

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH ____

FILED
DEC 17 2014
DANE COUNTY CIRCUIT COURT
COPY

FREEDOM FROM RELIGION
FOUNDATION, INC.,
P.O. Box 750
Madison, WI 53701-0422, and

PATRICK ELLIOTT
P.O. Box 750
Madison, WI 53701-0422

Plaintiffs,

v.

WISCONSIN OFFICE OF THE
COMMISSIONER OF INSURANCE
125 S. Webster Street
P.O. Box 7873
Madison, WI 53703, and

THEODORE NICKEL,
in his official capacity as
Commissioner of Insurance
125 S. Webster Street
P.O. Box 7873
Madison, WI 53703

Defendants.

14CV3429

Case No. _____
30701 Declaratory Judgment;
30952 Petition for Writ of Mandamus

THIS IS AN AUTHENTICATED COPY OF THE
ORIGINAL DOCUMENT FILED WITH THE DANE
COUNTY CLERK OF CIRCUIT COURT.

CARLO ESQUEDA
CLERK OF CIRCUIT COURT

COMPLAINT

Plaintiffs, by their attorneys, McGillivray Westerberg & Bender LLC, complain
against Defendants as follows under the Wisconsin Open Records Law, Wis. Stat. §
19.31 *et seq.* ("Open Records Law"):

Parties

1. Plaintiff Freedom From Religion Foundation, Inc. ("FFRF") is a non-profit corporation organized under the laws of Wisconsin and located in Madison, and whose mailing address is P.O. Box 750, Madison, WI 53701. FFRF submitted Open Records requests to the Defendants, and is a "requester" within the definition of the Wisconsin Open Records Law, Wis. Stat. § 19.32(3).

2. Plaintiff Patrick Elliott is an employee of FFRF located in Madison, and whose business mailing address is P.O. Box 750, Madison, WI 53701. Mr. Elliott submitted Open Records requests to the Defendants on behalf of FFRF, and is a "requester" within the definition of the Open Records Law, Wis. Stat. § 19.32(3).

3. Defendant Office of the Commissioner of Insurance ("OCI") is a state office whose address is 125 S. Webster Street, Madison, Wisconsin, 53703, and whose powers and duties are set forth in Wis. Stat. ch. 601, subch. II. It is an "authority" within the definition of the Open Records Law, Wis. Stat. § 19.32(1).

4. Defendant Ted Nickel is the Commissioner of Insurance for the State of Wisconsin, whose business address is 125 S. Webster Street, Madison, Wisconsin, 53703. He is the custodian of records for the Office of Commissioner of Insurance under Wis. Stat. § 19.33, and is an "authority" within the definition of the Open Records Law, Wis. Stat. § 19.32(1).

Venue

5. Venue is proper under Wis. Stat. §§ 801.50(2)(a) and (3)(a).

Facts

6. On June 30, 2014, the Supreme Court of the United States decided *Burwell v. Hobby Lobby Stores, Inc.*, Case No. 13-354. The court's opinion held that requiring certain family-owned corporations to pay for employees' insurance coverage for contraception under the Affordable Care Act violated a federal law known as the Religious Freedom Restoration Act of 1993, 42 U.S.C. §2000bb *et seq.*

7. On July 21, 2014, the website *MediaTrackers* quoted OCI Legislative Liaison and Public Information Officer J.P. Wieske as stating that Wisconsin's own contraceptive mandate, known as the Contraceptive Equity Law, would no longer be enforced because it was preempted by the *Hobby Lobby* decision.

8. The quote in the *MediaTrackers* story was picked up by other news outlets, including the *Milwaukee Journal-Sentinel*, which also reported that Wisconsin would not be enforcing the Contraceptive Equity Law.

9. Some legal experts and advocates disagreed that *Hobby Lobby* would preempt Wisconsin's contraceptive mandate since the Religious Freedom Restoration Act applies only to the federal government and not the states. See *City of Boerne v. Flores*, 521 U.S. 507 (1997).

10. On July 22, 2014, Plaintiffs emailed and mailed an Open Records Request to Defendants seeking the following records:

- 1) Any records related to non-enforcement of contraceptive coverage under Wisconsin statutes by the Office. This includes:
 - a. Any Office memos, reports, plans and other records concerning *Burwell v. Hobby Lobby Stores, Inc.* and its impact on Wisconsin law or insurance requirements relating to contraceptive coverage;
 - b. Any correspondence and emails from January 1, 2014 to the present concerning Office enforcement of contraceptive coverage requirements.
- 2) Any correspondence, emails, and other records sent or received between the Office and the Office of the Governor concerning contraceptive coverage requirements.
- 3) Any correspondence, emails, and other records sent or received between the Office and Brian Sikma or Media Trackers Wisconsin.
- 4) Any records concerning the authority of the Commissioner to disregard Wisconsin statutes mandating contraceptive coverage by insurance providers.

A true and correct copy of the July 22, 2014, request is attached hereto as Exhibit A.

11. The OCI's Chief Legal Counsel, Mollie Zito, confirmed receipt of the July 22, 2014, request on the same day it was submitted.

12. On July 25, 2014, Plaintiffs emailed another Open Records Request to Defendants seeking the following records:

- 1) Any correspondence and emails from July 21, 2014 to July 25, 2014 sent by Office employees concerning enforcement or non-enforcement of contraceptive coverage insurance requirements. This includes:
 - a. Any internal communications discussing the Office's handling of contraceptive coverage
 - b. Any communications with media or any other persons not employed by the Office

A true and correct copy of the July 25, 2014, request is attached hereto as Exhibit B.

13. Ms. Zito confirmed receipt of the July 25, 2014, request on July 28, 2014.

14. On August 25, 2014, Mr. Elliott emailed Ms. Zito to follow up on the two Open Records requests, since Plaintiffs had not yet received any responsive records.

15. On August 27, 2014, Ms. Zito responded with a letter on behalf of OCI attaching sixteen (16) pages of records, but also partially denying Plaintiffs' Open Records Requests. The denials were made on the basis of attorney-client privilege, attorney work product privilege, and the Open Records law balancing test. A true and correct copy of the Defendants' response letter is attached hereto as **Exhibit C**.

16. The sixteen pages of responsive documents were copies of correspondence between OCI employees and reporters dated between July 21 and 24, 2014, except for one internal OCI email indicating how OCI staff should respond to inquiries from insurers regarding the media reports on *Hobby Lobby*. A true and correct copy of the sixteen pages of responsive documents is attached hereto as **Exhibit D**.

