
WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC.,
1139 E. Knapp St.
Milwaukee, WI 53202

Petitioner,

v.

Petition for Writ of Mandamus

Case Code: 30952

Case No. 19-CV-

WISCONSIN DEPARTMENT OF PUBLIC INSTRUCTION,
125 S. Webster St.
Madison, WI 53703,
Respondent.

PETITION FOR WRIT OF MANDAMUS

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.

Petitioner Wisconsin Institute for Law & Liberty, Inc. ("WILL"), by its Attorneys, Richard M. Esenberg and Thomas C. Kamenick, hereby petitions this Court for a writ of mandamus directing the Respondent, Wisconsin Department of Public Instruction ("DPI"), to produce records requested by the Petitioner, alleging to the Court as follows:

FACTUAL ALLEGATIONS

Parties

1. Petitioner WILL is a non-stock corporation incorporated in the State of Wisconsin with a business address of 1139 East Knapp Street, Milwaukee, Wisconsin 53202.
2. Respondent DPI is an agency of the State of Wisconsin with a business address of 125 South Webster Street, Madison, Wisconsin 53703.
3. DPI is an "Authority" under Wis. Stat. § 19.32(1).

Venue & Jurisdiction

4. This Court has jurisdiction to hear this matter under Wis. Stat. § 19.37(1)(a), which provides record requesters a private right to “bring an action for mandamus asking a court to order release of the record.”

5. Venue is proper in this County under Wis. Stat. § 801.50(3), as the sole defendant is the state and the Petitioner hereby designates this County as venue.

WILL’s Open Records Request

6. On August 29, 2018, Lucas Vebber, WILL’s Deputy Counsel and Director of Regulatory Reform & Federalism, acting on behalf of WILL, sent an open records request to DPI for the following three sets of records:

1. Communications between the Department of Public Instruction (DPI) and school districts or school district officials regarding the “Every Student Succeeds Act” or “ESSA”
2. Any informational or explanatory materials, or guidance documents, prepared by DPI regarding the “Every Student Succeeds Act” or “ESSA”
3. All records related to DPI Proposed Rule No. “PI 42” as proposed by scope statement “SS 040-18”

A true and accurate copy of that request is attached to the Affidavit of Lucas Vebber as Exhibit V1.

7. Getting no response, Vebber sent a follow-up email requesting a status update on September 20, 2018. A true and accurate copy of that email is attached to the Affidavit of Lucas Vebber as Exhibit V2.

8. On September 21, 2018, an unknown person responding from the email address “DPIRecordsRequests@dpi.wi.gov” responded that they were in receipt of the request and it was in progress. A true and accurate copy of that email is attached to the Affidavit of Lucas Vebber as Exhibit V3.

9. On November 12, 2018, after nearly three months without receiving the records, Thomas Kamenick, WILL's Deputy Counsel and Litigation Manager, acting on behalf of WILL, sent a follow-up letter demanding that DPI comply with the Open Records Law and release the requested records. A true and accurate copy of that letter is attached to the Affidavit of Thomas Kamenick as Exhibit K1.

10. On November 13, 2018, DPI responded, partially granting and partially denying the request. A true and accurate copy of that letter is attached to the Affidavit of Lucas Vebber as Exhibit V4.

11. In the response, DPI provided hyperlinks to records responsive to Request #3 and some records responsive to Request #2.

12. DPI denied Request #1 and the portion of Request #2 asking for "any informational or explanatory materials" regarding the Every Student Succeeds Act as insufficiently specific, because it would require guessing what WILL wanted, because it would be unreasonably burdensome, and because it would impair the office's normal functions.

13. Although WILL disagreed with DPI's arguments, WILL updated its request on December 7, 2018 with narrowed search parameters. A true and accurate copy of that request is attached to the Affidavit of Lucas Vebber as Exhibit V5. That request sought only "All informational or explanatory materials, or guidance documents, prepared by the DPI regarding the federal accountability system required under the Every Student Succeeds Act, 20 U.S.C. § 6311(c) (Sec. 1111(c)) (2015), including the annual state report card required by Sec. 1111(h)(1)."

14. On December 13, 2018, DPI responded, acknowledging receipt of the request and promising to respond as soon as practical and without delay. A true and accurate copy of that email is attached to the Affidavit of Lucas Vebber as Exhibit V6.

15. On December 28, 2018, Vebber asked for a status update. A true and accurate copy of that email is attached to the Affidavit of Lucas Vebber as Exhibit V7.

16. On January 4, 2019, DPI responded, indicating that the request was being processed, it been delayed due to the holidays and the election, and it was being made a “priority.” A true and accurate copy of that email is attached to the Affidavit of Lucas Vebber as Exhibit V8.

17. WILL’s request has been outstanding for five months, and even the updated request has been outstanding over 2 months.

