

COLLIN ROTH
4407 N. Morris Boulevard
Shorewood, WI 53211,

Plaintiff,

v.

Petition for Writ of Mandamus
Case Code: 30952
Case No. 18-CV-

REPRESENTATIVE JONATHAN BROSTOFF
Wisconsin Assembly
Room 420 North
State Capitol
PO Box 8952
Madison, WI 53708,

Defendant.

SUMMONS

THE STATE OF WISCONSIN

To each person named above as a Defendant:

You are hereby notified that the Plaintiffs named above have filed a lawsuit or other legal action against you. The Complaint, which is attached, states the nature and basis of the legal action.

Within 45 days of receiving this Summons, you must respond with a written answer, as that term is used in Chapter 802 of the Wisconsin Statutes, to the Complaint. The court may reject or disregard an answer that does not follow the requirements of the statutes. The answer must be sent or delivered to the court, whose address is: **Clerk of Circuit Court, Dane County, 215 South Hamilton Street, Madison, WI 53703**, and to the Wisconsin Institute for Law & Liberty, Plaintiffs’ attorneys, whose address is: **1139 E. Knapp Street, Milwaukee, WI 53202**.

You may have an attorney help or represent you.

If you do not provide a proper answer within 45 days, the court may grant judgment against you for the award of money or other legal action requested in the Complaint, and you may lose your right to object to anything that is or may be incorrect in the Complaint. A

judgment may be enforced as provided by law. A judgment awarding money may become a lien against any real estate you own now or in the future, and may also be enforced by garnishment or seizure of property.

Dated this 15th day of February, 2018.

Respectfully submitted,
WISCONSIN INSTITUTE FOR LAW & LIBERTY
Attorneys for Plaintiff

Electronically signed by Thomas C. Kamenick

Thomas C. Kamenick, WBN 1063682

(414) 727-6368; tom@will-law.org

Clyde A. Taylor, WBN 1103207

(414)-727-7414; clyde@will-law.org

Richard M. Esenberg, WBN 1005622

(414) 727-6367; rick@will-law.org

1139 E. Knapp St.

Milwaukee, WI 53202

414-727-9455; FAX: 414-727-6385

COLLIN ROTH
4407 N. Morris Boulevard
Shorewood, WI 53211,

Plaintiff,

v.

Petition for Writ of Mandamus
Case Code: 30952
Case No. 18-CV-

REPRESENTATIVE JONATHAN BROSTOFF
Wisconsin Assembly
Room 420 North
State Capitol
PO Box 8952
Madison, WI 53708,

Defendant.

COMPLAINT

Plaintiff Collin Roth, by his attorneys, the Wisconsin Institute for Law & Liberty, as a Complaint against Defendant Representative Jonathan Brostoff, alleges to the Court as follows:

FACTUAL ALLEGATIONS

1. This action seeks to compel the release of records under Wisconsin’s Open Records Law, Wis. Stat. §§ 19.31 – 19.39. The Defendant unlawfully denied Plaintiff’s request for electronic files in native format and seeks to charge Plaintiff unlawful fees for producing the records in paper format, in violation of the Open Records Law.

2. Plaintiff Collin Roth is an adult citizen of the State of Wisconsin and a Research Fellow at the Wisconsin Institute for Law & Liberty. In that capacity, he conducts research, analysis, and writes reports on, among other things, issues related to occupational and

professional licensing in Wisconsin and across the country. His address is 4407 N. Morris Boulevard, Shorewood, WI 53211.

3. Defendant Representative Jonathan Brostoff is a member of the Wisconsin Assembly and has his official office in Room 420 North of the State Capitol, Madison, WI 53708. Representative Brostoff is sued in his official capacity.

4. As an “elective official”, Representative Brostoff is an “authority” under Wis. Stat. § 19.32(1).

5. This Court has jurisdiction under Wis. Stat. § 19.37(1)(a).

6. Venue is proper in Dane County pursuant to § 801.50(3)(a), as the sole defendant is a state officer and the Plaintiff designates Dane County as the venue.

7. On July 10, 2017, Mr. Roth wrote Representative Brostoff requesting “All emails sent to or from you and your legislative staff’s email accounts, whether government or personal, beginning on November 15, 2016 and continuing through the date you produce records in response to this request, containing any of the following terms: License, Licensing reform, Occupational licensing, Professional licensing, Wisconsin Institute, Flanders, Roth, Americans For Prosperity, AFP.” (Exhibit A.)

8. Mr. Roth’s request stated, “If these records are stored electronically, please provide them in that electronic format.”