17. Later on August 27, 2014, Mr. Elliott phoned Ms. Zito to clarify the denial. She confirmed that the response letter and associated sixteen pages of documents were intended to be Defendants' response to both the July 22 and July 25 requests, and that the balancing test denial applied to records other than those denied on the basis of attorney-client and attorney work product privilege.

18. On August 29, 2014, Plaintiffs wrote Ms. Zito a letter stating that the OCI's response to the July 22 and 25 requests was inadequate and unlawful because, *inter alia*, it did not provide records responsive to the July 22 request, the denial based on the balancing test was not sufficiently specific, and the denial did not contain an

adequate explanation of what and how many documents were being withheld. Mr. Elliott requested that the OCI perform an additional search and that responsive records be provided to Plaintiffs. A true and correct copy of the August 29, 2014, letter is attached hereto as **Exhibit E**.

19. Neither Defendants nor Ms. Zito responded to the August 29, 2014, letter from Mr. Elliott.

20. Plaintiffs subsequently made a request for records to the Office of the Governor for records related to Wisconsin's contraceptive mandate and the *Hobby Lobby* decision, including communications between the Governor's Office and the OCI.

21. By letter dated November 24, 2014, the Office of the Governor responded with thirty-six pages of documents. Its response indicated that two documents were being withheld on the basis of attorney-client privilege and attorney work product, and that some limited redactions were made under the balancing test to protect personal phone numbers and email addresses, but otherwise all responsive records were provided. A true and correct copy of the response letter is attached hereto as **Exhibit F**.

22. The responsive documents provided by the Governor's office included communications with the OCI that were not provided with Defendants' response to Plaintiffs' July 22 and 25, 2014, Open Records requests, but that were responsive to those requests. For example, the response from the Governor's office included multiple email messages between the OCI's J.P. Wieske and staff in the Governor's

office dated July 24, 2014. A true and correct copy of those messages is attached hereto as **Exhibit G**.

23. The response from the Office of the Governor, media reports, and other events indicate that the Defendants improperly withheld records that were responsive to Plaintiffs' July 22 and July 25, 2014, Open Records Requests, and that other records continue to be withheld.

**CAUSE OF ACTION: Defendants Have
Violated the Wisconsin Open Records Law**

1. Plaintiffs incorporate by reference all allegations set forth in the preceding paragraphs.

2. 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."

3. 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). Authorities must fill the request, or notify the requester of the authority's decision to deny the request and the reasons for denial, "as soon as practicable and without delay." Wis. Stat. § 19.35(4)(a).

4. Defendants violated the Open Records Law by failing to provide responsive records in response to Plaintiffs' requests, by failing to separate and provide non-privileged portions of responsive records, and by improperly denying Plaintiffs' requests for records.

5. Defendants violated the Open Records Law by failing to explain the specific reasons for denial of Plaintiffs' Open Records requests, and by failing to identify the documents that were withheld.

6. Defendants' actions have caused and will continue to cause injury to the Plaintiffs by depriving them and the public of their rights under the Open Records law.

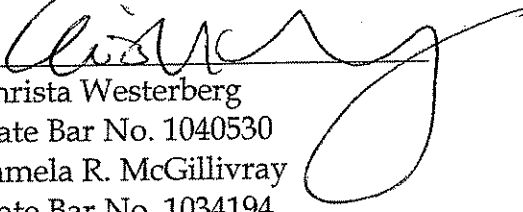
RELIEF REQUESTED

WHEREFORE, Plaintiffs requests that the Court grant the following relief pursuant to Wis. Stat. § 19.31 *et seq.*:

1. An order declaring that Defendants violated Wisconsin's Open Records law, Wis. Stat. §§ 19.31 *et seq.*, *see* Wis. Stat. § 806.04;
2. A mandamus order directing Defendants to produce for the Plaintiffs the requested records without further delay, Wis. Stat. § 19.37(1)(a);
3. An award to Plaintiffs for their reasonable attorneys' fees, damages of not less than \$100, Plaintiffs' other actual costs, and punitive damages related to their Open Records complaint, Wis. Stat. § 19.37(2), (3); and
4. Such other relief as the Court deems just and equitable.

Dated this 17th day of December, 2014.

McGILLIVRAY WESTERBERG & BENDER LLC
Attorneys for Plaintiffs



Christa Westerberg
State Bar No. 1040530
Pamela R. McGillivray
State Bar No. 1034194
211 S. Paterson St., Suite 320
Madison, Wisconsin 53703
Telephone: (608) 310-3560
Facsimile: (608) 310-3561
westerberg@mwbattoorneys.com
mcgillivray@mwbattoorneys.com

FREEDOM FROM RELIGION *foundation*

P.O. BOX 750 • MADISON, WI 53701 • (608) 256-8900 • WWW.FFRF.ORG

July 22, 2014

SENT VIA MAIL & EMAIL: ociinformation@wisconsin.gov

Commissioner Theodore Nickel
Wisconsin Office of the Commissioner of Insurance
P.O. Box 7873
Madison, WI 53707-7873

Re: Open Records Request

Dear Commissioner Nickel:

I am writing to you on behalf of the Freedom from Religion Foundation (FFRF) to request public records from the Wisconsin Office of the Commissioner of Insurance (Office). Pursuant to Wis. Stat. §§19.31-19.39, I hereby request a copy of the following:

- 1) Any records related to non-enforcement of contraceptive coverage under Wisconsin statutes by the Office. This includes:
 - a. Any Office memos, reports, plans and other records concerning *Burwell v. Hobby Lobby Stores, Inc.* and its impact on Wisconsin law or insurance requirements relating to contraceptive coverage;
 - b. Any correspondence and emails from January 1, 2014 to the present concerning Office enforcement of contraceptive coverage requirements.
- 2) Any correspondence, emails, and other records sent or received between the Office and the Office of the Governor concerning contraceptive coverage requirements.
- 3) Any correspondence, emails, and other records sent or received between the Office and Brian Sikma or Media Trackers Wisconsin.
- 4) Any records concerning the authority of the Commissioner to disregard Wisconsin statutes mandating contraceptive coverage by insurance providers.

Please be aware that under Wisconsin law, there is a "presumption of complete public access consistent with the conduct of government business. The denial of access generally is contrary to the public interest and only in exceptional cases can access be denied." See Wis. Stat. §19.31. If you choose to deny this request, please respond with a written explanation of the denial including any references to statutory exemptions or other case law upon which you rely.



