

STATE OF WISCONSIN : CIRCUIT COURT : DANE COUNTY

KATHLEEN METER LOUNSBURY
a/k/a KATY LOUNSBURY
6502 Grand Teton Plaza, Ste. 202
Madison, WI 53719

THE PROGRESSIVE, INC.
409 E. Main St.
Madison, WI 53703

and

JUD LOUNSBURY
c/o THE PROGRESSIVE
409 E. Main St.
Madison, WI 53703,

Plaintiffs,

-vs.-

WISCONSIN DEPARTMENT OF ADMINISTRATION,
NATHAN E. SCHWANZ, MICHAEL G. HEIFETZ,
PATRICIA REARDON a/k/a PATTI REARDON,
SCOTT WALKER, and SCOTT NEITZEL,
101 E. Wilson St.
Madison, WI 53703,

Defendants.

FILED

MAY 27 2015

DANE COUNTY CIRCUIT COURT

Case No.: 15CV1367

Case Classification: OTHER
EXTRAORDINARY WRIT 30954

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ORIGINAL DOCUMENT FILED WITH THE DANE
COUNTY CLERK OF CIRCUIT COURT.

CARLO ESQUEDA
CLERK OF CIRCUIT COURT

SUMMONS

THE STATE OF WISCONSIN, To each person named as a Defendant:

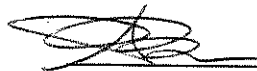
You are hereby notified that the Plaintiffs named above have filed a lawsuit or other legal action against you. The Complaint, which is attached, states the nature and basis of the legal action.

Within forty-five (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 215 S. Hamilton St., Room 1000, Madison, Wisconsin, 53703, and to April Rockstead Barker, attorney for the Plaintiffs, whose address is 16655 West Bluemound Road, Suite 270, Brookfield, Wisconsin, 53005. You may have an attorney help or represent you.

If you do not provide a proper answer within forty-five (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 27th day of May, 2015.

Respectfully submitted,



April Rockstead Barker
State Bar #: 1026163
abarker@sbe-law.com
Attorneys for Plaintiffs
SCHOTT, BUBLITZ & ENGEL s.c.
16655 W. Bluemound Road, Suite #270
Brookfield, WI 53005
(262) 827-1700
(262) 827-1701-Fax

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COMPLAINT – PUBLIC RECORDS

This is an action to enforce Wisconsin's Public Records Law, Wis. Stats. §§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.

Plaintiffs, KATHLEEN METER LOUNSBURY a/k/a KATY LOUNSBURY, THE PROGRESSIVE, INC., and JUD LOUNSBURY, by their attorneys, Schott, Bublitz & Engel s.c., as and for their claims under Wis. Stats. §19.37, allege that:

FACTUAL ALLEGATIONS

1. Plaintiff KATHLEEN METER LOUNSBURY a/k/a KATY LOUNSBURY ("KATY LOUNSBURY") is an adult resident of the State of Wisconsin and an attorney licensed in the State of Wisconsin whose principal business address is 6502 Grand Teton Plaza, Ste. 202, Madison, Wisconsin, 53719.

2. Plaintiff THE PROGRESSIVE, INC. (referenced hereafter as "THE PROGRESSIVE") is a media corporation organized and existing under the laws of the State of Wisconsin with its principal place of business at 409 E. Main Street, Madison, Wisconsin, 53703. THE PROGRESSIVE publishes a political magazine based out of Madison, Wisconsin.

3. Plaintiff JUD LOUNSBURY is an adult resident of the State of Wisconsin and a reporter and columnist for THE PROGRESSIVE.

4. Defendant WISCONSIN DEPARTMENT OF ADMINISTRATION is a public agency of the State of Wisconsin, with its principal offices at 101 E. Wilson Street, Madison, Wisconsin, and is an "authority" as that term is defined in Wis. Stats. §19.32(1) and used in the Public Records Law.

5. Defendants NATHAN E. SCHWANZ, MICHAEL G. HEIFETZ, PATRICIA REARDON a/k/a PATTI REARDON ("PATTI REARDON"), SCOTT WALKER, and SCOTT NEITZEL are officials, employees or other authorized legal representatives of the WISCONSIN DEPARTMENT OF ADMINISTRATION and upon information and belief are

or have acted as "legal custodians" of one or more of the records at issue in this action under Wis. Stats. §19.33 and as that term is used in the Public Records Law.

