

CENTER FOR MEDIA & DEMOCRACY
520 University Avenue, Suite 260
Madison, WI 53703,

COMMON CAUSE
1133 19th Street NW
Washington, DC 20036

Plaintiffs,

Case No.: _____
Code No.: 30952

v.

JEREMY THIESFELDT
State Representative
Room 16 West
State Capitol
Madison, WI 53708

PAT STRACHOTA
State Representative
Room 324 East
State Capitol
Madison, WI 53708

TYLER AUGUST
State Representative
Room 119 West
State Capitol
Madison, WI 53708

DAN KNODL
State Representative

Room 218 North
State Capitol
Madison, WI 53708

TOM LARSON
State Representative
Room 18 West
State Capitol
Madison, WI 53708

Defendants.

COMPLAINT FOR MANDAMUS

The Center for Media and Democracy (hereinafter “CMD”) and Common Cause, allege as their Complaint against Defendants Jeremy Thiesfeldt as State Representative (“Rep. Thiesfeldt”), Pat Strachota as State Representative (“Rep. Strachota”), Tyler August as State Representative, (hereinafter “Rep. August”), Dan Knodl as State Representative (“Rep. Knodl”), and Tom Larson as State Representative (“Rep. Larson”), and as follows:

1. CMD and Common Cause bring this action for mandamus under Wis. Stat §19.37(1)(a), requesting that this court order the defendants to release public records that the defendants have heretofore

failed to release pursuant to CMD's written request under the open records law, and assess appropriate damages, Wis. Stat. §§19.31 *et seq.*

2. CMD is a nonprofit, nonpartisan organization engaged in investigative reporting and research, with headquarters located at 520 University Avenue, Suite 260, Madison, WI 53703. Common Cause is a nonprofit, nonpartisan advocacy organization with headquarters located at 1133 19th Street NW, 9th Floor, Washington, DC 20036.

3. Both CMD and Common Cause are "requesters" as that term is defined in Wis. Stat. §19.32(3) and as used in throughout Wisconsin's Open Records law, Wis. Stat. §19.31 *et seq.*

4. Defendants, Rep. Thiesfeldt, Rep. Strachota, Rep. August, Rep. Knodl, and Rep. Larson, are each an "authority" as that term is defined in Wis. Stat. §19.32(1) and as that term is used throughout the Open Records law, §19.31 *et seq.*

5. On September 11, 2012, Attorney Brendan M. Fischer ("Fischer") who works for CMD, with Nick Surgey, who works for Common Cause ("Surgey"), together submitted requests on behalf of the two organizations to each Defendant requesting:

"all records containing the words 'American Legislative Exchange Council' and/or 'ALEC,' including but not limited to correspondence, e-mails 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 e-mails sent and received on official e-mail accounts as well as any other e-mail accounts that have been used for official business, and also applies to records that may be in the "trash" folder of these e-mail 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."

Exh. A.

6. The requested documents are "records" as that term is defined in Wis. Stat. §19.32(2) and as used throughout the Open Records law, Wis. Stat. §19.31 *et seq.*

a. An e-mail relating to official government business sent or received on a personal e-mail account is a record. *See* Department of Justice Wisconsin Public Records Compliance Outline (hereinafter "Open Records Compliance Guide"), September 2012, at p. 3 ("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"). "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*, 2010 WI 86 ¶140, 327 Wis. 2d 572, 786 N.W.2d 177, (Abrahamson, C.J., lead opinion).

i. The content of the requested e-mails mentioning “ALEC” and the “American Legislative Exchange Council” is indisputably related to official government business. Wisconsin legislators are members of ALEC only by virtue of their status as a state legislator, and they correspond with ALEC in their official capacity as Wisconsin legislators. *See* Exhibit B. ALEC is an organization through which state legislators meet with corporate representatives (many of whom are registered lobbyists) to vote on model legislation, and ALEC also advocates for the introduction and passage of that model legislation in Wisconsin and elsewhere. Legislators’ communications with ALEC are not related to personal matters. ALEC-related e-mails discussing public policy, or planning for meetings where public policy will be discussed, are clearly related to official government business. Additionally, ALEC itself has told the State of Wisconsin, through the Government Accountability Board, that its interactions with state legislators are related to official government business. *See*

