

# State of Wisconsin\Government Accountability Board

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Chairperson

KEVIN J. KENNEDY  
Director and General Counsel

September 17, 2015

Hand Delivered

The Honorable David Craig  
State Representative, 83<sup>rd</sup> State Assembly District  
Room 127 West, State Capitol  
Madison, WI 53702

Dear Representative Craig:

On September 2, 2015, the Government Accountability Board ("G.A.B." or "Board") received a public records request from you, seeking:

*all records sent or received by Shane Falk, former staff counsel, for the Government Accountability Board (GAB) on both his official GAB email account, the address "[sfalk0903@gmail.com](mailto:sfalk0903@gmail.com)", any other email accounts used for state business, and any other means of communication on the following dates: November 2, 2010, November 3, 2010, June 5, 2012, June 6, 2012, November 6, 2012, November 7, 2012, and November 8, 2012.*

Enclosed please find a disc containing responsive records from Mr. Falk's official State of Wisconsin email account sent and received on the requested dates.

There are no records responsive to your request for emails at the address [sfalk0903@gmail.com](mailto:sfalk0903@gmail.com) on those dates. There has been false speculation in the media that Mr. Falk used a personal email account to conduct official business. That is not true. That secure email account was used by Mr. Falk for official purposes to communicate with law enforcement personnel and other G.A.B. staff members who were admitted to a John Doe investigation. Even if records responsive to your request did exist, none of those records would be subject to release under the public records law due to the statutory restrictions placed on the G.A.B. by Wis. Stats. §§5.05(5s) and 12.13(5). You may have seen emails from that account which were selectively leaked to the media. Those emails were produced by the G.A.B. and provided to the plaintiffs through discovery in a civil lawsuit filed in Waukesha County Circuit Court. A qualified use order entered by a John Doe Judge and a protective order entered by the Circuit Court Judge allowed the G.A.B. to produce emails contained in this account related to that lawsuit. The court orders did not permit the release of those emails to the public or the media.

There are no records responsive to your request for emails sent or received by Mr. Falk from "any other email accounts used for state business, and any other means of communication" on those dates.

Some emails sent and received by Mr. Falk from Mr. Falk's official State of Wisconsin email account have been withheld because they contain information pertaining to confidential complaints, which requires the G.A.B. to withhold such records from disclosure. Wis. Stats. §§5.05(5s) and 12.13(5).

Some emails sent and received by Mr. Falk from Mr. Falk's official State of Wisconsin email account contain redactions to protect personally identifiable information of the email's subject which could, if released, subject the individual to the threat of identity or financial theft. Some emails sent and received by Mr. Falk from Mr. Falk's official State of Wisconsin email account contain redactions to protect the identity of individuals submitting anonymous election related complaints who have specifically requested to remain anonymous.

Finally, one (1) email sent by Mr. Falk on the requested dates has been withheld because it is a confidential attorney-client privileged communication. Wis. Stat. § 905.03.

### **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 (G.A.B.) 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 complaints the Board receives and the investigations it conducts 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."

I have reviewed the provisions of Wis. Stat. §5.05(5s), in conjunction with Wis. Stat. §12.13(5). Records related to confidential complaints 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). After a thorough examination, I determined that none of the communications related to confidential complaints received by the Board meet any of these enumerated exceptions, therefore these records have not been produced.

Purely election related complaints and associated documents have traditionally been presumed to be “non-confidential” in nature, and therefore such information has been provided in response to a public records request. In some instances, a balancing test has been used to determine whether election complaints submitted by individuals that have indicated they would like to remain anonymous should or should not be released. The records custodian must balance the strong public interest in disclosure of the record against the public interest favoring nondisclosure. *State Ex Rel. Journal Co. v. County Court of Racine County*, 43 Wis.2d 297, 168 N.W.2d 836 (1969). Generally, the subject matter of the complaints submitted by individuals wishing to remain anonymous is no different than the subject matter of complaints in which the complainant has offered to assist in additional follow-up or has offered additional witnesses to substantiate their claims. The Board believes there is a strong public interest in allowing complainants to remain anonymous when submitting election related complaints. Anonymous complaints and tips can prove very useful in rectifying a problem at a polling place or correcting a practice or procedure that may not have been brought to the Board’s attention had the complainant not been given the option to remain anonymous. The Board’s ability to act on anonymous election complaints and tips would be greatly reduced if the complainant’s identities are released if responsive records contain such information. Redacting the name and contact information for these complainants, but providing the full text of the complaint is in the Board’s view, the appropriate balance of interests as it relates to these records. Therefore several records are redacted to remove the complainant’s identifying information if anonymity was requested at the time of the complaint’s submission.

The redaction of one document involves an attachment to an email. One column of the spreadsheet has been redacted to protect the cell phone (sometimes personal) numbers of individuals in law enforcement, attorneys with the Wisconsin Department of Justice and staff members of the Board. The records custodian must balance the strong public interest in disclosure of the record against the public interest favoring nondisclosure. *State Ex Rel. Journal Co. v. County Court of Racine County*, 43 Wis.2d 297, 168 N.W.2d 836 (1969). The record in question was used as an internal resource document to quickly address potential Election Day issues, and a team member needed to be reached immediately. In some instances, team members provided their personal cell phone numbers to be reached in an emergency-like situation. This document was not intended to be circulated outside of the recipients of the email. The office phone numbers contained in this document have not been redacted as these numbers are generally public, whereas the cell phone (sometimes personal) numbers of these individuals may not be public. To aid in a sometimes quick response to complaints or issues that arise on Election Day, the use of cell phones (sometimes personal) is an important tool. The disclosure of the cell phone (sometimes personal) numbers of these individuals could cause team members to withhold this information in the future if it is made public. The Board believes production of the spreadsheet with the redacted cell phone numbers of these individuals is the appropriate balance of interests as it relates to this record.

Credit card numbers have been redacted from some of the records in accordance with the custodian’s authority to withhold access to such information. Wis. Stat. §19.36(13).


Finally, one record has been withheld because it is a confidential communication subject to the attorney-client privilege. Unlike other privileges, the attorney-client privilege (Wis. Stat. § 905.03) does provide sufficient grounds to deny access without resorting to the public policy balancing test. *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). Therefore the confidential attorney-client privileged communication has not been produced.

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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.

If you have additional questions please contact me.

**Government Accountability Board**

A handwritten signature in black ink that reads "Kevin J. Kennedy". The signature is written in a cursive style with a large, prominent initial "K".

Kevin J. Kennedy  
Director and General Counsel

Enclosure