9. On July 11, 2017, Mr. Roth received a letter from Representative Brostoff (sent via email) acknowledging that his office had received the open record request submitted on July 10, 2017. (Exhibit B.) The letter also stated the following, “These documents will be reproduced as paper copies and in accordance with 19.35(3) a fee may be required for the cost of these reproductions.”

10. On December 6, 2017, Rebecca Frank in Representative Brostoff’s office emailed Mr. Roth stating that they had completed the open records request and provided a cost estimate for producing the records. (Exhibit C.) That cost estimate, the vast majority of which is for printing electronic records, is below.

Including terms where “License” is a root word (licensed, licenses, etc), plus all other requested words.	Only documents with “License” as a standalone word, plus all other requested words.
\$276.81 for search time	\$270.59 for search time
\$2,962.95 for pages	\$1,538.25 for pages
\$3,239.76 total	\$1,808.84 total

11. On January 3, 2018, counsel for Mr. Roth wrote Representative Brostoff in response to the cost estimate provided by his staff on December 6, 2017. (Exhibit D.) In that letter counsel stated, “the records request asked specifically for the electronic records in their original format. Because the request specifically asked for the electronic records, they must be provided that way.” The letter also noted, “Providing electronic records in paper format does not comply with the Open Records Law.” Finally, the letter noted that record custodians may not charge fees for unnecessary printing.

12. Rebecca Frank from Representative Brostoff’s office emailed Mr. Roth’s counsel back the same day stating, “the Assembly Chief Clerk . . . has confirmed that law permits the documents to be provided in paper format, and that, per Assembly policy, they must be.” (Exhibit E.)

13. On February 2, 2018, Plaintiff’s counsel sent Representative Brostoff a final letter requesting that he fulfill his obligations under the open records law and produce electronic

records in the requested electronic format and not charge Plaintiff for printing records when no printing was necessary. (Exhibit F.)

14. In that letter, Plaintiff's counsel informed Defendant that the Dane County Circuit Court recently ruled against Defendant's colleague, Wisconsin State Representative Scott Krug, "and determined that Assembly Representatives are required to provide records in electronic format when requested." (*See* Dane County Case No. 16-CV-2189.)

15. Plaintiff's counsel's letter also attached a Wisconsin Attorney General opinion letter from 2011 noting that electronic records should be transferred on to some "electronic medium" to be provided to the requester, and concluding that charging "per page" for such records is inappropriate.

16. On February 5, 2018, Mr. Roth and his counsel received an email from Representative Brostoff, stating, "As directed by the Chief Clerk, I am again informing you that the Open Records Request you submitted has been printed and is ready for you to pick up." (Exhibit G.) The email contained the same cost estimates provided previously and was unresponsive to counsel's letter dated February 2, 2018, that stated the records must be provided in electronic format and without any charges for printing.

**FIRST CAUSE OF ACTION: Violation of Wis. Stat. § 19.35(1)(a)
Defendant Has Violated the Wisconsin Open Records Law
by Refusing to Provide Requested Records**

17. Plaintiff incorporates by reference all allegations set forth in the preceding Paragraphs.

18. 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 and the official acts of government officers and employees. Wis. Stat. § 19.31 thus provides that the

Open Records law “shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business,” and further, that “[t]he denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.”

19. The Open Records Law provides that a requester has the right to inspect any record except as otherwise provided by law. Wis. Stat. § 19.35(1)(a).

20. A “record” is defined 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 is being kept by an authority.” Wis. Stat. § 19.32(2). Under this definition, an electronic file on a government computer is a “record.”

21. The electronic files requested by Plaintiff on July 10, 2017, were “records” subject to disclosure under the Open Records Law.

22. Defendant has violated the Open Records Law by denying Plaintiff’s July 10, 2017, request for electronic files, without a valid basis for denial.

23. Defendant’s denial is arbitrary and capricious, as he was informed that this Court had already ruled that state representatives must provide electronic records in electronic format, yet he continued to deny the Plaintiff’s request.

24. Defendant’s actions have caused and will continue to cause injury to the Plaintiff by depriving him and the public of their rights under the Open Records Law.

**SECOND CAUSE OF ACTION: Violation of Wis. Stat. § 19.35(3)(a)
Defendant Has Violated the Wisconsin Open Records Law by Charging Improper Fees**

25. Under Wis. Stat. § 19.35(3)(a), record custodians are permitted to “impose a fee upon the requester of a copy of a record which may not exceed the actual, *necessary* and direct cost of reproduction” (emphasis added).

26. Printing the emails in this case is not necessary because the emails can be provided in electronic format.

27. Because the cost associated with printing the emails is not necessary, Defendant may not charge Plaintiff for that cost, as Defendant seeks to do.