Exhibit B.¹

b. The request is *not* for e-mails of a purely personal nature, nor is it for e-mails relating to campaign activity (especially because ALEC, as a charity organized under Section 501(c)(3) of the Internal Revenue Code, is legally prohibited from engaging in electoral activity).²

7. Defendants have a plain legal duty to disclose the records – indeed, complying with lawful open records requests is “an essential function of representative government and an integral part” of legislators’ routine duties³ – but each Defendant has refused to comply with the provision of Plaintiffs’ request asking for ALEC-related e-mails sent or received on “any other e-mail accounts that have been used for official business,” specifically e-mails related to official governmental business sent and received on non-governmental, personal e-mail accounts such as Gmail or Yahoo. As discussed below, Defendants have repeatedly given evasive responses in response to direct questions from CMD and

1 Letter from ALEC to Wisconsin Government Accountability Board, May 27, 2010 (discussing how state legislators “attend ALEC conferences on behalf of and for the benefit of the state”). CMD has disputed some of the other claims ALEC has made in this letter, as noted in the Exhibit B cover page.

2 See I.R.C. § 501(c)(3): such an organization “does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.”

3 Wis. Stat. §19.31 (Declaration of Policy)

Common Cause about whether they have searched personal e-mail accounts. Defendants have informed CMD and Common Cause that their requests are completed without releasing the requested records, and without issuing a denial or declaring what part of the law they believe entitles them to deny the request, as required by Wis. Stat. § 19.35(4)(a).

8. Records provided in response to open records requests demonstrates the requested ALEC-related correspondence has been intentionally re-routed from legislators' official e-mail accounts to personal e-mail accounts. In response to this open records request, Rep. Thiesfeldt's office provided a record of an e-mail sent from the legislator's official account to ALEC stating: **"Please send ALL ALEC material to the Representative's PERSONAL e-mail at [redacted] from now on. Please do not send his State account (@legis.wi.gov) any more updates. He will keep up through his personal account"** (capitalization in original).

Exhibit C. Similarly, in a record obtained through an open records request in a different state, an ALEC Education Task Force documents shows Rep. August provides his only e-mail contact as his personal "@charter.net" e-

mail address, but not his official legislative e-mail address. Exhibit D. Each of the other Defendants are also known members of ALEC.⁴

9. Based on the limited records that have been released and Defendants' interactions with Plaintiffs, Defendants do not appear to dispute that if the ALEC-related emails Plaintiffs seek were sent or received on their official legislative e-mail account, they would release those records under the Open Records Law. But Defendants apparently believe they can evade the Open Records Law by shifting those same correspondences to a personal email account. "[T]he 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 e-mail account." *Schill v. Wisconsin Rapids Sch. Dist.*, 2010 WI 86 ¶ 156 (Bradley, J., concurring).

10. The few records that remain on Defendants' official legislative accounts and that have been released largely consist of constituent e-mails inquiring into their legislator's ALEC membership. But this gives a distorted impression of ALEC's relationship with state legislators and the organization's influence over public policy. In

⁴ See Center for Media and Democracy, "ALEC Exposed in Wisconsin: The Hijacking of a State," May 17, 2012, available at http://alecexposed.org/wiki/Wisconsin_Report

Wisconsin, an estimated 32 bills or budget provisions introduced in the 2011-2012 session included language that reflects ALEC “model” legislation.⁵ ALEC Task Force meetings where legislators vote on model bills with corporate lobbyists and other private sector representatives are closed to the press and public. The organization does not register as a lobbyist, despite regularly contacting legislators to encourage the introduction or passage of legislation. ALEC does not report the thousands of dollars of corporate-funded gifts of flights and hotel rooms given to state legislators attending ALEC meetings, which may violate Wisconsin’s ethics and lobbying laws, and which only became public as the result of open records requests.⁶ Open records requests are one of the few means by which the public can, in the words of the Wisconsin Supreme Court, “keep track of what their government is up to,” particularly with respect to legislators’ interactions with ALEC.⁷

11. As described in detail below, Defendants have unequivocally and repeatedly refused to comply with their clear responsibilities under Wisconsin’s Open Records Law, asserting that the

⁵ *Id.*

⁶ See Wisconsin State Journal Editorial Board, “GAB Should Rule on ALEC Issue,” June 26, 2012, available at http://host.madison.com/wsj/news/opinion/editorial/gab-should-rule-on-alec-issue/article_b60414bc-bf1d-11e1-a58c-0019bb2963f4.html

⁷ *Schill*, 2010 WI 86, ¶ 2, (Abrahamson, C.J., lead opinion), citing Editorial, Shine Light on Public Records, Wis. State J., Mar. 14, 2010, at B1.

requests were “completed” or “closed” without releasing the requested records.

