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Transmitted by e-mail and certified mail

August 15, 2013

The Honorable Greg Abbott
Attorney General of Texas
Open Records Division
P.O. Box 12548
Austin, Texas 78711-2548

Dear Attorney General Abbott:

On July 9, the Center for Media and Democracy filed requests with Texas state legislators under the Texas Public Information Act for records relating to the American Legislative Exchange Council (ALEC). Several Texas state legislators fully complied with their responsibilities under the law and disclosed the ALEC-related materials sought, such as information about the bills favored by ALEC and its special interest funders.

However, ALEC has recently begun stamping its communications with legislators with a disclaimer asserting that “this document is the property of the American Legislative Exchange Council ... ALEC believes it is not subject to disclosure under any state Freedom of Information Act.”

Based on this assertion, Rep. Stephanie Klick sent a letter to your office on July 17, 2013 seeking a decision on whether the requested records in her possession must be disclosed.

In a letter dated July 31, ALEC claimed that if its communications to legislators are disclosed under the Texas Public Information Act, this will result in threats, harassment, and reprisal for its members, or hinder its internal deliberations, in violation of its asserted associational rights.

Additionally, Rep. Klick separately argued that the requested documents fall under the “deliberative process” exemption in Section 552.111 of the Texas Government Code.

For the reasons explained below, neither of these alleged exemptions apply to the requested documents. Simply put, communications with a public official, in their official capacity as a representative of the public, about matters of significant public concern, should be subject to the Public Information Act, unless a specific exemption applies. And that is not the case here.

About ALEC

Founded in 1973, ALEC describes itself as a group of nearly 2,000 state legislators, but more than 98% of its revenue comes from corporations or foundations. At least two dozen state legislators from Texas are part of ALEC, and more than 100 corporations and special interest groups help fund ALEC.

Texas legislators are part of ALEC only by virtue of their status as state legislators, not as private citizens or based on their private roles in their communities. They attend ALEC meetings and correspond with ALEC in their official capacity, as representatives of their district and their constituents. ALEC communicates with Texas legislators because they are elected officials whom ALEC and its funders want to influence in order to change the laws of Texas.

The crux of ALEC's operations involve the approval of "model" bills to be proposed and passed into law in statehouses across the country. Under ALEC's bylaws, its state legislative leaders are tasked with a duty to get ALEC bills introduced in the legislatures they lead as elected officials.

Most of ALEC's model bills are developed by the special interests that fund its operations, and the bills often are designed to benefit the same industries and business that fund ALEC. Indeed, ALEC is almost entirely corporate-funded, with special interests paying between 50 and 500 times as much as a lawmaker to be part of the organization. The "dues" for lawmakers are nominal, at \$50 per year, compared with many thousands of dollars that special interests pay to gain access to state legislators and to get a vote on adopting model bills (before legislators introduce the bills in their state).

ALEC is quintessentially a pay-to-play operation that helps lobbyists obtain extraordinary access to lawmakers, and that provides trips to lawmakers who are supportive of this legislative agenda.

ALEC boasts that around 1,000 of its bills are introduced across the country each year, and 20% become law. As ALEC's former Executive Director wrote in 1995: "I would say that ALEC is a good investment. Nowhere else can you get a return that high."

Regardless of one's view on ALEC's special interest legislation, the public has a right to know about organizations seeking to influence their elected representatives, including what bills an organization contacts a legislator to push or oppose. Such transparency is necessary to track and deter undue influence and violations of ethics and lobbying laws. The Texas Public Information Act is based on these purposes. *See* Open Records Decision No. 212 at 3 (1978).

Open records laws are particularly important when it comes to a group like ALEC. The press and average citizens are barred from attending ALEC meetings, and legislators rarely disclose if a particular bill they've introduced came from ALEC, or if their decision to introduce the bill may have been influenced by ALEC or one of ALEC's special interest funders. It is through open records requests that the public has been able to get some sense of how much ALEC communicates with Texas elected officials and about which bills, as well as the extent of the extraordinary influence ALEC has facilitated over legislators and state law.