If your agency does not maintain these public records, please let me know the proper custodians of these records. Please provide their names and addresses. If I can provide any clarification that will help expedite your attention to my request, please contact me at 608-256-8900. If any records are available in electronic format, they may be emailed to Patrick@llrf.org. Thank you for your time and attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Patrick Elliott", with a stylized flourish at the end.

Patrick Elliott
Staff Attorney

FREEDOM FROM RELIGION *foundation*

P.O. BOX 750 • MADISON, WI 53701 • (608) 256-8900 • WWW.FFRF.ORG

July 25, 2014

SENT VIA EMAIL ONLY: Mollie.Zito@wisconsin.gov

Ms. Mollie K. Zito
Chief Legal Counsel
WI Office of the Commissioner of Insurance
P.O. Box 7873
Madison, WI 53707-7873

Re: Open Records Request

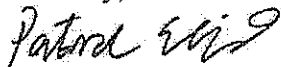
Dear Ms. Zito:

I am writing to you on behalf of the Freedom from Religion Foundation (FFRF) to request public records from the Wisconsin Office of the Commissioner of Insurance (Office). Pursuant to Wis. Stat. §§19.31-19.39, I hereby request a copy of the following:

- 1) Any correspondence and emails from July 21, 2014 to July 25, 2014 sent by Office employees concerning enforcement or non-enforcement of contraceptive coverage insurance requirements. This includes:
 - a. Any internal communications discussing the Office's handling of contraceptive coverage
 - b. Any communications with media or any other persons not employed by the Office

If I can provide any clarification that will help expedite your attention to my request, please contact me at 608-256-8900. If any records are available in electronic format, they may be emailed to Patrick@ffrf.org. Thank you for your time and attention to this matter.

Sincerely,



Patrick Elliott
Staff Attorney





State of Wisconsin / OFFICE OF THE COMMISSIONER OF INSURANCE

Scott Walker, Governor
Theodore K. Nickel, Commissioner

Wisconsin.gov

Legal Unit
125 South Webster Street • P.O. Box 7873
Madison, Wisconsin 53707-7873
Phone: (608) 267-9586 • Fax: (608) 264-5228
Web Address: oci.wi.gov

August 27, 2014

MR PATRICK ELLIOTT
STAFF ATTORNEY
FREEDOM FROM RELIGION FOUNDATION
PO BOX 750
MADISON WI 53701

Re: Open Records Request

Dear Mr. Elliott:

This letter is in response to your open record requests received by the Office of the Commissioner of Insurance (OCI) on July 22 and 25, 2014. Enclosed please find records that are responsive to your requests related to enforcement or non-enforcement of contraceptive coverage under the Wisconsin mandate. OCI has withheld privileged documents as permitted under ss. 19.35 (1) and 19.85 (1) (g), Wis. Stat., and based upon the balancing test.

Section 19.35, Wis. Stat., states: "[E]xcept as otherwise provided by law, any requester has a right to inspect any record." The attorney-client privilege suffices as an "exception otherwise provided by law" for a refusal to disclose records under the Public Records Law of Wisconsin. The attorney-client privilege allows a client to refuse to disclose, and to prevent any other person from disclosing, confidential communications made for the purpose of providing legal representation to the client. (See also s. 905.03, Wis. Stat.)

Additionally, the attorney work product doctrine which is codified at s. 804.01 (2) (c) 1., Wis. Stat., applies to create an exception to the Public Records Law (*Seifert and Seifert v. School District of Sheboygan Falls*, 2007 WI App 207, 305 Wis. 2d 582, 740 N.W. 2d 177). The purpose of some of the withheld documents was to communicate with and confer with legal counsel.

In addition to the exception under the Public Records Law for attorney-client privilege and attorney work product, there are public policy reasons in favor of non-disclosure that outweigh the presumption of open records when applying a balancing test. The need for OCI to be afforded the opportunity to obtain confidential legal advice and representation relating to its regulatory and other obligations outweighs the public's interest in the disclosure of records related to that representation.

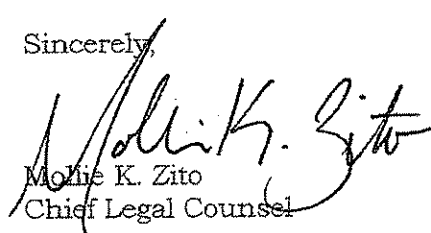
EXHIBIT

C

Pursuant to s. 19.35 (4) (b), Wis. Stat., this letter constitutes a written statement regarding OCI's partial denial of your request. This determination is subject to review by mandamus under s. 19.37 (1), Wis. Stat., or upon application to the attorney general or district attorney.

If you have any questions, please call me at (608) 261-6017 or e-mail me at mollie.zito@wisconsin.gov.

Sincerely,



Mollie K. Zito
Chief Legal Counsel

Wieske, JP - OCI

From: Jason Stein <jstein@jrn.com>
Sent: Monday, July 21, 2014 4:26 PM
To: Wieske, JP - OCI, Guy Boulton; Patrick Marley
Subject: Fwd: This might interest you guys - WI suspends contraception mandate

Hi JP,

Can you go over what the current law says on this and what OCI has decided to do in terms of enforcement? Do you know when this law passed? -J

----- Forwarded message -----

From: Brian Sikma, Media Trackers <brian@mediatrackers.org>
Date: Mon, Jul 21, 2014 at 4:22 PM
Subject: This might interest you guys - WI suspends contraception mandate
To: Jason Stein <jstein@jrn.com>, Patrick Marley <pmarlev@jrn.com>

Hi Guys,

Thought this might possibly interest one of you.

<http://mediatrackers.org/wisconsin/2014/07/21/wis-wont-enforce-state-contraception-mandate>

Regards,
Brian

--
Brian Sikma
Communications Director
Media Trackers
brian@mediatrackers.org
608.492.1774 - Mobile

Learn More:
www.MediaTrackers.org
www.twitter.com/MediaTrackers
www.facebook.com/mediatrackersWI

--
Jason Stein | State Capitol reporter

Milwaukee Journal Sentinel
608-258-2262
jstein@jrn.com
<http://www.jsonline.com>



Wieske, JP - OCI

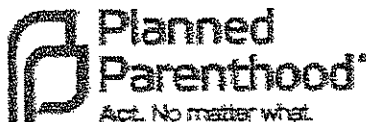
From: David Wahlberg <DWahlberg@madison.com>
Sent: Wednesday, July 23, 2014 12:08 PM
To: Wieske, JP - OCI
Subject: FW: Walker Administration Unilaterally Ends Enforcement of Wisconsin Birth Control Law
Attachments: July 23 Media Statement PPAWI Contraceptive Equity.pdf

JP: What is OCI's take on this? What was announced? Has OCI received any complaints from people who say their employers aren't covering birth control (or what is required by law)?