12. By refusing to release records to Plaintiffs as required by the Wisconsin Open Records law, the Defendants have caused and will continue to cause injury to Plaintiffs by depriving them and the public of their rights under the law.⁸ Plaintiffs have no other adequate remedy at law.

SUMMARY OF THE FACTS

Summary of the Facts as to Rep. Thiesfeldt (Exh. E)

September 11, 2012

13. On September 11, Fischer e-mailed the above request to Rep. Thiesfeldt.

September 12, 2012

14. On September 12, Hariah Hutkowski, legislative staffer and records custodian for Rep. Thiesfeldt, wrote in an e-mail: “After a 30 minute search in all possible e-mail folders there are no records per your request from the official e-mails of “Rep.Thiesfeldt@legis.wi.gov” or Jeremy.Thiesfeldt@legis.wi.gov” or any documents on our

⁸ Any member of the public, or the media, is damaged when the open records law is broken. *Watton v. Hegerty*, 2007 WI App 267, ¶ 33 306 Wis. 2d 542, 744 N.W.2d 619, *rev'd*, 2008 WI 74, 311 Wis. 2d 52, 751 N.W.2d 369 (reversed but not on this point).

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.”

15. Fischer sent a reply e-mail stating: “I will remind you that the request was for all e-mails sent and received on both official e-mail accounts and any other e-mail accounts used for official business. If you see page three of Attorney General Van Hollen's recently-released open records compliance guide, you will note that: ‘E-mail conducting government business sent or received on the personal e-mail account of an authority’s officer or employee also constitutes a record.’”

16. Despite Fischer’s e-mail clearly referencing official e-mails sent on personal accounts and making no reference to the official e-mail accounts of staffers, Hutkowski replied, “Thanks for pointing out the compliance guide, especially the definition of ‘record’ . . . 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 e-mail communications in my original search . . . Upon learning of my oversight, I turned up one record and it is attached. 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.”

17. The record Hutkowski released included an e-mail he sent on June 22, 2012 to Gavin Koester at ALEC asking **“Please send ALL ALEC material to the Representative’s PERSONAL e-mail at [redacted] from now on. Please do not send his State account (@legis.wi.gov) any more updates. He will keep up through his personal account”** (emphasis in original). *See* Exhibit C.

18. Fischer sent an e-mail replying to Hutkowski’s e-mail reiterating that the request is for official e-mails on Rep. Thiesfeldt’s personal account: “As you are aware, a ‘record’ includes all e-mails 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 e-mails sent and received on his official account but also ‘any other e-mail accounts that have been used for official business,’ there can be no ambiguity that this request is intended to encompass his personal e-mail accounts” (emphasis in original).

19. Hutkowski replied in an e-mail stating: “He has no records per part iii [the provision in the Open Records Compliance Guide

discussing personal e-mail accounts under the Open Records Law]. I double checked too. Thanks for the additional clarification. “

20. Fischer sent a reply e-mail: “I just want to confirm that, per our original request, you did a search for all e-mails sent and received on Rep. Thiesfeldt's personal e-mail accounts . . . I ask because the one record you have released shows that since June of last year all ALEC-related e-mails are going to his personal accounts. I also ask because you said it took 30 minutes to search his official e-mail accounts but in less than nine minutes you apparently managed to search -- and double check -- his personal account and then send me an e-mail.”

September 13, 2012

21. Hutkowski replied in an e-mail: “I have complied with your request.”

22. Fischer sent a reply e-mail: “We are directly asking you to confirm that, per our request, you not only searched for the requested records on the office's official e-mail accounts, but also any other e-mails accounts (including personal e-mail 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.”

September 14, 2012

23. On September 14, Fischer sent an e-mail to Assembly Chief Clerk Patrick Fuller ("Chief Clerk Fuller"), cc'ing Hutkowski and Rep. Thiesfeldt, as well as the other Defendants (who, as will be discussed below, gave similarly evasive responses), stating, "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."