This is precisely why the Public Information Act was created. The preamble to the Act states:

“The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.” Sec. 552.01(a).

Or, as James Madison has noted, “a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.”

The Texas Public Information Act gives the public the tools to hold elected officials accountable and preserve a fully representative and democratic government. Such transparency is required to equip people with the knowledge necessary for self-government in a representative democracy.

Yet ALEC, through its Washington DC-based law firm, seeks to declare itself immune from those laws so it may facilitate special interest influence from the shadows.

ALEC’s Claimed Associational Rights Are Not Infringed by Transparency

In its stamp on documents sent to Texas legislators, ALEC asserts that “this document is the property of the American Legislative Exchange Council ... ALEC believes it is not subject to disclosure under any state Freedom of Information Act.”

In its letter to the Attorney General, ALEC alleges (1) that disclosing documents noting the identity of its members would subject them to “threats, harassment, or reprisals from private parties” and (2) that public disclosure of ALEC documents impairs its ability to deliberate internally. Neither of these assertions is valid or justifies immunity from the Texas Public Information Act.

ALEC Does Not Qualify for the “Threats, Harassment, and Reprisals” Exception

In limited situations, courts have carved-out an as-applied exception to disclosure requirements for “minor parties” whose members face a risk of threat, harassment or reprisal if their identities were disclosed: these are groups with small political constituencies that promoted unpopular ideas, such as African-American civil rights activists in the 1950s who faced very real threats of being lynched to death if their identities were disclosed. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 31-35 (1976); *Brown v. Socialist Workers Comm.*, 459 U.S. 87, 102 (1982); *NAACP v. Patterson*, 357 U.S. 449, 466 (1958). See also *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197, 1215 (2009) (“it would appear that . . . minor status is a necessary element of a successful as-applied claim”); *Doe v. Reed*, 823 F. Supp. 2d 1195, 1202 (W.D. Wash. 2011) (injunction denied, *Doe #1 v. Reed*, 132 S. Ct. 449 (U.S. 2011)).

This is not the case here. ALEC is by no means an organization with a small political constituency: the organization has boasted of having thousands of members from the public sector and private sector and regularly features national political leaders at its meetings. And

ALEC has had no trouble promoting its ideas: indeed, the organization has bragged about its success at having its model legislation introduced and passed in state legislatures across the country, with approximately 1,000 model bills introduced each year and around 20 percent becoming law. ALEC is not the sort of small, disfavored organization promoting unpopular ideas whose members would be unable to freely associate if the membership list were disclosed.¹

Moreover, ALEC's private sector members, which would allegedly be the ones at risk of "harassment" if their identities were disclosed, are powerful global corporations that have significant influence over the political process on all levels of government, through lobbying, campaign contributions, and other political spending. By no means would such special interests be forced to retreat from the marketplace of ideas if their participation in ALEC were disclosed: they have the resources, power, and clout to continue contributing to the marketplace of ideas in numerous ways.

In the open records context, your office appears to have only allowed a disclosure exception for a group that, like the "minor parties" that courts have exempted from disclosure requirements, has few members and limited political power. The leading Texas Attorney General opinion on this issue -- which ALEC relies on in its July 31 letter -- involved the potential open records disclosure of the names of volunteers with CASA of Trinity Valley, Inc., a group that represents children who are victims of abuse and investigates cases of suspected child abuse. *See* Open Records Decision 2004-5764. Your office found that volunteers who donate their time and services to helping child abuse victims were considered "contributors," and that disclosing the identities of these volunteers/contributors through an open records request could make them subject to threats, reprisal or harassment, presumably from alleged child abusers.²

CASA of Trinity Valley works in a particularly sensitive area -- representing children who are victims of abuse and investigating cases of suspected child abuse -- and there are significant reasons to protect the identities of their volunteers. In contrast, ALEC's claimed "threats" are entirely different from the risk that an abusive parent might target a social services provider who has denied him or her access to a child based on allegations of violence or sexual abuse. Neither the legislators nor the special interests involved in ALEC resemble that special exception in any way.

