



STATE OF WISCONSIN
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July 13, 2018

Katelyn Ferral
The Cap Times
1901 Fish Hatchery Road
Madison, WI 53713

Dear Ms. Ferral:

This is in response to your correspondence, received on June 19, 2018, in which you requested the following records:

- the checklist and all associated memos and emails sent from Delanie Breuer and Dan Lennington directing staff how to write legal briefs
- total budget, including line-items and current salaries for each Assistant Solicitor General, + SG Tseytlin
- all emails sent and received by Misha Tseytlin for June 18, 2018.

The Department of Justice (DOJ) construes your correspondence as a public records request pursuant to the Wisconsin Public Records Law, Wis. Stat. §§ 19.31 to 19.39.

Regarding your first bulleted request, we searched for records from May 1, 2017 to August 31, 2017. Our search for responsive records included a search for DOJ emails sent from Chief of Staff Delanie Breuer or Senior Counsel Daniel Lennington. We searched using the search term checklist.

Regarding your second bulleted request, the budget for the Office of the Solicitor General (OSG) is combined with the state's biennial budget for DOJ's Division of Legal Services (DLS). Therefore, DOJ does not have a line-item budget to provide to you. The public records law "does not require an authority to provide requested information if no record exists, or to simply answer questions about a topic of interest to the requester." *Journal Times v. City of Racine Board of Police and Fire Commissioners*, 2015 WI 56, 55 (citation omitted); see also *State ex rel. Zinngrabe v. Sch. Dist. of Sevastopol*, 146 Wis. 2d 629, 431 N.W.2d 734 (Ct. App. 1988). However, as a courtesy, DOJ is providing spreadsheets detailing current OSG salaries and the combined budget for DLS and OSG for fiscal year 2019.

Regarding your third bulleted request, we searched for DOJ emails sent to or from Solicitor General Misha Tseytlin on June 18, 2018.

We reviewed our files and identified records responsive to your request. We are providing them to you as explained below.

I am not releasing certain records because they are attorney-client privileged communications or attorney work product. Attorney-client privileged communications are not subject to disclosure under the public records law. *George v. Record Custodian*, 169 Wis. 2d 573, 582, 485 N.W.2d 460 (Ct. App. 1992); *Wisconsin Newspress, Inc. v. School Dist. of Sheboygan Falls*, 199 Wis. 2d 768, 782-83, 546 N.W.2d 143 (1996); Wis. Stat. § 905.03(2). Attorney-client privileged communications include those between DOJ attorneys and counsel representing others in a matter of common interest. See Wis. Stat. § 905.03(2). Attorney work product is a statutory and common-law exception to disclosure. See Wis. Stat. § 19.35(1)(a); see also *Seifert v. Sch. Dist. of Sheboygan Falls*, 2007 WI App 207, ¶¶ 27-28, 305 Wis. 2d 582, 740 N.W.2d 177 ("The common law long has recognized the privileged status of attorney work product, including the material, information, mental impressions and strategies an attorney compiles in preparation for litigation."); Wis. Stat. § 804.01(2)(c)1.

Pursuant to Wis. Stat. § 19.36(10)(a), personal electronic mail addresses of employees have been redacted. To the extent this information is not directly governed by Wis. Stat. § 19.36(10)(a), this information, as well as personal electronic mail addresses of other individuals, has been redacted pursuant to the Wis. Stat. § 19.35(1)(a) balancing test. Well-established public policy recognizing the confidentiality and privacy of the personal contact information of an employer's employees is expressed in Wis. Stat. § 19.36(10)(a). I find that the same underlying public policy of protecting the confidentiality and privacy of personal contact information and the public interest in the expectation of privacy on the part of individuals in their personal lives outweigh any public interest in disclosure of this information.

Records pertaining to suspicious email messages or suspected SPAM email messages have been redacted pursuant to the Wis. Stat. § 19.35(1)(a) balancing test. Release of these records would pose a security risk and may impair the effectiveness of DOJ's email filters and the qualifiers used to protect DOJ's data network from messages that may contain computer viruses or other malicious software programs. Applying the public records balancing test, I determined that the public interest in DOJ's security and preventing circumvention of DOJ's email filters, as well as the public policies expressed in Wis. Stat. § 19.36(9), outweigh any public interest in disclosure. Furthermore, pursuant to Wis. Stat. § 19.35(1)(a), the exemptions to the requirement of a governmental body to meet in open session under Wis. Stat. § 19.85 are indicative of public policy, "but may be used as grounds for denying public access to a record only if the authority or legal custodian ... makes a specific demonstration that there is a need to restrict public access at the time the request to inspect or copy the record is made." Well-established public policies regarding the confidentiality of this information are evidenced in Wis. Stat. § 19.85(1)(d) ("considering strategy for crime detection or prevention") and disclosure of this information would adversely impact this public interest. In applying the balancing test, I concluded, that the public interest in disclosure of this information is outweighed by the public interest in nondisclosure.

Pursuant to the Wis. Stat. § 19.35(1)(a) balancing test, conference call telephone numbers and passcodes have been redacted. Disclosure of conference call telephone numbers and passcodes would allow unfettered public access to conference calls that could involve attorney-client privileged communication or other confidential content. In applying the balancing test, I determined the public interest in ensuring that government can operate safely and effectively and in preventing confidential information from disclosure outweighs the public interest in disclosure of the conference call telephone numbers and passcodes.

Records containing copyrighted information are not being produced. Examples of such records include copyrighted newsletters from WisPolitics, and The State Bar of Wisconsin. "[M]aterials to which access is limited by copyright" are not records under the public records law. Wis. Stat. § 19.32(2).

Drafts of documents are not being produced because drafts are not records as defined in Wis. Stat. § 19.32(2). See *Schill v. Wis. Rapids Sch. Dist.*, 2010 WI 86, ¶ 71, 327 Wis. 2d 572, 786 N.W.2d 177; *Journal/Sentinel, Inc. v. Sch. Bd. of Sch. Dist. of Shorewood*, 186 Wis. 2d 443, 456, 521 N.W.2d 165 (Ct. App. 1994). Final documents are being produced.

Where possible, only one copy of records for which duplicate copies exist has been included with the records prepared for release. *Stone v. Bd. of Regents*, 2007 WI App 223, ¶ 20, 305 Wis. 2d 679, 741 N.W.2d 774. Duplicate copies of records are not included when attached to emails when copies of these records are included as attachments within the responsive records. Where possible, email chains, where the last email of the chain is being produced, were omitted.

The law permits DOJ to impose fees for certain "actual, necessary and direct" costs associated with responding to public records requests. Wis. Stat. § 19.35(3). Pursuant to Wis. Stat. § 19.35(3)(f), DOJ may require prepayment for the costs of locating (if applicable), copying, and mailing the requested records if the total amount exceeds \$5.00. Pursuant to Wis. Stat. § 19.35(3)(e), in this instance, DOJ is waiving its fees associated with responding to your request. Enclosed, please find the records responsive to your request.

Pursuant to Wis. Stat. § 19.35(4)(b), this determination is subject to review by mandamus under Wis. Stat. § 19.37(1) or upon application to a district attorney or the Attorney General.

Sincerely,



Paul M. Ferguson
Assistant Attorney General
Office of Open Government

PMF:cks

Enclosure