24. Fischer's e-mail described the September 11 request from CMD and Common Cause and the legal basis for why the requested personal e-mails are subject to Wisconsin's Open Records Law:

As you are aware, a "record" for purposes of the Open Records Law does indeed include e-mails sent on a legislator's personal e-mail 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 e-mail 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).⁹

25. Neither Chief Clerk Fuller, nor Hutkowski, nor Rep.

Thiesfeldt replied to the e-mail.

September 17, 2012

26. Fischer sent an e-mail to Hutkowski asking for an update on the status of the request.

27. Hutkowski did not reply.

Summary of the Facts as to Rep. Strachota (Exh. F)

September 11, 2012

28. On September 11, Fischer e-mailed the above request to Rep. Strachota.

September 12, 2012

⁹ Rep. Donald Pridemore's records custodian initially gave evasive responses to Plaintiffs' request and was also cc'd on the e-mail to Chief Clerk Fuller. After that e-mail was sent his records custodian told Plaintiffs the office was working to fully comply

29. On September 12, Heather Moore (“Moore”), legislative staffer and records custodian for Rep. Strachota, replied in an e-mail stating: “Our office no longer handles any e-mail correspondence, receives mail, and does no scheduling for ALEC which has been in effect since November of 2011. The representative does this on her own personal time.”

30. Fischer sent a reply e-mail asking if Moore’s statement was a denial, and if so, that the law requires she provide a legal basis for the denial and do so in writing. Fischer’s e-mail also noted also that even if Rep. Strachota corresponds with ALEC on a personal e-mail account and does ALEC-related scheduling outside of the office, “a record is anything ‘created or kept in connection with official purpose or function of the agency’” and that “it is the content determines whether a document is a ‘record,’ not medium, format, or location.” (Citations omitted).

31. Moore replied in an e-mail stating: “This is not a denial, this office has nothing pertaining to ALEC from the dates in which you have requested.”

September 14, 2012

32. On September 14, Fischer sent the aforementioned e-mail to Chief Clerk Fuller and cc’d Moore and Rep. Strachota showing that

“records” for purposes of the Open Records Law includes official e-mails sent on personal e-mail accounts and clarifying their responsibilities under that law.

33. Neither Chief Clerk Fuller, nor Moore, nor Rep. Strachota replied to the e-mail.

September 17, 2012

34. Fischer sent an e-mail to Moore asking for an update on the status of the request.

35. Moore did not reply.

Summary of the Facts as to Rep. Tyler August (Exh. G)

September 11, 2012

36. On September 11, 2012, Surgey e-mailed the above request to Rep. August.

September 12, 2012

37. On September 12, Rep. August’s legislative assistant and records custodian Luke Bacher (“Bacher”) sent a reply e-mail to Surgey stating that “We have received your open records request and our search came up with no results. Please consider this request completed.”

38. Surgey sent an e-mail asking Bacher “Can you please confirm that your search included all e-mail accounts, including personal

e-mail accounts used by Rep. August,” and reminding him that “the request was for all e-mails sent and received on both official e-mail accounts and any other e-mail accounts used for official business.” The e-mail also noted that the Department of Justice Wisconsin Public Records Compliance Outline states that “E-mail conducting government business sent or received on the personal e-mail account” of a legislator is subject to the Open Records Law.

39. Bacher replied in an e-mail: “Our office has no records.”

40. Surgey sent a reply e-mail: “So as to avoid any confusion, could you please confirm whether your search included Rep. August’s e-mail addresses . . . as is required and outlined in the [Attorney General’s] open records compliance guide.”

41. Bacher replied in an e-mail, repeating again, “Our office has no records,” and cc’d Chief Clerk Fuller.

42. Fischer replied in an e-mail to Bacher stating that “even if a record is not contained within the physical bounds of your office or computer system, it is still subject to the open records law,” with citations to Attorney General Opinions and case law, and again reminding Bacher that “the request was for all e-mails sent and received on both official e-mail accounts and any other e-mail accounts used for official business.”

Fischer also stated that "If this is a denial, the law requires you to state this in writing and declare what part of the law you believe entitles you to deny this request." Fischer cc'd Chief Clerk Fuller on the e-mail.

