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DEPARTMENT OF JUSTICE

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June 21, 2018

Keegan Kyle
Gannett Wisconsin Media
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Dear Mr. Kyle:

This is in response to your email correspondence, received on May 18, 2018, in which you requested the following:

- 1) All emails sent by Deputy Solicitor General Kevin LeRoy where the email address of at least one recipient contains the phrase "adflegal.org". Please narrow the scope of responsive records to emails sent from January 1, 2015 to the present.
- 2) All emails received by Deputy Solicitor General Kevin LeRoy where the email address of the sender contains the phrase "adflegal.org". Please narrow the scope of responsive records to emails received from January 1, 2015 to the present.
- 3) All emails received by Deputy Solicitor General Kevin LeRoy where the sender of the email was Attorney General Brad Schimel and the contents of the email refer to an Alliance Defending Freedom conference in July 2017.
- 4) All emails sent by Deputy Solicitor General Kevin LeRoy where the recipient of the email was Attorney General Brad Schimel and the contents of the email refer to an Alliance Defending Freedom conference in July 2017.
- 5) All emails sent by Solicitor General Misha Tseytlin where the email address of at least one recipient contains the phrase "adflegal.org". Please narrow the scope of responsive records to emails sent from January 1, 2015 to the present.
- 6) All emails received by Solicitor General Misha Tseytlin where the email address of the sender contains the phrase "adflegal.org". Please narrow the scope of responsive records to emails received from January 1, 2015 to the present.

- 7) Any scripts, trip schedules, hand-outs and presentation materials produced for the purpose of Solicitor General Misha Tseytlin attending an Alliance Defending Freedom conference in July 2017
- 8) Any transcripts, video recordings and audio recordings of remarks made by Solicitor General Misha Tseytlin during his attendance at an Alliance Defending Freedom conference in July 2017
- 9) Any receipts, credit card statements, checks and other financial documents containing information related to Solicitor General Misha Tseytlin and Deputy Solicitor General Kevin LeRoy attending an Alliance Defending Freedom conference in July 2017

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

We searched for records from January 1, 2015 through May 18, 2018 (date of your request). Our search for responsive records included a search of emails between Solicitor General Misha Tseytlin or Deputy Solicitor General Kevin LeRoy and email domain @adfflegal.org. We also searched for emails sent between Attorney General Brad Schimel and Deputy Solicitor General Kevin LeRoy using the search terms: Alliance Defending Freedom, ADF, and "defending religious liberty." If you wish to revise the scope of your request to include specific search terms, you may do so at any time.

Regarding your requests #1-6 and #9, we identified records responsive to your requests. 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). 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.

Home addresses and home electronic mail addresses of employees were redacted pursuant to Wis. Stat. § 19.36(10)(a). To the extent such records and information are not directly governed by Wis. Stat. § 19.36(10)(a), the information 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.

A credit card number of an individual has been redacted pursuant to Wis. Stat. § 19.36(13). To the extent this information is not directly governed by Wis. Stat. § 19.36(13), these records have been redacted pursuant to the Wis. Stat. § 19.35(1)(a) balancing test to protect against identity theft or other unauthorized use following any subsequent disclosure. The public interest in protecting this kind of economically valuable information from misappropriation or misuse is recognized in Wis. Stat. § 19.36(13), which prohibits disclosure of financial identifying information of individuals. Although Wis. Stat. § 19.36(13) may not apply to DOJ financial information, the same public interest in protecting financial identifying information from misappropriation or other misuse applies here. Therefore, I determined that the public interest in protecting this economically valuable information from misappropriation or misuse, as well as the public policies outlined in Wis. Stat. §§ 801.19, 801.20, and 801.21, outweigh any public interest in disclosure.

Pursuant to the Wis. Stat. § 19.35(1)(a) balancing test, records related to settlement negotiations were withheld. There is a strong public interest in maintaining the confidentiality of settlement negotiations (as distinct from settlement agreements). Settlements are cost-effective and benefit judicial efficiency, and parties negotiating freely in confidence allows for more effective negotiations. Evidence of these public policies can be found in other Wisconsin statutes and in federal court opinions. *See, e.g.*, Wis. Stat. § 904.85 ("to encourage the candor and cooperation of disputing parties, to the end that disputes may be quickly, fairly and voluntarily settled," communications in mediation are generally not admissible in evidence or subject to discovery or compulsory process and therefore not a public record); *see also Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976, 979-81 (6th Cir. 2003) (concluding a settlement privilege concerning confidential negotiations should exist). In applying the balancing test, I concluded the public interest in keeping the settlement negotiations confidential outweighs the public interest in disclosure of this information.

The date of birth of an individual person has been redacted to protect against identity theft or other unauthorized use following any subsequent disclosure. In performing the public records balancing test pursuant to Wis. Stat. § 19.35(1)(a), I concluded that the public interest in favor of protecting the confidentiality of this economically valuable individually identifiable information and preventing its misuse upon any subsequent disclosure, as well as the public policies outlined in Wis. Stat. §§ 801.19, 801.20, and 801.21, outweigh any public interest in disclosure of the date of birth.

Frequent flyer numbers, event confirmation numbers, flight confirmation numbers, and event web application usernames and passwords have been redacted pursuant to the Wis. Stat. § 19.35(1)(a) balancing test. These numbers are economically valuable financially identifiable information, and they have been redacted to protect against misappropriation or other unauthorized use following any subsequent disclosure. In performing the public records balancing test pursuant to Wis. Stat. § 19.35(1)(a), I concluded that the public policy in favor of protecting the confidentiality of this economically valuable financially identifiable information and preventing its misuse upon any subsequent disclosure outweighs any public interest in disclosure of the information.

Pursuant to the Wis. Stat. § 19.35(1)(a) balancing test, conference call telephone numbers and passcodes have been redacted. I determined that the public interest in individuals performing their job responsibilities without disruption and unnecessary interruption if their conference call telephone numbers and passcodes became public knowledge outweighs any public interest in disclosure of the numbers. Additionally, the 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.

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.

Regarding your requests #7 and #8, DOJ does not have records responsive to these portions of your request. The public records law “does not require an authority to provide requested information if no records 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).

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

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Enclosure