28. Defendant has violated the Open Records Law by charging unauthorized, excessive fees for Plaintiff's July 10, 2017 request for electronic records.

29. Defendant's actions have caused and will continue to cause injury to the Plaintiff by depriving him and the public of their rights under the Open Records Law.

RELIEF REQUESTED

WHEREFORE, Plaintiff requests that the Court grant the following relief:

1. A finding that Defendant violated Wisconsin's Open Records Law, Wis. Stat. §§ 19.31 *et seq.*
2. An order directing Defendant to produce to the Plaintiff the requested records in electronic format without further delay, Wis. Stat. § 19.37(1)(a);
3. An order stating that Defendant is only entitled to payment of fees related to search time for the electronic records, Wis. Stat. § 19.35(3)(c), and the "actual, necessary and direct cost of reproduction and transcription of the record", Wis. Stat. § 19.35(3)(a), to include electronic reproduction on digital media but not to include printing costs;
4. An award to Plaintiff for his reasonable attorneys' fees, damages of not less than \$100, and Plaintiff's other actual costs under Wis. Stat. § 19.37(2);
5. An award to Plaintiff of punitive damages if the Court finds the Defendant arbitrarily and capriciously denied Plaintiff's request or charged him excessive fees under Wis. Stat. § 19.37(3); and

6. Such other relief as the Court deems just and equitable.

Dated this 15th day of February, 2018.

Respectfully submitted,
WISCONSIN INSTITUTE FOR LAW & LIBERTY
Attorneys for Plaintiff

Electronically signed by Thomas C. Kamenick

Thomas C. Kamenick, WBN 1063682

(414) 727-6368; tom@will-law.org

Clyde A. Taylor, WBN 1103207

(414)-727-7414; clyde@will-law.org

Richard M. Esenberg, WBN 1005622

(414) 727-6367; rick@will-law.org

1139 E. Knapp St.

Milwaukee, WI 53202

414-727-9455; FAX: 414-727-6385



WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC.
1139 E. Knapp Street, Milwaukee, WI 53202-2828
414-727-WILL
Fax 414-727-6385
www.will-law.org

Representative Jonathan Brostoff
Room 3 North
State Capitol
P.O. Box 8952
Madison, WI 53708

July 10, 2017

Re: Open Records Request

Dear Representative Brostoff

This letter is a request for the following records, made under Wisconsin's Open Records Law, Wis. Stats. §§19.31-19.39:

- All emails sent to or from you and your legislative staff's email accounts, whether government or personal, beginning on November 15, 2016 and continuing through the date you produce records in response to this request, containing any of the following terms:
 - License
 - Licensing reform
 - Occupational licensing
 - Professional licensing
 - Wisconsin Institute
 - Flanders
 - Roth
 - Americans For Prosperity
 - AFP

Please be aware that the Open Records Law defines "record" to include information that is maintained on paper as well as electronically, such as data files and unprinted emails. Wis. Stat. §19.32(2).

If these records are stored electronically, please provide them in that electronic format via email to collin@will-law.org. Otherwise, they may be mailed to the address above.

Please also be aware that the Open Records Law "shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business.

The denial of access generally is contrary to the public interest, and only in an exceptional case may access be denied.” Wis. Stat. § 19.32(1). If you deny my request, the law requires you to do so in writing and state what part of the law you believe entitles you to deny my request. Wis. Stat. §19.35(4)(a).

The Open Records Law states that you may charge for "the actual, necessary and direct cost" of locating records, if this exceeds \$50, for photocopies, and for postage. Wis. Stat. §19.35(3). Please advise me before processing this request if the total cost will exceed \$50.

As you know, the law requires you to respond to this request “as soon as practicable and without delay.” Wis. Stat. §19.35(4)(a).

If you are not the records custodian for this information, please forward this request to the appropriate person.

Also, please contact me if I can help clarify or refine this request.

Sincerely,

Collin Roth

EXHIBIT B

From: [Rep. Brostoff](#)
To: [Collin Roth](#)
Cc: [CJ Szafir](#)
Subject: RE: Open Records Request - July 7, 2017
Date: Tuesday, July 11, 2017 1:44:00 PM
Attachments: [image003.jpg](#)
[Brostoff ORR.DOCX](#)

July 11, 2017

Collin Roth
Wisconsin Institute for Law and Liberty, Inc.
1139 E. Knapp Street
Milwaukee, WI 53202

Mr. Roth,

This letter is to acknowledge that my office has received the open record request you submitted via email which is dated July 10, 2017.