43. Bacher replied, for the third time, "Our office has no records," again cc'ing Chief Clerk Fuller.

September 14, 2012

44. On September 14, Fischer sent the aforementioned e-mail to Chief Clerk Fuller and cc'd Moore and Rep. Strachota showing that "records" for purposes of the Open Records Law includes official e-mails sent on personal e-mail accounts and clarifying their responsibilities under that law.

45. Neither Chief Clerk Fuller, nor Bacher, nor Rep. August replied to the e-mail.

September 17, 2012

46. On September 17, Fischer e-mailed Bacher asking for an update on the status of the request.

47. Bacher replied in an e-mail: "We have received your open records request and our search came up with no results. Please consider this request completed." Chief Clerk Fuller was cc'd on the e-mail.

48. Fischer sent a reply e-mail: "As we asked on Sept 12, will you please confirm that your search included Rep. August's personal e-mail addresses. I have no doubt you are now aware of the precise parameters of our request and your responsibilities under the Open Records Law." Chief Clerk Fuller was cc'd on the e-mail.

49. Neither Bacher nor Chief Clerk Fuller replied to the e-mail.
September 18, 2012

50. On September 18, Rep. August released hard copies of 14 e-mails that he claimed were responsive to the open records request, submitted through the Assembly Chief Clerk's office. None of the documents came from Rep. August's personal e-mail accounts, which evidence suggests is the primary means by which he conducts ALEC-related communications, *see* Exhibit D, and which were clearly sought by the open records request and had been the source of several days of correspondence with CMD and Common Cause. The released records only consisted of constituent e-mails asking Rep. August about ALEC, as well as copies of open records requests seeking ALEC-related records (but not the responses to those requests).

51. Rep. August's cover letter provides a lengthy explanation for why he redacted certain "personal citizen information" such as names,

phone numbers, and e-mail addresses. *See* final page of Exhibit E.

Plaintiffs are not seeking personal information and do not dispute the redaction of this information.

52. Rep. August's letter ignored Plaintiff's repeated requests to confirm that his response included a search for e-mails on personal e-mail accounts, and the documents released did not include anything from the personal "@charter.net" e-mail address Rep. August uses to correspond with ALEC.

Summary of the Facts as to Rep. Knodl (Exh. H)

September 11, 2012

53. On September 11, Surgey e-mailed the above request to Rep. Knodl.

September 12, 2012

54. On September 12, Rep. Knodl's legislative staffer and records custodian BJ Dernbach ("Dernbach") replied by e-mailing a .zip file including e-mails sent and received on Rep. Knodl's official e-mail account, but none from any personal e-mail accounts.

55. Surgey sent a reply e-mail asking for confirmation that the response included a search of all e-mail accounts used for official business, including personal e-mail accounts.

September 13, 2012

56. On September 13, Dernbach replied in an e-mail: "I did conduct another search of all the office records in the office database. There were 9 e-mails that were inadvertently not included in your request. They were in our constituent folder and one calendar item." Chief Clerk Fuller was cc'd on the e-mail.

57. Surgey sent a reply e-mail: "So as to avoid any confusion, as previously requested would you please confirm that your search included personal e-mail accounts used for government business. There is no doubt that communications from ALEC should be considered government business," along with citations showing that e-mails sent on personal accounts are covered by the Open Records Law. Chief Clerk Fuller was also cc'd on this e-mail.

58. Dernbach replied in an e-mail: "The search included all records pertaining to your request," and cc'd Chief Clerk Fuller.

59. Surgey replied in an e-mail that "we are directly asking you to confirm that, per our request," that Dernbach had searched personal e-mail accounts used for official business, and noting "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."

Surgey's e-mail also noted that Rep. Knodl could be subject to actual and punitive damages if his office denies a request willfully and intentionally or arbitrarily and capriciously.

60. Dernbach sent a reply e-mail repeating the claim "The search included all records pertaining to your request" and stating "If you have other questions regarding this request, I would refer you to [Chief Clerk] Pat Fuller."

September 14, 2012

61. On September 14, Fischer sent the aforementioned e-mail to Chief Clerk Fuller and cc'd Dernbach and Rep. Knodl, showing that "records" for purposes of the Open Records Law includes official e-mails sent on personal e-mail accounts and clarifying their responsibilities under that law.