David

David Wahlberg
Health/medicine reporter
Wisconsin State Journal
1901 Fish Hatchery Road
Madison, WI 53708
dwahlberg@madison.com
@davidkwahlberg
www.madison.com/wsj
(608) 252-6125 phone
(608) 252-6119 fax

From: Kendellen, Laura [mailto:Laura.Kendellen@ppwi.org]
Sent: Wednesday, July 23, 2014 12:00 PM
To: Kendellen, Laura
Subject: Walker Administration Unilaterally Ends Enforcement of Wisconsin Birth Control Law



Planned Parenthood Advocates of Wisconsin

FOR IMMEDIATE RELEASE
July 23, 2014

Contact: Lisa Boyce
608-345-7549

**Walker Administration Unilaterally Ends Enforcement of Wisconsin Birth Control Law
in Latest Effort to Restrict Women's Access to Essential Health Care
*National Women's Law Center Says Move is in Conflict with Law***

MADISON – This week, the Office of the Commissioner of Insurance (OCI) under Governor Walker's administration announced via a media interview that the state will no longer enforce Wisconsin's birth control coverage law (Wis. stat. 632.895(17)) that ensures prescription drug plans cover birth control the same as other prescription drugs. Governor Walker justified this move in light of the Hobby Lobby decision by the Supreme Court in June. Legal experts with the National Women's Law Center, however, have released an analysis that concludes the Hobby Lobby ruling does not invalidate Wisconsin's contraceptive coverage law and it must therefore be enforced. The Walker Administration's move

is just the latest in a long line of efforts to reduce women's access to everything from sex education, cancer screens, and birth control to safe and legal abortion.

"Governor Walker's latest effort to unilaterally end the enforcement of Wisconsin's birth control law without legislative action shows just how far he is willing to go to restrict women's access to essential health care," stated Tanya Atkinson, Executive Director of Planned Parenthood Advocates of Wisconsin. Since taking office, Governor Walker has initiated and/or signed into law an unprecedented number of laws and policies that compromise women's health and wellbeing. "Despite the proven benefits of affordable birth control access for women and their employers, and the overwhelming public support for birth control coverage, it's unbelievable that we are still fighting for access to birth control in 2014."

Last month, in a 5-4 ruling, conservative justices on the U.S. Supreme Court ruled in favor of corporations who argued that they should not have to provide insurance coverage for their employees' birth control, as required by the Affordable Care Act (ACA) because of the business owners' personal religious beliefs. The Hobby Lobby decision was an answer to a specific question related to whether for-profit companies with religious objections could be exempted from the ACA's coverage requirement and not state-specific laws related to insurance requirements.

According to a legal analysis from the National Women's Law Center, "the Hobby Lobby decision does not directly affect the Wisconsin contraceptive coverage law." The legal memo goes on to state, "Closely-held for-profit corporations doing business in Wisconsin that do not self-insure must abide by the state law, and continue to provide birth control coverage to the same extent they provide preventive care and prescription drugs. The Wisconsin Office of the Commissioner of Insurance must continue to enforce this provision."

"We call on Governor Walker to enforce Wisconsin's birth control law," Atkinson stated. "It is time to stop the political interference in women's health. Ninety-nine percent of women rely on birth control at some point in their lives. Ensuring affordable access to this important preventative service is one area where we should all agree."

"While Governor Walker continues his career-long campaign to restrict women's health care, Planned Parenthood remains committed to providing essential health care services including birth control, cancer screens, STD testing and treatment, and health referrals that women and families rely on to stay safe, healthy, and strong," Atkinson concluded.

###

BACKGROUND

Birth control is basic health care and used by 99 percent of women at some point in their lives, yet before the passage of laws like Wisconsin's Contraceptive Coverage Law in 2009, many health insurance plans deliberately excluded coverage for contraceptives. Before this inequity was addressed, women of reproductive age were forced to pay as much as 68 percent more for out-of-pocket medical care than men. For each woman supplied with prescription contraceptive coverage over a five-year period, insurance companies save a minimum of \$10,000 because of the costs associated with unintended pregnancy (Population Connection, Contraception Equity: What You Need to Know, 6/21/2007)

After decades of discriminatory coverage by insurance companies, it has been categorized as a part of women's basic preventive care and all insurance policies to cover birth control with no out-of-pocket cost to women. According to the Department of Health and Human Services, 30 million women nationally are already eligible for this benefit. When the law is fully implemented, 47 million women nationally will have access to no-co-pay birth control thanks to the Affordable Care Act.

Studies also show that women who receive birth control with no co-pay or at a reduced cost are able to avoid more than two million unplanned pregnancies each year, which also reduces the need for abortion. It's not surprising that the public overwhelmingly supports the birth control benefit by a nearly two-to-one margin.

Birth control is tremendously important to women for all kinds of reasons, including the need to control certain medical conditions and to plan our families. Under the birth control benefit, women have access to this important preventive care at no cost.

- The wide availability of birth control has been an enormous benefit for countless women and their families, enabling them to support themselves financially, complete their education, and plan their families and have children when they're ready.
- Virtually all (99 percent) American women between the ages of 15 and 44 who are sexually active have used birth control at some time.
- A 2010 survey found that more than a third of female voters have struggled to afford prescription birth control at some point in their lives, and as a result, used birth control inconsistently. This isn't surprising considering co-pays for birth control pills typically range between \$15 and \$50 per month — up to \$600 per year.
- Other methods, such as IUDs, can cost several hundred dollars, even with health insurance. For the first time, under the birth control benefit, IUDs are now fully covered by insurance companies without additional out-of-pocket expense.
- For many women, birth control is used for a host of health care reasons. According to the Guttmacher Institute, 58 percent of birth control pill users cite health benefits as a contributing factor for using the birth control pill, including treating endometriosis, menstrual pain, and menstrual regulation.

For a comprehensive list of policies Governor Walker has passed that restrict women's health and well-being, [click here](#).