As the custodian of these records, I write to confirm that it is the intent of my office to comply with this request. My staff has initiated a review for records that respond to your request pertaining to:

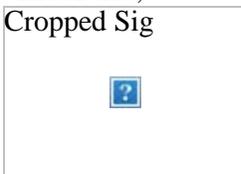
- All emails sent to or from you and your legislative staff's email accounts, whether government or personal, beginning on November 15, 2016, containing any of the following terms: License, Licensing reform, Occupational licensing, Professional licensing, Wisconsin Institute, Flanders, Roth, Americans For Prosperity, and AFP.

My office will work to comply with the request in accordance with Wisconsin Open Records law, Wis. Stat. 19.31 through 19.39. Due to the potentially large number of documents this request will yield there could be a significant amount of time associated with fulfilling this request. Nonetheless, my office will work to fulfill it as soon as practicable and without delay.

These documents will be reproduced as paper copies and in accordance with 19.35(3) a fee may be required for the cost of these reproductions. As requested, my office will make you aware of the costs associated with this request through the Assembly Chief Clerk as we work to fulfill it.

Thank you for your interest in this matter.

In service,
Cropped Sig



Jonathan Brostoff
State Representative
19th Assembly District

Like me on [Facebook](#)
Follow me on [Twitter](#)

From: Collin Roth [mailto:collin@will-law.org]
Sent: Monday, July 10, 2017 4:19 PM
To: Rep.Brostoff <Rep.Brostoff@legis.wisconsin.gov>
Cc: CJ Szafir <cj@will-law.org>
Subject: RE: Open Records Request - July 7, 2017

Ok. Please make the end date July 10, 2017.

Thanks.

-Collin Roth

From: Rep.Brostoff [mailto:Rep.Brostoff@legis.wisconsin.gov]
Sent: Monday, July 10, 2017 4:21 PM
To: Collin Roth <collin@will-law.org>
Cc: CJ Szafir <cj@will-law.org>
Subject: RE: Open Records Request - July 7, 2017

Good afternoon,

I have discussed your request with the Assembly Chief Clerk who has advised me that there cannot be an open ended date, nor can there be a future date, on the Open Records Request. Please let me know a specific end date, today being the last possible due to it being the date the request was received, for the request so that I may begin compiling the records.

Thank you,
Rebecca Frank

Office of Representative Brostoff
AD 19 | 608.266.0650
Like on [Facebook](#), Follow on [Twitter](#)

From: Collin Roth [mailto:collin@will-law.org]
Sent: Monday, July 10, 2017 3:33 PM
To: Rep.Brostoff <Rep.Brostoff@legis.wisconsin.gov>
Cc: CJ Szafir <cj@will-law.org>
Subject: Open Records Request - July 7, 2017

Rep. Brostoff,

Attached is an open records request. Please call or email with any questions or clarifications. I look forward to your timely response.

-Collin Roth

Collin Roth

Research Fellow

Wisconsin Institute for Law & Liberty (WILL)

Bloodgood House

1139 East Knapp Street

Milwaukee, WI 53202

collin@will-law.org

OFFICE: 414-727-WILL (9455)

CELL: 414-607-2558

EXHIBIT C

From: [Rep.Brostoff](#)
To: [Collin Roth](#)
Cc: [CJ Szafir](#); [Tom](#)
Subject: RE: Open Records Request - July 7, 2017
Date: Wednesday, December 06, 2017 11:53:40 AM
Attachments: [image001.jpg](#)

Good afternoon,

We have completed the open records request. The cost estimates are listed below.

Including terms where “License” is a root word (licensed, licenses, etc), plus all other requested words.	Only documents with “License” as a standalone word, plus all other requested words.
\$276.81 for search time \$2,962.95 for pages \$3,239.76 total	\$270.59 for search time \$1,538.25 for pages \$1,808.84 total

Please let me know which you would like fulfilled.

Thank you,
Rebecca Frank

Office of Representative Brostoff
AD 19 | 608.266.0650
Like on [Facebook](#), Follow on [Twitter](#)

From: Rep.Brostoff
Sent: Thursday, August 03, 2017 2:05 PM
To: Collin Roth <collin@will-law.org>
Cc: CJ Szafir <cj@will-law.org>; Tom <Tom@will-law.org>
Subject: RE: Open Records Request - July 7, 2017

Good morning,

We are working on getting you the cost estimates. There are also the words licenses and licensees to consider. Licensed, licenses, and licensees all have the root word license and so will take longer to weed out if you do not want them but will add more pages if you do. I will let you know when we have the two estimates – including just the root word and including words containing the root word. Please let me know if you have any questions.