The alleged past incidents of "threats, harassment, and reprisals" raised by ALEC have involved nothing more than private citizens exercising their First Amendment rights by signing petitions requesting that ALEC member corporations drop their membership or asking that lawmakers leave ALEC, based on concerns about the legislative agenda of the organization, which is *prima facie* a matter in the public interest.

¹ Compare this with the facts in *Brown*, one of the few cases where the U.S. Supreme Court granted an as-applied disclosure exception for the sixty-member Socialist Workers Party, which was unable to garner public support at the polls or sufficient financial resources due to being unpopular, vilified, and historically rejected by the government and the citizenry. 459 U.S. at 88.

² Notably, the ruling states: "This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances."

This “threat” is an entirely different from what could faced by CASA volunteers, and it is not even remotely comparable to the mortal or economic threats faced by members of the NAACP in the 1950s (who faced lynching and physical coercion) or members of the Socialist Workers Party in the 1970s (private citizens who lost their jobs, had their property destroyed, and had shots fired at their office).

In contrast, private citizens signing petitions and making their views known to corporations and elected officials are key parts of the political discourse in a democracy of the people, by the people and for the people, in the famous words of Republican President Abraham Lincoln.

As U.S. Supreme Court Justice Antonin Scalia has noted:

“[H]arsh criticism, short of unlawful action, is a price our people have traditionally been willing to pay for self governance. Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed.” *Doe*, 130 S.Ct. at 2832 (Scalia, J., concurring).

It would be anathema to the very idea of a republic, in a representative democracy, to use citizens assembling to exercise their First Amendment rights about the role of unelected special interests influencing lawmakers as an excuse to prevent the public from learning about communications of those special interests with the People’s representatives.

Moreover, there has never been a formal boycott announced against an ALEC member, but it should be noted that the U.S. Supreme Court has recognized boycott as a form of protected First Amendment activity. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911–12 (1982). Likewise, the possibility of a boycott as the result of company trying to influence legislators cannot possibly be permitted as a reason to keep those lobbying contacts secret.

The people of Texas in creating the Public Information Act could never have intended to exclude the communications of a special interest group seeking to influence laws in Texas. If that were the rule, the communications of a single lobbyist to a legislator could be disclosed, but if lobbyists formed a club with lawmakers, then somehow their communications with elected officials would be immunized from disclosure, simply because the public might object to such secretive dealings. That result would be inconsistent with the law and the policy objectives behind it.

In any event, on balance, the public benefit in knowing which corporations are trying to influence state representatives to get state laws rewritten outweighs any potential impact such disclosure might have on a corporation’s decision to continue funding ALEC. The identities of the proponents of the legislation being provided to Texas lawmakers is important to the public’s understanding of who is seeking changes in state laws that affect the rights of Texans, and vital for preserving a fully representative democracy.

(ALEC has repeatedly told the IRS that it engages in “zero” lobbying, but Common Cause, the Center for Media and Democracy, the Voters Legislative Transparency Project, and Clergy Voice have each filed complaints or requests for investigation into ALEC’s compliance with

federal law regarding its lobbying activities and have presented hundreds of pages of evidence documenting ALEC's communications with lawmakers asking that bills be introduced, passed, or stopped. Regardless of the Internal Revenue Service's investigation of these matters, it is unequivocally the case that the very documents ALEC seeks to withhold from disclosure in Texas include materials that show which bills it wants to be priorities in the state legislature, along with talking points or other materials in support of that agenda.)

ALEC's Purely Internal Deliberations Are Not Affected by Disclosure

In a few cases, courts have found that the internal documents of a "political" organization or "political campaign" are not subject to discovery in litigation, if the organization can show that disclosure would discourage freedom of association by inhibiting internal communications.

However, the contents of the thousands of communications between ALEC and lawmakers that have been obtained through open records requests in recent years relate primarily to its legislative agenda, and are communicated externally, to Texas legislators. The minutes of the internal deliberations at ALEC's board meetings are not one of the documents purported to be withheld by the Texas lawmaker seeking an opinion from the Attorney General.