Wieske, JP - OCI

From: Jessica VanEgeren <JVanegeren@madison.com>
Sent: Thursday, July 24, 2014 3:00 PM
To: Wieske, JP - OCI
Subject: check

JP,

Here is what I believe you said in our last conversation. Sikma got it wrong, and below is what I think is correct. Let me know.

Wisconsin is no longer enforcing its Contraceptive Equity Law it comes to policies submitted by insurance companies that contain a policy that does not cover birth control and a separate policy that has a contraceptive rider, which acts similar to a prescription drug rider. Prior to Jan. 1 when the ACA regulations took effect, Insurance Commissioner's Office would have viewed this as a problem, given the state contraceptive law.

Is this correct?



Wieske, JP - OCI

From: Wieske, JP - OCI
Sent: Thursday, July 24, 2014 4:37 PM
To: Capital Times, jvanegeren
Subject: RE: check

Jessica,

I wouldn't specifically say Sikma got it wrong, all the press reports did.

And just to be clear, I would say:

Wisconsin PREEMPTED from its Contraceptive Equity Law it comes to policies submitted by insurance companies that contain BOTH a policy that does not cover birth control and a separate policy that has a contraceptive rider, which acts similar to a prescription drug rider. Prior to Jan. 1 when the ACA regulations took effect, Insurance Commissioner's Office would have viewed this as a problem, given the state contraceptive law BUT POST ACA ISSUING THE 2 POLICIES IS REQUIRED UNDER FEDERAL REGULATIONS.....

J.P. Wieske, FLMI
Legislative Liaison & Public Information Officer
Office of the Commissioner of Insurance
jp.wieske@wisconsin.gov
(608) 266-2493

From: Jessica VanEgeren [<mailto:JVanegeren@madison.com>]
Sent: Thursday, July 24, 2014 3:00 PM
To: Wieske, JP - OCI
Subject: check

JP,

Here is what I believe you said in our last conversation. Sikma got it wrong, and below is what I think is correct. Let me know.

Wisconsin is no longer enforcing its Contraceptive Equity Law it comes to policies submitted by insurance companies that contain a policy that does not cover birth control and a separate policy that has a contraceptive rider, which acts similar to a prescription drug rider. Prior to Jan. 1 when the ACA regulations took effect, Insurance Commissioner's Office would have viewed this as a problem, given the state contraceptive law.

Is this correct?

Wieske, JP - OCI

From: Jessica VanEgeren <JVanegeren@madison.com>
Sent: Friday, July 25, 2014 8:37 AM
To: Wieske, JP - OCI
Subject: RE: check

Got it

From: Wieske, JP - OCI [mailto:JP.Wieske@wisconsin.gov]
Sent: Thursday, July 24, 2014 4:37 PM
To: Jessica VanEgeren
Subject: RE: check

Jessica,

I wouldn't specifically say Sikma got it wrong, all the press reports did.

And just to be clear, I would say:

Wisconsin PREEMPTED from its Contraceptive Equity Law it comes to policies submitted by insurance companies that contain BOTH a policy that does not cover birth control and a separate policy that has a contraceptive rider, which acts similar to a prescription drug rider. Prior to Jan. 1 when the ACA regulations took effect, Insurance Commissioner's Office would have viewed this as a problem, given the state contraceptive law BUT POST ACA ISSUING THE 2 POLICIES IS REQUIRED UNDER FEDERAL REGULATIONS.....

J.P. Wieske, FLMI
Legislative Liaison & Public Information Officer
Office of the Commissioner of Insurance
jp.wieske@wisconsin.gov
(608) 266-2493

From: Jessica VanEgeren [mailto:JVanegeren@madison.com]
Sent: Thursday, July 24, 2014 3:00 PM
To: Wieske, JP - OCI
Subject: check

JP,

Here is what I believe you said in our last conversation. Sikma got it wrong, and below is what I think is correct. Let me know.

Wisconsin is no longer enforcing its Contraceptive Equity Law it comes to policies submitted by insurance companies that contain a policy that does not cover birth

control and a separate policy that has a contraceptive rider, which acts similar to a prescription drug rider. Prior to Jan. 1 when the ACA regulations took effect, Insurance Commissioner's Office would have viewed this as a problem, given the state contraceptive law.

Is this correct?

Wieske, JP - OCI

From: Jason Stein <jstein@jrn.com>
Sent: Thursday, July 24, 2014 5:00 PM
To: Wieske, JP - OCI; Dana Ferguson
Cc: dhaynes@jrn.com
Subject: Re: Contraceptive coverage

JP,

Thanks for your note. We are in the process of reporting a story that would make clear the alternate procedure for employees in these cases to receive contraceptive coverage.

In the case of your other objections, I would note that the story laid out the narrow grounds of the pre-emption as you see it and its source. Nowhere does the story say enforcement of the state law was being dropped entirely. In fact, it goes out of its way to state the opposite. Let me know if you have other concerns.

On Thu, Jul 24, 2014 at 4:50 PM, Wieske, JP - OCI <JP.Wieske@wisconsin.gov> wrote:

Jason

I want to express my dismay with the inaccurate stories posted Monday and Wednesday on jsonline.com. The posted story claimed that Wisconsin was not enforcing the state contraceptive mandate. This is not true, but it also misleads consumers into believing that they would not have access to insurance coverage for contraceptives. It is important to note that the federal rules ONLY apply narrowly to employers who assert the religious exemption and there has been no change in OCI policy since we began reviewing Affordable Care Act policies last year.

What I specifically explained was that essentially nothing has changed relative to Wisconsin's contraceptive mandate from the Hobby Lobby decision except the scope of the religious exemption. Under federal rules, insurers are required to issue policies without contraceptive coverage to employers who assert a religious exemption. Insurers are also required to issue a no-cost (to employer or employee) contraceptive only plan to the employees of those asserting a religious exemption. In order for our insurers to comply with the federal requirements under the Affordable Care Act, Wisconsin was required to review these separate insurance policies.

In short, our law was preempted by federal law but employees at religious firms continue to receive contraceptive coverage through the required separate contraceptive-only insurance policy.

The details in any news story need to be complete and accurate. Unfortunately, the story posted on your website and printed in your paper was neither.