What I can tell you so far is that each page will cost \$.15 and double sided pages count as two. The hourly rate is applied only for the time it takes to search for the records, not for compiling or other work related to it. The Assembly Chief Clerk’s office does not charge until it goes over an hour. Unfortunately, this request will.

Each intern account is taking about 30 minutes. There are eight intern accounts that are being searched. The other email boxes to be searched include the general Rep.Brostoff email, the Representative’s direct email and personal email account, and two staff accounts.

The hourly is billed at different rates depending on who the person fulfilling the request is. Intern hours are billed at \$10.66 per hour while staff and the representative’s hours are billed at what their hourly rate is. Four of the intern accounts will be done by interns. The other four intern accounts may all be done by staff or assigned to other interns as the interns have left the office.

Thank you,
Rebecca Frank

Office of Representative Brostoff
AD 19 | 608.266.0650
Like on [Facebook](#), Follow on [Twitter](#)

From: Collin Roth [<mailto:collin@will-law.org>]
Sent: Friday, July 28, 2017 1:38 PM
To: Rep.Brostoff <Rep.Brostoff@legis.wisconsin.gov>
Cc: CJ Szafir <cj@will-law.org>; Tom <Tom@will-law.org>
Subject: RE: Open Records Request - July 7, 2017

Thanks for the call and email. I'm still a little confused since this email suggests both outcomes will result in "drastic" increases to the cost of the records request. I understood from your call that doing "licensed" would be in "the spirit" of the request – but it is unclear to me what the cost implications of either request is.

Can you give me any idea what that estimate might look like for either request?

Thank you for your time and consideration.

-Collin Roth

From: Rep.Brostoff [<mailto:Rep.Brostoff@legis.wisconsin.gov>]
Sent: Thursday, July 27, 2017 10:20 AM
To: Rep.Brostoff <Rep.Brostoff@legis.wisconsin.gov>; Collin Roth <collin@will-law.org>
Cc: CJ Szafir <cj@will-law.org>
Subject: RE: Open Records Request - July 7, 2017

Good morning,

I am emailing with a clarifying question regarding your Open Records Request. Would you also like to include the term "licensed?"

I have been advised to inform you that not including this word would drastically increase the amount of billable time being clocked for the fulfillment of the request as we cannot then simply search for the term "license" and print the results. On the other hand, including "licensed" will drastically increase the number of documents printed, which also is billable, most of which are not relevant to, what I assume, your intent with the request is. There may be relevant ones mixed in, however.

Please let me know if you would like to include the word "licensed."

Thank you,
Rebecca Frank

Office of Representative Brostoff
AD 19 | 608.266.0650
Like on [Facebook](#), Follow on [Twitter](#)

From: Rep.Brostoff
Sent: Tuesday, July 11, 2017 1:50 PM
To: Collin Roth <collin@will-law.org>
Cc: CJ Szafir <cj@will-law.org>
Subject: RE: Open Records Request - July 7, 2017

July 11, 2017

Collin Roth
Wisconsin Institute for Law and Liberty, Inc.
1139 E. Knapp Street
Milwaukee, WI 53202

Mr. Roth,

This letter is to acknowledge that my office has received the open record request you submitted via email which is dated July 10, 2017.

As the custodian of these records, I write to confirm that it is the intent of my office to comply with this request. My staff has initiated a review for records that respond to your request pertaining to:

- All emails sent to or from you and your legislative staff's email accounts, whether government or personal, beginning on November 15, 2016, containing any of the following terms: License, Licensing reform, Occupational licensing, Professional licensing, Wisconsin Institute, Flanders, Roth, Americans For Prosperity, and AFP.

My office will work to comply with the request in accordance with Wisconsin Open Records law, Wis. Stat. 19.31 through 19.39. Due to the potentially large number of documents this request will yield there could be a significant amount of time associated with fulfilling this request. Nonetheless, my office will work to fulfill it as soon as practicable and without delay.

These documents will be reproduced as paper copies and in accordance with 19.35(3) a fee may be required for the cost of these reproductions. As requested, my office will make you aware of the costs associated with this request through the Assembly Chief Clerk as we work to fulfill it.

Thank you for your interest in this matter.

In service,
Cropped Sig



Jonathan Brostoff
State Representative
19th Assembly District

Like me on [Facebook](#)

Follow me on [Twitter](#)

From: Collin Roth [<mailto:collin@will-law.org>]
Sent: Monday, July 10, 2017 4:19 PM
To: Rep.Brostoff <Rep.Brostoff@legis.wisconsin.gov>
Cc: CJ Szafir <cj@will-law.org>
Subject: RE: Open Records Request - July 7, 2017

Ok. Please make the end date July 10, 2017.

Thanks.

-Collin Roth

From: Rep.Brostoff [<mailto:Rep.Brostoff@legis.wisconsin.gov>]
Sent: Monday, July 10, 2017 4:21 PM
To: Collin Roth <collin@will-law.org>
Cc: CJ Szafir <cj@will-law.org>
Subject: RE: Open Records Request - July 7, 2017

Good afternoon,

I have discussed your request with the Assembly Chief Clerk who has advised me that there cannot be an open ended date, nor can there be a future date, on the Open Records Request. Please let me know a specific end date, today being the last possible due to it being the date the request was received, for the request so that I may begin compiling the records.

Thank you,
Rebecca Frank

Office of Representative Brostoff
AD 19 | 608.266.0650
Like on [Facebook](#), Follow on [Twitter](#)

From: Collin Roth [<mailto:collin@will-law.org>]
Sent: Monday, July 10, 2017 3:33 PM
To: Rep.Brostoff <Rep.Brostoff@legis.wisconsin.gov>
Cc: CJ Szafir <cj@will-law.org>
Subject: Open Records Request - July 7, 2017

Rep. Brostoff,

Attached is an open records request. Please call or email with any questions or clarifications. I look forward to your timely response.

-Collin Roth

Collin Roth

Research Fellow

Wisconsin Institute for Law & Liberty (WILL)

Bloodgood House

1139 East Knapp Street

Milwaukee, WI 53202

collin@will-law.org

OFFICE: 414-727-WILL (9455)

CELL: 414-607-2558



WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC.
1139 E. Knapp Street, Milwaukee, WI 53202-2828
414-727-WILL
Fax 414-727-6385
www.will-law.org

Representative Jonathan Brostoff
Wisconsin Assembly
608.266.0650
Rep.Brostoff@legis.wisconsin.gov
VIA EMAIL

January 3, 2018

RE: Collin Roth Open Records Request

I am writing on behalf of Collin Roth, who in July made a record request to you under Wisconsin's Open Records Law, Wis. Stat. §§ 19.31-19.39, for certain emails. You have responded with a cost estimate asking for prepayment of either \$3,239.76 or \$1,808.84, depending on exactly which search term we would like to use. The majority of the cost under each estimate appears to be for printing paper copies of the requested records.

However, the records request asked specifically for the electronic records in their original format: "If these records are stored electronically, please provide them in that electronic format via email to collin@will-law.org." Because the request specifically asked for the electronic records, they must be provided that way.

1) Record Custodians Must Provide Files in their Native Format, if Requested

Providing electronic records in paper format does not comply with the Open Records Law. The Open Records Law does not permit a custodian to create a new and substantively-different record in response to a request.

A "record" is defined 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 is being kept by an authority." Wis. Stat. § 19.32(2).

Under this definition, an electronic file (or to be extremely precise, the magnetic or solid-state storage device on which the file is located) on a government computer is a "record." It is material on which electromagnetic information is recorded and preserved, being kept by an authority. Regardless of the type of file, it is a record. *See* Wis. DOJ 2012 Open Records Compliance Guide, 53 ("Examples of electronic records . . . include word processing documents, database files, email correspondence, web-based information, PowerPoint presentations, and

audio and video recordings”) (available at www.doj.state.wi.us/sites/default/files/dls/2015-PRL-Guide.pdf).

Any person “has a right to inspect a record and to make or receive a copy of a record.” Wis. Stat. § 19.35(1)(b). This creates two distinct rights. A record requester has the right to inspect a particular file – for example, an email file – by appearing at the government office. *See* Wis. Stat. § 19.45(2)(a) (establishing protocols for inspecting the records of government authorities with regular business hours). A record requester also has the right to receive a copy of that same email file. Not a paper document with some of the same information, but an identical copy of that file with all the same information in it. “If a ‘copy’ differs in some significant way for purposes of responding to an open records request, then it is not truly an identical copy, but instead a different record.” *Stone v. Bd. of Regents of the Univ. of Wis.*, 2007 WI App 223, ¶18, 305 Wis. 2d 679, 741 N.W.2d 774. Such distinct records must be disclosed. *Id.*

A paper printout of an email file does not contain the same information as the original file; it differs in a significant manner from the original. A printed document lacks substantial amounts of information, sometimes referred to as “metadata,” from the original file, including but not limited to:

- The author or creator of the file
- The date the file was created
- Hidden header information, including blind carbon copy (bcc) recipients
- The server and folder location where the file was located

See generally Thomas J. Watson, *Avoiding the Dangers of Metadata*, Wisconsin Lawyer, June 2008 (describing some of the types of metadata listed above). Metadata is part of the “electromagnetic information” maintained by an authority, and therefore meets the statutory definition of a record.¹

Converting an email file into a paper document will erase all of that information. In no sense can a paper document be considered an identical copy of an email file. It is analogous to providing a transcript of an audio or video recording when the recording itself is requested, which is not permitted. *See* Wis. Stat. § 19.35(1)(c) (permitting a transcript only if the requester so requests).

This request is comparable to the request in *State ex rel. Milwaukee Police Ass’n v. Jones*, 2000 WI App 146, 237 Wis. 2d 840, 615 N.W.2d 190. In that case, the plaintiff first requested a copy of a 911 call “in its original [form—]unaltered, unmodified and otherwise uncensored in any fashion.” *Id.*, ¶3. The police chief provided an analog copy of the call. *Id.*, ¶4. In response, the plaintiff made an enhanced request specifically for the original digital recording of the call, and the chief refused. *Id.*, ¶¶4-5. The court of appeals held that the analog copy was *insufficient* to satisfy the enhanced request, because § 19.36(4) requires custodians provide access to or copies of “material produced as a product of the computer program.” *Id.*, ¶¶16-18. Notably, the court held specifically that it was immaterial that the analog recording was “substantially as audible”

¹ The Compliance Guide indicates no precedential Wisconsin court opinion exists on this issue, but notes that courts in other jurisdictions have come to the conclusion that “metadata is part of electronic records and must be disclosed.” Wis. DOJ 2015 Open Records Compliance Guide, 55.

as the original. *Id.*, ¶13. Like the request for a digital recording file that could not be satisfied by an analog recording, Mr. Roth's request for the original email files cannot be satisfied by a printout.

Mr. Roth has the right to obtain a copy of the email records he has requested in the same native file format in which those emails are kept on government computers.

2) Record Custodians May Not Charge Fees for Unnecessary Printing

Mr. Roth is willing to accept paper copies of the emails he requested as a compromise position, but you are not permitted to charge him the cost of printing the emails.

Under Wis. Stat. § 19.35(3)(a), you are permitted to “impose a fee upon the requester of a copy of a record which may not exceed the actual, *necessary* and direct cost of reproduction” (emphasis added). Printing the emails is not necessary (as noted above, it is not even permissible unless the requester consents) because the emails can be provided in electronic format. Because the cost associated with printing the emails is not necessary, you may not charge Mr. Roth for that cost.

Conclusion

I remind you that the law provides Mr. Roth with the legal right to file a lawsuit in order to compel compliance with the Open Records Law. Wis. Stat. § 19.37(1). As a state officer, you may be sued in any county in the state. Wis. Stat. § 801.50(3)(a). If successful, plaintiffs can recover costs and reasonable attorney fees. Wis. Stat. § 19.37(2).

Please provide a revised estimate including only the search time and allowable necessary costs for reproduction of electronic files, *e.g.*, the cost of a CD if there are too many files to email.

I look forward to hearing back from you.

Sincerely,

Tom Kamenick
Deputy Counsel, Wisconsin Institute for Law & Liberty
(414) 727-6368
tom@will-law.org

EXHIBIT E

From: [Rep.Brostoff](#)
To: [Tom](#)
Subject: RE: Letter re: Collin Roth record request
Date: Wednesday, January 03, 2018 4:01:35 PM

Good afternoon,

I have discussed this matter with the Assembly Chief Clerk, and he has confirmed that law permits the documents to be provided in paper format, and that, per Assembly policy, they must be. The Assembly does not provide digital records, and it is not required to do so. Regarding the cost of \$.15 per page, that is the actual cost. If you have concerns with the records costing too much, you are able to sit in the Assembly Chief Clerk's office and view them there.

Please let me know if you would like the records submitted and, if so, which set.

Thank you,
Rebecca Frank

Office of Representative Brostoff
AD 19 | 608.266.0650
Like on [Facebook](#), Follow on [Twitter](#)

From: Tom [mailto:Tom@will-law.org]
Sent: Wednesday, January 03, 2018 2:28 PM
To: Rep.Brostoff <Rep.Brostoff@legis.wisconsin.gov>
Subject: Letter re: Collin Roth record request

Representative Brostoff,

Attached, please find a letter regarding Collin Roth's record request. I look forward to hearing back from you.