Courts have narrowly interpreted the documents covered by an "internal deliberations" claim; for example, in the leading case cited by ALEC, *Perry v. Schwarzenegger*, the court wrote: "We emphasize that our holding is limited to *private, internal* campaign communications concerning the formulation of campaign strategy and messages. . . [and] limited to communications among the core group of *persons* engaged in the formulation of campaign strategy and messages." 591 F.3d 1126, 1145 fn. 12 (9th Cir. 2010) (emphasis in original).

Furthermore, ALEC has innumerable internal deliberations within its offices that are not subject to Texas open records laws because lawmakers are not copied on those conversations among ALEC staff. ALEC communications only come under the purview of Texas open records law when they are transmitted to lawmakers. And by-and-large these communications with Texas lawmakers relate to legislation ALEC supports, which is the essence of what Texas open records law is designed to make public. Again, communications with a public official, in their official capacity as a representative of the public, about matters of significant public concern, should be subject to the Public Information Act.

Moreover, ALEC has offered zero evidence that publicly disclosing its communications with legislators would have an impact on its claimed freedom of association as a corporation.

This is particularly the case because for decades, ALEC's interactions with lawmakers have been subject to disclosure under open records laws, in Texas and around the country. Disclosure of these documents have not affected ALEC's ability to deliberate or advance its agenda: in the first six months of 2013, the Center for Media and Democracy has counted at least 450 ALEC-related bills introduced in state legislatures (with the total number likely much higher).

ALEC has also claimed to attract hundreds of legislative and private sector members, and has communicated extensively with lawmakers on bills it endorsed, and it has regularly tracked and boasted about how much of its model legislation becomes law in all 50 states.

There Is a Compelling Interest in Disclosing ALEC Communications with Legislators

Even if, arguendo, ALEC were to show that it has an associational right that were somehow adversely affected by the public disclosure of the names of the lobbyists seeking to influence legislators, or the legislators involved with ALEC, or ALEC's communications with lawmakers about bills it endorses or opposes and the talking points or arguments in support of such legislation, the public has a compelling interest in disclosure of such ALEC-related records.

State legislators are members of ALEC in their official capacity and attend ALEC meetings because they are elected officials. It is long-standing black letter law in Texas that the state and its citizens have a compelling interest in knowing what their elected officials are doing in their name.

This interest is expressed in the preamble to the Texas Public Information Act: "The people insist on remaining informed so that they may retain control over the instruments they have created."

For the purposes of state public records law, the fact that ALEC exists so private interests can influence state legislators cannot be ignored. In this context, there is an additional compelling state interest in favor of disclosure: preventing corruption and detecting violations of the law.

ALEC meetings not only involve lobbying (asking for bills to be introduced or blocked), but also fancy parties and events paid for by special interests. For example, at ALEC's meeting this month in Chicago, Texas legislators were treated to a "state night" event at the posh Lawry's Steakhouse sponsored by corporate lobbying principals within Texas. (See attached invitation). These types of parties potentially create an environment for improper influence and in some cases could violate state ethics and lobbying laws.

The public has a strong interest in having access to this type of information to deter corruption or the appearance of corruption (including quid pro quo corruption), and so the public can help detect potential violations of the law. Your office has found that these are substantial government interests on which the Public Information Act is based.

As the Texas Attorney General's Office has previously ruled: "In [Buckley v. Valeo], the Court upheld reporting and disclosure provisions of the Federal Election Campaign Act of 1971. The Court said that the governmental interests involved were sufficiently important to outweigh the possibility of infringement of First Amendment rights. The governmental interests served by the reporting and disclosure requirements were (1) providing the electorate with information with which to evaluate candidates, (2) deterring corruption or the appearance of corruption, and (3) making it possible to detect violations of law. The Texas Open Records Act is based on very similar purposes, which we believe 'directly serve substantial governmental interests.'" Open Records Decision No. 212 at 3 (1978).