Sincerely

JP

J.P. Wieske, FLMI

Legislative Liaison & Public Information Officer

Office of the Commissioner of Insurance

jp.wieske@wisconsin.gov

[\(608\) 266-2493](tel:(608)266-2493)

--

Jason Stein | State Capitol reporter

.....
Milwaukee Journal Sentinel

608-258-2262

jstein@jm.com

<http://www.jsonline.com>



Wieske, JP - OCI

From: Jason Stein <jstein@jrn.com>
Sent: Friday, July 25, 2014 3:30 PM
To: Wieske, JP - OCI
Cc: dhaynes@jrn.com
Subject: Re: Contraceptive coverage

The update story is now up online.

<http://www.jsonline.com/news/statepolitics/birth-control-covered-even-if-employers-have-religious-objections-b99317722z1-268631402.html>

On Fri, Jul 25, 2014 at 8:20 AM, Wieske, JP - OCI <JP.Wieske@wisconsin.gov> wrote:

Thank you for the thoughtful response, and for the paper committing to another story. It is a complicated issue. Thanks again.

JP

J.P. Wieske, FLMI

Legislative Liaison & Public Information Officer

Office of the Commissioner of Insurance

jp.wieske@wisconsin.gov

[\(608\) 266-2493](tel:(608)266-2493)

From: Jason Stein [<mailto:jstein@jrn.com>]
Sent: Thursday, July 24, 2014 5:00 PM
To: Wieske, JP - OCI; Dana Ferguson
Cc: dhaynes@jrn.com
Subject: Re: Contraceptive coverage

JP,

Thanks for your note. We are in the process of reporting a story that would make clear the alternate procedure for employees in these cases to receive contraceptive coverage.

In the case of your other objections, I would note that the story laid out the narrow grounds of the pre-emption as you see it and its source. Nowhere does the story say enforcement of the state law was being dropped entirely. In fact, it goes out of its way to state the opposite. Let me know if you have other concerns.

On Thu, Jul 24, 2014 at 4:50 PM, Wieske, JP - OCI <JP.Wieske@wisconsin.gov> wrote:

Jason

I want to express my dismay with the inaccurate stories posted Monday and Wednesday on jsonline.com. The posted story claimed that Wisconsin was not enforcing the state contraceptive mandate. This is not true, but it also misleads consumers into believing that they would not have access to insurance coverage for contraceptives. It is important to note that the federal rules ONLY apply narrowly to employers who assert the religious exemption and there has been no change in OCI policy since we began reviewing Affordable Care Act policies last year.

What I specifically explained was that essentially nothing has changed relative to Wisconsin's contraceptive mandate from the Hobby Lobby decision except the scope of the religious exemption. Under federal rules, insurers are required to issue policies without contraceptive coverage to employers who assert a religious exemption. Insurers are also required to issue a no-cost (to employer or employee) contraceptive only plan to the employees of those asserting a religious exemption. In order for our insurers to comply with the federal requirements under the Affordable Care Act, Wisconsin was required to review these separate insurance policies.

In short, our law was preempted by federal law but employees at religious firms continue to receive contraceptive coverage through the required separate contraceptive-only insurance policy.

The details in any news story need to be complete and accurate. Unfortunately, the story posted on your website and printed in your paper was neither.

Sincerely

JP

J.P. Wieske, FLMI

Legislative Liaison & Public Information Officer

Office of the Commissioner of Insurance

jp.wieske@wisconsin.gov

[\(608\) 266-2483](tel:(608)266-2483)

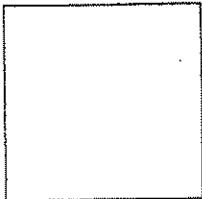
—
Jason Stein | State Capitol reporter

.....
Milwaukee Journal Sentinel

[608-258-2262](tel:608-258-2262)

jstein@jrn.com

<http://www.jsonline.com>



—
Jason Stein | State Capitol reporter

.....
Milwaukee Journal Sentinel

[608-258-2262](tel:608-258-2262)

jstein@jrn.com

<http://www.jsonline.com>



/alsh, Julie E - OCI

From: Dambach, Diane E - OCI
Sent: Monday, July 28, 2014 3:17 PM
To: Walsh, Julie E - OCI
Subject: Open Records Wisconsin contraceptive mandate

Julie -- Here's the info we have.

Diane Dambach
Chief, Accident & Health Insurance Section Bureau of Market Regulation Office of the Commissioner of Insurance
(608) 266-0106
diane.dambach@wisconsin.gov

-----Original Message-----

From: Dambach, Diane E - OCI
Sent: Thursday, July 24, 2014 9:01 AM
To: OCI DL Accident & Health Insurance Section
Subject: Wisconsin makes exception for enforcement of contraceptive mandate

FYI -- <http://www.isonline.com/news/statepolitics/wisconsin-makes-exception-for-enforcement-of-contraceptive-mandate-b99315515z1-268019571.html>

If you get a call from one of your companies regarding the above article, indicate that we'll call them back. I'm waiting for information on how we're going to officially provide information to our insurers.
If you get a call from other than an insurance company, transfer the call to JP. Thank you

FREEDOM FROM RELIGION *foundation*

P.O. BOX 750 • MADISON, WI 53701 • (608) 256-8900 • WWW.FFRF.ORG

August 29, 2014

SENT VIA MAIL & EMAIL: Mollie.Zito@wisconsin.gov

Ms. Mollie K. Zito
Chief Legal Counsel
WI Office of the Commissioner of Insurance
P.O. Box 7873
Madison, WI 53707-7873

Re: Violation of Public Records Law

Dear Ms. Zito:

I am writing regarding the inadequate and unlawful response that we received from the Wisconsin Office of the Commissioner of Insurance (Office) concerning a public records requests that I submitted on behalf of FFRF on July 22 and 25.

On July 22, FFRF requested, in part, "any records related to non-enforcement of contraceptive coverage under Wisconsin statutes by the Office." This is a request that broadly applies to any records, as defined by Wisconsin law, of non-enforcement of statutory contraceptive coverage. You provided no records in response to this request.

FFRF noted that the request included any "correspondence and emails" from this year concerning Office enforcement of contraceptive coverage requirements. You provided no records in response.

The Office did not provide one record in response to the four subject areas that were requested on July 22. As you will recall, I called you on August 27 to confirm that your letter of the same date was the Office's formal reply to both FFRF's July 22 and 25 requests.

It is troubling that the Office, which apparently issued a change in policy concerning an important health-related matter, has done so in secret and cannot produce one record on this subject area. The residents of Wisconsin have a right to understand the operations of OCI and to receive public records.

