:

Check #:

Date:

Amount Due:

Amount Enclosed: