

State of Wisconsin\Government Accountability Board

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JUDGE GERALD C. NICHOL
Chair

KEVIN J. KENNEDY
Director and General Counsel

February 6, 2015

Mr. Nathan Mehrens
Americans for Limited Government
10332 Main Street
No. 326
Fairfax VA 22030

[Via Email \(Nathan@getliberty.org\)](mailto:Nathan@getliberty.org)

Dear Mr. Mehrens:

On April 16, 2014, the Government Accountability Board received a public records request from you for the following records:

(I.) Any record of the Government Accountability Board (GAB) that:

(A.) Mentions or is related to Friends of Scott Walker, Wisconsin Club for Growth, Wisconsin Manufacturers & Commerce, Citizens for a Strong America, RJ Johnson, Valerie Johnson, Coalition Partners, L.L.C., Deborah Jordahl, Keith Gilkes or Kelly Rindfleisch; and that:

(B.) (1.) relates to or records an action of the GAB authorizing the filing of a civil complaint; or

(2.) relates to or records an action of the GAB referring a matter to a district attorney or other prosecutor for investigation or prosecution; or

(3.) contains a finding that a complaint does not raise a reasonable suspicion that a violation of the law has occurred; or

(4.) contains a finding, following an investigation, that no probable cause exists to believe that a violation of the law has occurred.

(II.) Any records of the GAB that identify the (a.) name and (b.) salary or rate of compensation of every "investigative or prosecutorial hire." For the purposes of this request, an "investigative or prosecutorial hire" means any person hired by GAB or entering into a contract with GAB to work as an employee or independent contractor for purposes of conducting investigations or prosecutions regarding the campaign finance laws, from January 1, 2012 to present.

I apologize for the extended delay in providing a response to your request.

As to records requested in section (I.) of your request, there are no responsive records in the possession of the GAB, therefore there are no records to provide you at this time.

As to records requested in section (II.) of your request, I am denying your request as explained more fully below.

Your requests in section (II.) are denied because Wisconsin statutes specifically exempt the records you have requested from disclosure and provide for criminal penalties to anyone who discloses such information. Wis. Stats. §§5.05(5s) and 12.13(5). While there are exceptions to these confidentiality provisions, we have thoroughly analyzed these exceptions and have determined that none of those apply to your specific requests. *See* Wis. Stats. §§ 5.05(1)(c) and 5.05(5s).

Legal Authority and Analysis

Wisconsin has a presumption of open access to all public records, which is reflected in both our statutes and case law. Wis. Stat. §19.31 and *Linzmeier v. Forcey*, 2002 WI 84. “The right to inspect public records, however, is not absolute.” *Osborn v. Board of Regents*, 2002 WI 83, ¶ 14.

Wis. Stat. §5.05(5s) specifically states that “Records obtained or prepared by the board in connection with an investigation, including the full text of any complaint received by the board, are not subject to the right of inspection and copying under s. 19.35 (1)”

When G.A.B. was established in 2007, the Legislature also created strict confidentiality requirements regarding the Board’s investigations that do not apply to other state officials or law enforcement. Notably, the Legislature specifically restricted the release of investigative information and added criminal penalties. Wis. Stat. §12.13(5) is titled “UNAUTHORIZED RELEASE OF RECORDS OR INVESTIGATORY INFORMATION.” Wis. Stat. §12.13(5) further states:

Except as specifically authorized by law and except as provided in par. (b), no investigator, prosecutor, employee of an investigator or prosecutor, or member or employee of the board may disclose *information related to an investigation* or prosecution under chs. 5 to 12, subch. III of ch. 13, or subch. III of ch. 19 or any other law specified in s. 978.05 (1) or (2) *or provide access to any record of the investigator, prosecutor, or the board that is not subject to access under s. 5.05 (5s) to any person other than an employee or agent of the prosecutor or investigator or a member, employee, or agent of the board prior to presentation of the information or record in a court of law.*

In addition, Wis. Stat. §12.60(1)(bm) provides: “Whoever violates s. 12.13 (5) may be fined not more than \$10,000 or imprisoned for not more than 9 months or both.”

Wis. Stat. §5.05(5s) severely limits access to information from any investigation to specifically the following items:

- (a) The board shall permit inspection of records that are distributed or discussed in the course of a meeting or hearing by the board in open session.
- (b) Investigatory records of the board may be made public in the course of a prosecution initiated under chs. 5 to 12, subch. III of ch. 13, or subch. III of ch. 19.

(c) The board shall provide information from investigation and hearing records that pertains to the location of individuals and assets of individuals as requested under s. 49.22 (2m) by the department of children and families or by a county child support agency under s. 59.53 (5).

(d) If the board commences a civil prosecution of a person for an alleged violation of chs. 5 to 12, subch. III of ch. 13, or subch. III of ch. 19 as the result of an investigation, the person who is the subject of the investigation may authorize the board to make available for inspection and copying under s. 19.35 (1) records of the investigation pertaining to that person if the records are available by law to the subject person and the board shall then make those records available.

(e) The following records of the board are open to public inspection and copying under s. 19.35 (1):

1. Any record of the action of the board authorizing the filing of a civil complaint under sub. (2m) (c) 6.
2. Any record of the action of the board referring a matter to a district attorney or other prosecutor for investigation or prosecution.
3. Any record containing a finding that a complaint does not raise a reasonable suspicion that a violation of the law has occurred.
4. Any record containing a finding, following an investigation, that no probable cause exists to believe that a violation of the law has occurred.

Finally, Wis. Stat. §5.05(1)(c) also indicates that settlement agreements are subject to public inspection.

I have reviewed the provisions of Wis. Stat. §§5.05(1)(c) and 5.05(5s), in conjunction with Wis. Stat. §12.13(5). The specific records you request in section (II.) of your request can only be provided if such records qualify for one of the Wis. Stat. §5.05(5s) exceptions to confidentiality and further qualify for disclosure under Wis. Stat. §12.13(5). Your request seeks specific records that identify the (a.) name and (b.) salary or rate of compensation of every “investigative or prosecutorial hire” which you define as persons hired by the GAB or persons that have entered into contracts with the GAB for purposes of conducting investigations or prosecutions regarding campaign finance laws, from January 1, 2012 to present. Your request seeks “information” or “records” related to investigations of the Board, specifically the name of investigators, contracts, or other documents that could show the salary or rate of compensation between the Board and individuals hired as investigators. To analyze your request, I first must identify what specific investigation records may be public under Wis. Stats. §§5.05(1)(c) and 5.05(5s) and second, I must identify whether there are other limiting factors on disclosure as set forth in Wis. Stat. §12.13(5).

You have not requested inspection of settlement agreements, but rather have sought specific investigatory records. Your specific records requests do not qualify as an inspection of settlement agreements pursuant to Wis. Stat. §5.05(1)(c).

During the period of your requests and regarding the specific subject matter of your requests, the Board did not distribute any investigation records in an open session meeting of the Board. Therefore, the Board has no investigation records responsive to your requests that have become public pursuant to Wis. Stat. §5.05(5s)(a).

During the period of your requests and regarding the specific subject matter of your requests, none of the Board's investigation records were made public during the course of a prosecution initiated under Wis. Stats. chs. 5 to 12, subch. III of ch. 13, or subch. III of ch. 19. Therefore, the Board has no investigation records responsive to your specific requests that have become public pursuant to Wis. Stats. §§5.05(5s)(b) or 5.05(5s)(e)2.

You are not a qualified requestor of the Department of Children and Families or a county child support agency seeking the location of individuals and their assets, so you do not have standing to request investigation information or records pursuant to Wis. Stat. §5.05(5s)(c).

During the period of your requests, the Board did not commence a civil prosecution of a person for violation of Wis. Stats. chs. 5 to 12, subch. III of ch. 13, or subch. III of ch. 19 as a result of an investigation. Since the Board did not commence a civil prosecution as a result of an investigation, I do not have to obtain authorization from the subject of any such investigation to permit your access to those records. In short, there are no records of the Board available to you under Wis. Stats. §§5.05(5s)(d) or 5.05(5s)(e)1, regardless of the period or specific subject matter of your requests.

During the period of your requests and regarding the specific subject matter of your requests, none of the Board's records of a finding of no reasonable suspicion or no probable cause contained the records you seek. Therefore, the specific information you request does not qualify for disclosure under Wis. Stat. §5.05(5s)(e)3-4.

Finally, the specific information you request in your letter cannot be released pursuant to further prohibitions found in Wis. Stat. §12.13(5). If the G.A.B. hires investigators, and if they contract or correspond with the G.A.B., their identity and any of their information regarding investigations would fall under the categories of "*information related to an investigation*" and "*any record* of the investigator, prosecutor, or the board that is not subject to access under s. 5.05(5s)..." pursuant to Wis. Stat. §12.13(5).

While other investigatory or prosecutorial agencies or law enforcement may have released investigatory information in response to public records requests, those agencies and law enforcement are not likely constrained by Wis. Stats. §§5.05(1)(c), 5.05(5s), and most importantly, 12.13(5). They are not prohibited from releasing "any record" of an investigation or "information related to an investigation" conducted by their offices under threat of criminal prosecution and penalties including a \$10,000 fine or up to nine months in jail or both.

Pursuant to Wis. Stat. §19.35(4)(b) the above determinations and responses are subject to review by mandamus under Wis. Stat. §19.37(1) or upon application to a district attorney or the Attorney General.

Conclusion

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As to records requested in section (I.) of your request, the GAB does not have any records in its possession that are responsive. As to records requested in section (II.) of your request, your request is denied as set forth by the reasons contained above.

Sincerely,

GOVERNMENT ACCOUNTABILITY BOARD

/s/

Reid Magney
Public Information Officer