This is affirmed in the general purpose for the public records law:

[P]roviding persons with such information is declared to be 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. To that end, ss. 19.32 to 19.37 shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business. The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied. Wis. Stat. § 19.31.

It was also troubling when you confirmed over the phone that the fourth paragraph of your letter concerning the balancing test was intended to apply to records that are outside the scope of attorney-client privilege and attorney work product. No other balancing justification was offered. A records custodian who denies access to a record must specifically state the public policy reasons for the refusal. *Newspapers, Inc. v. Breier*, 89 Wis. 2d 417, 427 (1979) ("If the custodian decides not to allow inspection, he must state specific public-policy reasons for the refusal. These reasons provide a basis for review in the event of court action.")

The Attorney General also has provided guidance on this issue: "If no responsive records exist, the authority should say so in its response... Records or portions of records not being provided should be identified with sufficient detail for the requester to understand what is being withheld..." Wisconsin Public Records Law Compliance Outline, p.15 (Sept. 2012).

The OCI response does not give any detail as to what records are being withheld due to the "balancing test," what categories requested do not have responsive records, and what types of records are claimed to be attorney-client privilege and attorney work product.

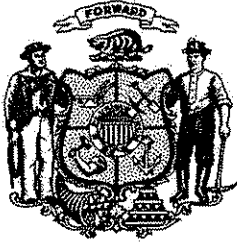
You did not indicate if any search was conducted and the form of the search. We have reason to believe that OCI informed insurers about this matter and also that responsive communications are in the position of J.P. Wieske.

The August 27 response is an unlawful denial under the Wisconsin's public records law. We hope that an additional search may be conducted and responsive records provided to FFRF. If any records are available in electronic format, they may be emailed to Patrick@ffrf.org.

Sincerely,



Patrick Elliott
Staff Attorney



SCOTT WALKER
OFFICE OF THE GOVERNOR
STATE OF WISCONSIN

P.O. Box 7863
MADISON, WI 53707

November 24, 2014

Patrick Elliott
Freedom from Religion Foundation
patrick@ffrf.org

Dear Mr. Elliott,

I am writing to respond to your public records request for the following:

- 1) *Any correspondence emails, and other records sent or received between the Office of the Governor and the Wisconsin Office of the Commissioner of Insurance concerning contraceptive insurance coverage requirements;*
- 2) *Any records in the possession of the Office of the Governor related to nonenforcement of contraceptive coverage under Wisconsin statutes. This includes:*
 - a. *Any memos, reports, plans and other records concerning Burwell v. Hobby Lobby Stores, Inc. and its impact on Wisconsin law or insurance requirements relating to contraceptive coverage;*
 - b. *Any correspondence and emails from January 1, 2014, to the present [October 6, 2014] concerning Office of the Commissioner of Insurance enforcement of contraceptive coverage requirements.*

In a subsequent email you indicated that, for parts 1 and 2(a), our search could be limited to a date range of Sept. 19, 2013 through Oct. 6, 2014. In response to all parts of your request, we have completed our search, and 36 pages of responsive records are included as an attachment to this letter in PDF format.

When reviewing the records, you will notice that some material is redacted. The Wisconsin Public Records Law incorporates the common-law balancing test, which requires us to weigh the public interest in disclosure against any harm that could result from disclosure. *See*, Wis. Stat. § 19.35(1)(a), *see Wisconsin Newspress, Inc. v. Sch. Dist. of Sheboygan Falls*, 199 Wis. 2d 768, 777-78 (1996). Applying this standard, we have redacted the following material:

Non-public direct telephone numbers for staff members in the Office of the Governor have been redacted pursuant to the balancing test. The staff members who use these direct telephone numbers are state public officials holding key positions in state government with numerous responsibilities. Given the existence of a central telephone number (608-266-1212) through which all staff may be contacted as their availability permits, disclosure of non-public direct numbers would serve no significant public interest. Any public interest in disclosure is therefore

outweighed by the public interest in efficient government, an interest which would be undermined if the dissemination of direct telephone numbers caused unnecessary disruptions to staff members' ability to carry out their responsibilities.

Additionally, all identifiers of the non-public official direct email address for the Governor have been redacted pursuant to the balancing test. The Governor holds the highest executive position in state government, with numerous official responsibilities. Given the existence of other publicly available means through which to contact the Governor, we have determined that the public interest in avoiding potential disruption to the Governor's ability to carry out his responsibilities without unnecessary interruption outweighs any public interest in disclosure.

Lastly, two records that constitute attorney work product and privileged attorney-client communication have been withheld. The confidentiality of attorney-client communications is a highly valued public policy protected throughout Wisconsin law. The rules of conduct for attorneys established by the Wisconsin Supreme Court provide that an attorney "shall not reveal information relating to the representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation." SCR 20:1.6(a). And the rules of evidence protect attorney-client communications from unauthorized disclosure in court. See Wis. Stat. § 905.03. In the context of the public records law, case law demonstrates that the attorney-client privilege alone is sufficient grounds to deny access to public records. See, e.g., *Wis. Newspress, Inc. v. Sch. Dist. of Sheboygan Falls*, 199 Wis. 2d 768, 782-83 (1996). No balancing of competing interests is required if the records are protected by an established privilege. See *Seifert v. Sch. Dist. of Sheboygan Falls*, 2007 Wis. App. 207, at ¶ 28-29 (discussing balancing in dicta, but stating that it is not required if records are determined to have privileged status).

Wisconsin law also protects attorney work product. "The general policy against invading the privacy of an attorney's course of preparation is ... well recognized and ... essential to an orderly working of our system of legal procedure ..." *State ex rel. Dudek v. Circuit Court for Milwaukee County*, 34 Wis. 2d 559, 588 (1967). Further, the limitations on civil discovery also protect attorney work product. Wis. Stat. § 804.01(2)(c)1. As a result, courts have ruled that the public records law "cannot be used to circumvent established principles that shield work product." *Seifert v. Sch. Dist. of Sheboygan Falls*, 2007 Wis. App. 207, at ¶ 28. These established principles protect materials "prepared in anticipation of litigation," specifically "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." Wis. Stat. § 804.01(2)(c)1. The privilege applies if there is a possibility of litigation, "even if not certainly and imminently" *Seifert* at ¶ 28.