18. The delay in responding to this request is well outside of DPI’s normal length of response. A 2017 report found that DPI’s average response time during the period August 2016 – May 2017 was 8.9 business days.¹

19. WILL’s and the public’s need for the information contained in these records is pressing.

20. The Every Student Succeeds Act requires DPI to create a federal accountability system and post the information annually, starting on or before December 31st for the 2017-2018 school year. *See* 20 U.S.C. 6311(c)(4)(D)(i) and non-regulatory guidance from the U.S. Department of Education.² The U.S. Department of Education non-regulatory guidance states that the federal accountability system must be easily accessible to the public.

¹ <http://www.will-law.org/wp-content/uploads/2017/11/sunshine-report-2017.pdf>.

² <https://www2.ed.gov/policy/elsec/leg/essa/essastatereportcard.pdf>.

21. The federal accountability system determines whether each Wisconsin school and district is deemed proficient. If a school or district does not meet those proficiency standards, the school and/or district may be subject to DPI interventions.

22. DPI applied the federal accountability system to schools and districts and sent preliminary informational materials to each on their performance in December. Astonishingly, DPI insisted that school and district administrators keep these materials hidden from not only the public, but from their own school boards and parents.³

23. Just days ago, DPI sent “final joint federal notification packets for 2017-18” to school districts around the state.⁴ In its cover letter, DPI again claimed that the documents were “under embargo until the scheduled public release on March 5, 2019.” The letter further states that “No information is to be shared with anyone in the public until that date.”

24. The documents sought by WILL and illegally embargoed by DPI will help establish whether DPI is violating both the REINS Act under Wisconsin law by illegally creating a federal accountability system without a corresponding agency regulation and federal law by failing to meet the requirements for the federal accountability system.

25. As of the date of this Petition, DPI has failed to fulfill WILL’s updated request, deny the request, explain its delay, ask for clarification, or provide a timeline for responding.

CAUSE OF ACTION – VIOLATION OF § 19.35(4)
Illegal Delay in Producing Records

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

³ https://dpi.wi.gov/sites/default/files/imce/assessment/pdf/DAC_Digest_12-12-18.pdf.

⁴ <https://dpi.wi.gov/administrators/e-mail/final-joint-notification-packet-materials-safe>.

27. Under Wis. Stat. § 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.”

28. Wis. Stat. § 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.”

29. Subject to qualifications not relevant here, Wis. Stat. § 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.”

30. Under Wis. Stat. § 19.35(4)(a), “[e]ach authority, upon request for any record, shall, as soon as practicable and without delay, either fill the request or notify the requestor of the authority’s determination to deny the request in whole or in part and the reasons therefor.”

31. The Attorney General of Wisconsin has opined that “ten working days generally is a reasonable time for responding to a simple request for a limited number of easily identifiable records.” Wis. Dep’t of Justice, Attorney General Brad D. Schimel, *Wisconsin Public Records Law Compliance Guide*, March 2018, at 15. “Requests for public records should be given high priority.” *Id.*

32. An authority must either fulfill or deny an open records request; offering to comply at some unidentified time in the future is not authorized by law. *WTMJ, Inc. v. Sullivan*, 204 Wis. 2d 452, 457-58, 555 N.W.2d 140 (Ct. App. 1996).

33. DPI's "embargo" of public records is without authority and a brazen flouting of the Open Records Law.

34. It has been over five months since WILL made its open records request, and over two months since WILL narrowed its request, and DPI has failed to comply with her obligations under the Open Records Law.

35. DPI has maliciously delayed responding to WILL's record requests in order to mask the Department's illegal activities.

36. Therefore, DPI has violated the Open Records Law and Wis. Stat. § 19.35(4) by failing to fulfill or deny the record request "as soon as practicable and without delay."

37. "If an authority . . . delays granting access to a record or part of a record after a written request for disclosure is made, the requester may . . . bring an action for mandamus asking a court to order release of the record." Wis. Stat. § 19.37(1), (a).

38. Furthermore, DPI has denied and delayed responding to WILL's request arbitrarily and capriciously by imposing an illegal "embargo" on the release of public records and seeking to mask its illegal activities, making it subject to punitive damages under Wis. Stat. § 19.37(3).

RELIEF REQUESTED

WHEREFORE, the Petitioner demands a writ of mandamus to issue against the Respondent under Wis. Stat. § 19.37(1):

1. Compelling the Respondent to immediately produce the requested records;
2. Declaring the Petitioner's rights and limiting the Respondent's conduct with respect to the requested records;
3. Awarding the Petitioner punitive damages under Wis. Stat. § 19.37(3);

4. Awarding the Petitioner its reasonable attorney fees, damages of not less than \$100, and other actual costs under Wis. Stat. § 19.37(2), and;

5. Awarding such other relief as the Court deems appropriate.

Dated this February 7, 2019

Respectfully submitted,

Attorneys for Petitioner

Electronically Signed by Thomas C. Kamenick

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