62. Neither Chief Clerk Fuller, nor Dernbach, nor Rep. Knodl replied to the e-mail.

September 17, 2012

63. Fischer sent an e-mail to Dernbach asking for an update on the status of the request.

64. Dernbach did not reply.

Summary of the Facts as to Rep. Larson (Exh. I)

September 11, 2012

65. On September 11, Surgey e-mailed the above request to Rep. Larson.

September 12, 2012

66. On September 12, Mark Florian ("Florian"), records custodian for Rep. Larson's office and a Limited Term Employee, replied in an e-mail that there were no records responsive to the request.

67. Surgey replied in an e-mail reminding Florian that the "request was for all e-mails sent and received on both official e-mail accounts and any other e-mail accounts used for official business," referred Florian to the relevant section of the Open Records Compliance Guide, and asked "Can you please confirm that your search included all e-mail accounts, including personal e-mail accounts used by Rep. Larson."

68. Florian replied in an e-mail: "We have thoroughly searched our records and have complied with the open records request."

69. Fischer sent a reply e-mail to Florian stating: "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," providing additional citations for the fact that official e-mails sent on personal accounts are subject to the Open Records Law, and warning that

Rep. Larson's office may be subject to actual and punitive damages.

Fischer repeated that "We are directly asking you to confirm that, per our request, you not only searched for the requested records on the office's official e-mail accounts, but also any other e-mails accounts that have been used for official business."

70. Florian replied in an e-mail: "Thank you for the additional clarification. As stated earlier, we have complied with the open records request."

September 14, 2012

71. On September 14, Fischer sent the aforementioned e-mail to Chief Clerk Fuller and cc'd Florian and Rep. Larson, showing that "records" for purposes of the Open Records Law includes official e-mails sent on personal e-mail accounts and clarifying their responsibilities under that law.

72. Neither Chief Clerk Fuller, nor Florian, nor Rep. Larson replied to the e-mail.

September 17, 2012

73. Fischer sent an e-mail to Florian asking for an update on the status of the request.

74. Florian did not reply.

RELIEF SOUGHT

75. As of October 1, 2012, Defendants have failed to comply with the lawful requests from CMD and Common Cause for e-mails related to official governmental business containing the terms “American Legislative Exchange Council” and “ALEC” sent and received on personal e-mail accounts.

76. This complaint for mandamus requests an order directing the Defendants to release the records requested by CMD and Common Cause in their September 11, 2012 request.

77. The Wisconsin Open Records Law (Wis. Stat. §§ 19.31 *et seq.*) has long been construed with the presumption of complete public access, consistent with the conduct of governmental business. The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.

78. The efforts by Defendants to elude the requirements of Wisconsin’s Open Records Law clearly violate the law’s intent and the state’s long tradition of open, transparent government. The legislature has declared that “[a] representative government is dependent on an informed electorate” and that “it is the public policy of this state . . . that all persons are entitled to the greatest possible information regarding the affairs of

government and the official acts” of government officers and employees. Wis. Stat. § 19.31 (Declaration of Policy). The Wisconsin Supreme Court has observed that “If Wisconsin were not known as the Dairy State it could be known, and rightfully so, as the Sunshine State. All branches of Wisconsin government have, over many years, kept a strong commitment to transparent government.” *Schill*, 2010 WI 86 ¶ 1.

79. Defendants are failing that proud tradition. Each Defendant has repeatedly refused to comply with their clear responsibilities under Wisconsin’s Open Records Law. Wis. Stat. § 19.31 *et seq.* CMD and Common Cause respectfully asks the Court to assess whether these denials were willful or intentional, and arbitrary and capricious (as they appear to be) and assess damages against the Defendants.

WHEREFORE, Plaintiffs CMD and Common Cause request that the Court grant the following relief pursuant to Wis. Stat. § 19.31 *et seq.* and Wis. Stat. § 806.04:

- a. Allow additional legal argument, as necessary, after the Defendants have answered the Complaint;
- b. Order the Defendants to provide copies of the requested records to CMD and Common Cause;

- c. Award CMD and Common Cause their actual costs and damages under Wis. Stats. § 19.37(2)(a);
- d. Assess whether Defendants acted in a willful or intentional manner, and arbitrarily and capriciously denied or delayed response to the request from CMD and Common Cause, and assess appropriate damages under Wis. Stats. §§19.37(2)(b) and (3), and;
- e. Order other such relief as the Court deems appropriate.

Dated this 1st day of October, 2012.

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