BACKGROUND AND RECORDS REQUEST

6. On or about February 6, 2015, Plaintiff KATY LOUNSBURY requested in writing, via electronic mail, that the WISCONSIN DEPARTMENT OF ADMINISTRATION, NATHAN E. SCHWANZ and MICHAEL G. HEIFETZ produce for inspection the following records:

. . . all records, which either of you sent, received, or created anytime between October 1, 2014 and February 3, 2015, and which have anything to do with the language contained in sec. 36.01 of the Wisconsin Statutes, including any discussions or proposals regarding whether that language should be changed.

This request includes but is not limited to:

- Emails from both official and personal accounts
- Handwritten notes
- Word documents
- Text messages
- Voicemail messages
- Social media exchanges

Plaintiff KATY LOUNSBURY submitted the records request after consultation with JUD LOUNSBURY and in an attempt to obtain records that JUD LOUNSBURY could review and analyze for prospective commentary for THE PROGRESSIVE. A true and correct copy of the written request appears in the document attached hereto as Exhibit 1.

7. Between February 6, 2015, and May 8, 2015, Plaintiff KATY LOUNSBURY corresponded by e-mail with the WISCONSIN DEPARTMENT OF ADMINISTRATION to request updates concerning the status of the response to her request. The Wisconsin Public Records Law declares that providing the public with information about the activities of government is an "essential function of a representative government and an integral

part of the routine duties of officers and employees whose responsibility it is to provide such information.” Wis. Stats. §19.31. Contrary to the letter and spirit of this declaration of policy, the WISCONSIN DEPARTMENT OF ADMINISTRATION, by PATTI REARDON, Program and Policy Analyst, described to Plaintiff KATY LOUNSBURY the WISCONSIN DEPARTMENT OF ADMINISTRATION's approach to timeliness in fulfilling records requests as follows:

. . . the time it takes to respond to each request will vary depending on the nature of the request, staff available to locate and prepare the particular records, the volume of other pending requests, etc. It is not possible, nor are we required, to impose a deadline by which we must provide you with the requested records.

At the time of the communication to Plaintiff KATY LOUNSBURY that included the above statements, it had been nearly two months since Plaintiff KATY LOUNSBURY submitted the request.

8. On or about May 8, 2015, more than 90 days after Plaintiff KATY LOUNSBURY sent the records request, the WISCONSIN DEPARTMENT OF ADMINISTRATION, by and through its Chief Legal Counsel and on letterhead bearing the names of Defendants SCOTT WALKER and SCOTT NEITZEL, denied Plaintiff's request with respect to certain records. Among other things, the WISCONSIN DEPARTMENT OF ADMINISTRATION, on its behalf and on behalf of the individually-named Defendants, asserted that:

. . . some of the materials that we are withholding consist of preliminary analysis and deliberations created and exchanged by and among DOA and Governor's office employees in preparation of the Governor's budget, before the budget legislation was introduced in the legislature. By law, the Governor is responsible for the state's biennial budget, and the Department of Administration is mandated to prepare the budget under the direction of the Governor. . . . A candid, complete, and creative evaluation of the state's finances within DOA and within the Governor's office is inherent to

the development of the Governor's executive budget. Making these internal discussions just as open to disclosure as the final version of the budget would inhibit the free exchange of ideas, opinions, proposals, and recommendations among those involved in deciding what to include in the final legislation. Disclosure of this narrow category of records – limited to discussions within DOA, within the Governor's office, and between the two – would discourage frank internal discussion and harm the quality of the final executive decision. Further, it would disincentivize the free exchange of emails and written documentation necessary to hone the precise language and calculations that are key to proper budget development. Without a doubt, this would significantly inhibit the efficiency and efficacy of the employees who develop the detailed language and financial calculations for the budget. In addition, disclosure would risk public confusion as a result of publishing non-final proposals, which may not ultimately have been adopted.

The WISCONSIN DEPARTMENT OF ADMINISTRATION further claimed in its response letter that public policy recognized by the federal Freedom of Information Act supports state officials' denial of public access to their communications about state budget legislation. It also claimed that the public's "limited" interest in records relating to state budget legislation essentially includes only a budget as ultimately passed and whatever press releases officials choose to release to explain and justify a budget after the fact. A true and correct copy of the substance of the response letter denying access to certain records is attached hereto as Exhibit 2.

9. The WISCONSIN DEPARTMENT OF ADMINISTRATION also, upon information and belief, withheld documents as "notes" or "drafts" based on an interpretation of Wis. Stats. §19.32 that is contrary to the definition of "record" and failed and refused to provide access to copies of e-mail messages and other messages responsive to Plaintiffs' request.

10. To date, the WISCONSIN DEPARTMENT OF ADMINISTRATION has not provided Plaintiffs with access to the records that it withheld for the alleged reasons described above.

CLAIMS

11. Plaintiffs reallege and reincorporate herein the allegations of paragraphs 1 through 10, above.

12. Under Wis. Stats. §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. Section 19.31, Wis. Stats., affirms the presumption of complete public access to governmental records, consistent with the conduct of governmental business. 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.” This is not an exceptional case.

13. Defendants have violated the Public Records Law and Wis. Stats. §19.37(1) by withholding and denying access in response to Plaintiffs’ records requests. Defendants’ reasons, as stated, for withholding the records violate the law because, among other things, (1) Defendants improperly rely upon public policy rationales as “blanket exceptions” to disclosure, and failed to conduct a record-by-record review, as required; (2) Defendants purport to apply the results of an alleged public policy balancing analysis that neither considers nor determines whether the facts present an “exceptional case” against disclosure; and (3) Defendants rely upon rationales that, on their face, do not provide a basis for nondisclosure of the records under Wisconsin law. To the contrary, the rationales asserted by Defendants are patently inconsistent with the letter

and spirit of Wisconsin's Public Records Law, the Wisconsin Constitution, and Wisconsin's common law. It is manifestly apparent from the Defendants' denial letter that the records that the Defendants withheld are quintessentially the kinds of records that the Public Records law requires be made available to the public and the press in response to records requests. Put simply, Defendants' rationales turn on their heads basic and fundamental principles of open and Democratic government.

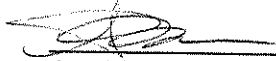
14. Defendants' actions have caused and will continue to cause injury to the Plaintiffs in that they deprive them and the rest of the public of their rights under the Public Records Law.

RELIEF REQUESTED

WHEREFORE, the Plaintiffs demand a judgment of mandamus against the Defendants pursuant to Wis. Stats. §19.37(1):

1. Compelling the Defendants to permit the Plaintiffs forthwith to inspect and copy the requested records;
2. Declaring the Plaintiffs' rights and limiting the Defendants' conduct with respect to the requested records;
3. Awarding Plaintiffs their reasonable attorneys' fees under Wis. Stats. §19.37(2);
4. Awarding punitive damages as a result of the Defendants' willful violations of the Public Records law; and
5. Awarding such other relief as the Court deems appropriate.

Dated this 27th day of May, 2015.



April Rockstead Barker
State Bar #: 1026163
Attorneys for Plaintiffs
SCHOTT, BUBLITZ & ENGEL s.c.
16655 W. Bluemound Road, Suite #270
Brookfield, WI 53005
(262) 827-1700
(262) 827-1701-Fax
abarker@sbe-law.com

5998

Reardon, Patricia A - DOA

From: Murray, Gregory D - DOA
Sent: Friday, February 06, 2015 12:49 PM
To: Reardon, Patricia A - DOA
Subject: FW: Open record request

From: Heifetz, Michael G - DOA
Sent: Friday, February 06, 2015 8:48 AM
To: Murray, Gregory D - DOA
Subject: FW: Open record request

From: Katy Lounsbury [mailto:klounsbury@ehkkelaw.com]
Sent: Friday, February 06, 2015 8:18 AM
To: Schwanz, Nathan E - DOA; Heifetz, Michael G - DOA
Cc: Jud Meter Lounsbury
Subject: Open record request

Dear Messrs. Schwanz and Heifetz:

This is an open record request.

I would like copies of all records, which either of you sent, received, or created anytime between October 1, 2014 and February 3, 2015, and which have anything to do with the language contained in sec. 36.01 of the Wisconsin Statutes, including any discussions or proposals regarding whether that language should be changed.

This requests includes but is not limited to:

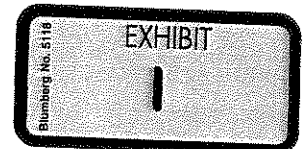
- Emails from both official and personal accounts
- Handwritten notes
- Word documents
- Text messages
- Voicemail messages
- Social media exchanges

If you believe any records which would be responsive to this request should not be released, please identify those records by description, date of creation, and custodian of the record, and state the basis for withholding the record.

I would appreciate if you would confirm receipt of this email.

Thank you,

Katy Lounsbury





WISCONSIN DEPARTMENT OF
ADMINISTRATION

SCOTT WALKER
GOVERNOR
SCOTT A. NETZEL
SECRETARY

Office of the Secretary
Post Office Box 7864
Madison, WI 53707-7864
Voice (608) 266-1741
Fax (608) 267-3842

May 8, 2015

Katy Lounsbury
Ehlke, Bero-Lehmann & Lounsbury, S.C.
klounsbury@ehkelaw.com

Dear Ms. Lounsbury:

This is in response to your public records request for records sent, received, or created by Nathan Schwanz or Michael Heifetz between October 1, 2014 and February 3, 2015 related to the language in § 36.01, Wis. Stats.

With this letter, we are providing records responsive to your request. We are waiving our standard \$0.25 per page photocopy fee. We have withheld or redacted the following information from the records we compiled.

We have removed drafts, notes, preliminary computations, and like materials that fall outside the definition of "record" as set forth in § 19.32(2), Wis. Stats.

Also note, some of the materials that we are withholding consist of preliminary analysis and deliberations created and exchanged by and among DOA and Governor's office employees in preparation of the Governor's budget, before the budget legislation was introduced in the legislature. By law, the Governor is responsible for the state's biennial budget, and the Department of Administration is mandated to prepare the budget under the direction of the Governor. See Wis. Stats. §§ 16.42-16.47. A candid, complete, and creative evaluation of the state's finances within DOA and within the Governor's office is inherent to the development of the Governor's executive budget. Making these internal discussions just as open to disclosure as the final version of the budget would inhibit the free exchange of ideas, opinions, proposals, and recommendations among those involved in deciding what to include in the final legislation. Disclosure of this narrow category of records—limited to discussions within DOA, within the Governor's office, and between the two—would discourage frank internal discussion and harm the quality of the final executive decision. Further, it would disincentivize the free exchange of emails and written documentation necessary to hone the precise language and calculations that are key to proper budget development. Without a doubt, this would significantly inhibit the efficiency and efficacy of the employees who develop the detailed language and financial calculations for the budget. In addition, disclosure would risk public confusion as a result of publishing non-final proposals, which may not ultimately have been adopted.

WISCONSIN IS OPEN FOR BUSINESS
Wisconsin.gov



May 8, 2015

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The public interests supporting confidentiality have long been nationally recognized, including in federal law. See Freedom of Information Act (FOIA), 5 USC § 552(b)(5); *Bureau of National Affairs v. U.S. Department of Justice*, 742 F.2d 1484 (D.C. Cir. 1984). Conversely, the public interest in accessing these particular records is limited. All legislation is publicly available once it is introduced, and numerous documents are produced and released to the public explaining and justifying the specifics of the executive budget. Thus, pursuant to the required balancing test, we have concluded that the public interest in protecting the quality of the executive decision-making process and maintaining the efficiency and efficacy of the budget writing process outweighs the public interest in the release of these materials.

Further, the public records law exempts from public disclosure drafts, notes, preliminary computations, and like materials prepared for the originator's personal use or prepared by the originator in the name of a person for whom the originator is working. Wis. Stats. § 19.32(2). These preliminary analyses and deliberations are "like materials" - similar to drafts, notes, and preliminary computations - prepared by individuals working for the Governor on creation of the Governor's biennial budget. Release of these preliminary materials would be contrary to the conduct of government business, running counter to § 19.32(2)'s exclusions and to the declaration of policy in § 19.31, Wis. Stats.

Note that we have not analyzed communications with representatives of UW System or the Legislative Reference Bureau under this reasoning. We are providing these communications because it is our understanding that they are already publicly available.

We are required to inform you that to the extent this response amounts to a partial denial of a written request for records, it is subject to review by mandamus under § 19.37(1), Wis. Stats., or upon application to the Attorney General or a District Attorney.

Sincerely,


Gregory D. Murray
Chief Legal Counsel