The 552.111 “Deliberative Process” Exemption Does Not Apply

In a separate letter to the Attorney General dated July 17, Rep. Klick asserts that some of the requested documents should be exempted under the “deliberative process” privilege encompassed in Section 552.111, Texas Government Code.

It is not known which documents Rep. Klick is asserting fall under this deliberative process exception; many of the records that are likely responsive to CMD’s request have nothing to do with the deliberative process, such as meeting agendas and party invitations. Nonetheless, invoking Sect. 552.111 to protect any of ALEC’s communications with legislators or model legislation is inappropriate.

Your office has concluded that, for the deliberative process privilege to apply, the “information must be related to the policymaking functions **of the governmental body.**” Open Records Decision No. 615 at 4 (1993) (emphasis added). The exception “is intended to protect advice and opinions on policy matters and to encourage frank and open discussion **within the agency** in connection with its decision-making processes.” *Id.* at 2, citing *Texas Dep’t of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 412 (Tex. App.--Austin 1992) (emphasis added).

To the extent that the responsive records involve any sort of “deliberation,” it does not involve deliberation within a state governmental body (the Texas legislature), nor does it involve discussion or decision-making within a state agency. Any deliberation reflected within the requested records would, at most, shed light on the decision-making process of a group that includes special interests and lawmakers, the very type of communications Texas open records law is designed to unmask. And because ALEC is an organization that has boasted of its influence in statehouses across the country, this is precisely the type of information that should be disclosed under the public records law.

Rep. Klick incorrectly cites to Open Records Decision No. 561 at 9 (1990) for her claim that the deliberative process exception could encompass communications between a governmental body and a third party. That decision suggested that communications between a local or state agency and a federal agency could be protected by the deliberative process exception. This is hardly comparable to the situation at hand, which involves a private organization merely seeking to keep its communications with state officials hidden from public view.

Government to government communications are entirely different from government to special interest group communications and vice versa. That is why the decision cited by Rep. Klick rejected the notion that correspondence from an individual outside of the agency could be considered the agency’s work product. *Id.*

ALEC Cannot Unilaterally Declare Itself Immune from Public Transparency Laws

ALEC’s effort, via essentially a rubber stamp, to declare itself immune from Texas’ Public Information Act has implications well beyond the immediate case.

Although there is no counterpart to ALEC on the opposite end of the political spectrum, special interest groups of all political stripes would jump at the opportunity to evade open records laws and public accountability by simply declaring themselves a secret society and asking legislators to join, then claiming that compliance with the Public Information Act hinders their freedom of association.

Excluding ALEC's communications from the purview of state sunshine laws would also mean that the communications of ordinary citizens would still be disclosed, but the communications of special interests would be hidden, cloaking some of the most powerful interests and creating a distorted public record of who is contacting elected representatives about legislative matters.

ALEC exists so special interests can access and influence state legislators, and so those interests may communicate with those legislators about specific pieces of legislation they would like introduced via ALEC. Allowing such a relationship to be freed from the transparency requirements of the Public Information Act is contrary to fundamental principles of democracy and representative government.

Accordingly, we respectfully request that you reject ALEC's claims and interpret the Public Information Act to apply to require the disclosure of the records in Rep. Klick's possession regarding ALEC's communications with her.

Thank you for considering our views.

Sincerely,



Lisa Graves
Executive Director



Brendan Fischer
General Counsel

SAVE THE DATE

2013 ALEC TEXAS LEGISLATIVE DINNER

WEDNESDAY, AUGUST 7

6:30PM

**LAWRY'S, THE PRIME RIB RESTAURANT
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FORD MOTOR COMPANY/tony reinhart

GLAXOSMITHKLINE/gaspar laca

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OTSUKA/hilary carter

PFIZER/amber pearce

UNITED STATES STEEL CORPORATION/paul vercher

VERIZON/richard lawson

(partial host list)

**PLEASE RSVP TO MYRA LEO AT
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