Tom

Thomas C. Kamenick
Deputy Counsel & Litigation Manager
Wisconsin Institute for Law & Liberty
1139 E. Knapp St.
Milwaukee, WI 53202
(414) 727-WILL
(414) 727-6368 (direct)
(414) 727-6385 (fax)

Visit us on [Facebook](#), our [Website](#), or [Twitter](#)

CONFIDENTIALITY NOTICE: The information contained in this e-mail and attached document(s) may contain confidential information that is intended only for the addressee(s). If you are not the intended recipient, you are hereby advised that any disclosure, copying, distribution or taking of any action in reliance upon the information is prohibited. If you have received this e-mail in error, please immediately notify the sender and delete it from your system.



WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC.
1139 E. Knapp Street, Milwaukee, WI 53202-2828
414-727-WILL
Fax 414-727-6385
www.will-law.org

Representative Jonathan Brostoff
Wisconsin Assembly
608.266.0650
Rep.Brostoff@legis.wisconsin.gov
VIA EMAIL

February 2, 2018

RE: Collin Roth Open Records Request

I am writing to give you one last chance to fulfill your obligations under the open records law. You have repeatedly refused to produce electronic records in the requested electronic format, and are attempting to charge my client for printing out records when no printing was necessary.

As I hope you are aware, the Dane County Circuit Court recently ruled against your colleague Scott Krug and determined that Assembly Representatives **are required** to provide records in electronic format when requested. Mr. Roth insists on the format the requested emails are stored in so that he may access the metadata contained in those files and use more efficient electronic means of searching, storing, and organizing those responsive emails.

I am attaching a copy of the court's opinion for your review. I am also attaching an Attorney General opinion letter from 2011 noting that electronic records should be transferred on to some "electronic medium" to be provided to the requester, and also concluding that charging "per page" for such records is inappropriate.

If you do not provide the records in the same electronic format as they are stored and reduce your fee to reflect merely the necessary costs for providing the records via email or on electronic storage such as a CD, DVD, or flash drive, we will file suit against you for violating the Open Records Law. We will also seek punitive damages against you. While the court declined to impose them on Representative Krug, that is because he did not know he was required to provide electronic records. You no longer have that excuse; you cannot ignore the court's ruling.

We hope to see the requested records and a revised invoice shortly.

Sincerely,

A handwritten signature in black ink, appearing to read "Tom Kamenick", is written over a light blue horizontal line.

Tom Kamenick

Deputy Counsel, Wisconsin Institute for Law & Liberty
(414) 727-6368
tom@will-law.org

EXHIBIT G

From: [Rep.Brostoff](#)
To: [Tom](#)
Cc: [Collin Roth](#)
Subject: RE: Final Letter re: Collin Roth record request
Date: Monday, February 05, 2018 2:48:20 PM

Good afternoon,

As directed by the Chief Clerk, I am again informing you that the Open Records Request you submitted has been printed and is ready for you to pick up.

You are not required to take the whole stack, and will only be charged for the pages you do select. If you choose to take all of the pages, the estimated prices are as listed below.

Including terms where “License” is a root word (licensed, licenses, etc.), plus all other requested words.	Only documents with “License” as a standalone word, plus all other requested words.
\$276.81 for search time \$2,962.95 for pages \$3,239.76 total	\$270.59 for search time \$1,538.25 for pages \$1,808.84 total

Please let me know which fulfillment you would like sent to the Chief Clerk’s office.

Thank you,
Rebecca Frank

Office of Representative Brostoff
AD 19 | 608.266.0650
Like on [Facebook](#), Follow on [Twitter](#)

From: Tom [mailto:Tom@will-law.org]
Sent: Friday, February 02, 2018 11:40 AM
To: Rep.Brostoff <Rep.Brostoff@legis.wisconsin.gov>
Subject: Final Letter re: Collin Roth record request

[Representative Brostoff](#),

Attached, please find a final letter regarding Collin Roth’s record request and two supporting documents.

Please feel free to give me a call if you have any questions.

Thomas C. Kamenick
Deputy Counsel & Litigation Manager
Wisconsin Institute for Law & Liberty
1139 E. Knapp St.
Milwaukee, WI 53202
(414) 727-WILL
(414) 727-6368 (direct)
(414) 727-6385 (fax)

Visit us on [Facebook](#), our [Website](#), or [Twitter](#)

CONFIDENTIALITY NOTICE: The information contained in this e-mail and attached document(s) may contain confidential information that is intended only for the addressee(s). If you are not the intended recipient, you are hereby advised that any disclosure, copying, distribution or taking of any action in reliance upon the information is prohibited. If you have received this e-mail in error, please immediately notify the sender and delete it from your system.