Here, the documents withheld are attorney-drafted materials protected by both the attorney-client privilege and the privilege for attorney work product. They are protected because the above privileges apply to the Office of the Governor and to the legal counsel it receives. The Office of the Governor has a right to the same attorney-client relationship that the members of the public expect with their attorneys, and revealing the specifics of legal inquiries compromises the attorney-client relationship. If this information is open to the public, the legal advice the Governor and his office receives would not be as candid or complete, and it could compromise the effectiveness of legal counsel. Further, because there is a possibility of litigation over the issue in question, the withheld records are privileged as attorney work product.

In conclusion, it is the consistent practice of this office to withhold documents protected by the attorney-client privilege and the privilege for attorney work product. And as laid out above, the expectations of confidentiality in attorney work product and attorney-client communications are supported by statutes, ethics rules, and case law. The courts have also held that these privileges are proper limits on access to records under the public records law. Therefore, we are withholding privileged material here consistent with past practice and with the guidance of the courts of this state.

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

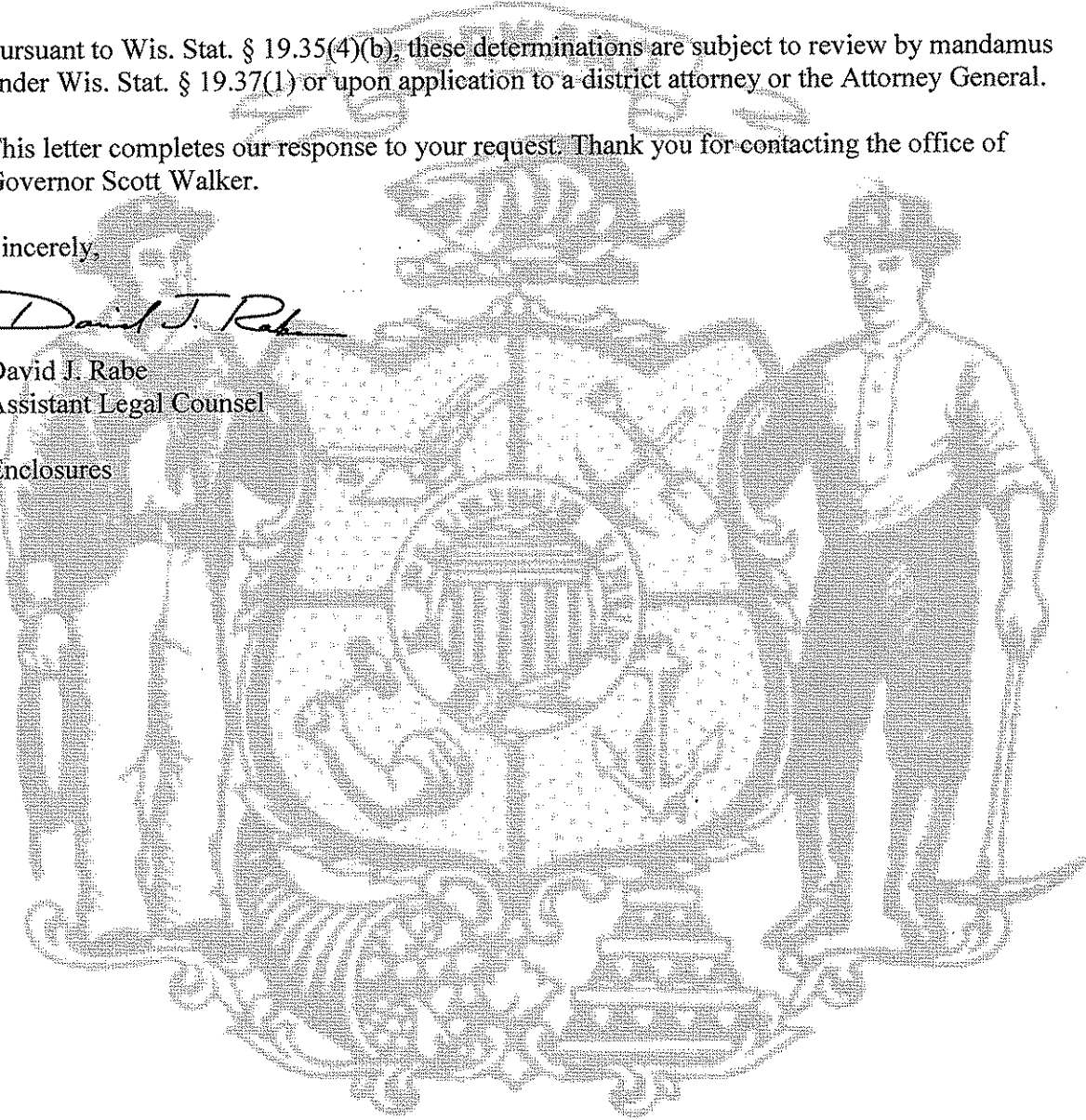
This letter completes our response to your request. Thank you for contacting the office of Governor Scott Walker.

Sincerely,



David J. Rabe
Assistant Legal Counsel

Enclosures



From: Patrick, Laurel - GOV
To: Wieske, JP - OCI
Subject: RE: Quick chat
Date: Thursday, July 24, 2014 1:01:00 PM

Thanks!

*Laurel Patrick | Press Secretary
Office of Governor Scott Walker
(o) 608-267-7303*



From: Wieske, JP - OCI
Sent: Thursday, July 24, 2014 1:01 PM
To: Patrick, Laurel - GOV
Subject: RE: Quick chat

It is incorrect to say the administration is no longer enforcing the state's contraception coverage. The contraceptive mandate is still in place. Only in very rare circumstances when there are religious objections is it not, in which case federal rules and the Supreme Court decision preempt state law.

J.P. Wieske, FLMI
Legislative Liaison & Public Information Officer
Office of the Commissioner of Insurance
jp.wieske@wisconsin.gov
(608) 266-2493

From: Patrick, Laurel - GOV
Sent: Thursday, July 24, 2014 12:54 PM
To: Wieske, JP - OCI
Subject: RE: Quick chat

It is incorrect to say the administration is no longer enforcing the state's contraception coverage. The contraceptive mandate is still in place. Only in very rare circumstances when there are religious objections is it not, in which case the Supreme Court decision becomes law.

*Laurel Patrick | Press Secretary
Office of Governor Scott Walker
(o) 608-267-7303*



From: Wieske, JP - OCI
Sent: Thursday, July 24, 2014 12:51 PM
To: Patrick, Laurel - GOV
Subject: RE: Quick chat

Now works

J.P. Wieske, FLMI
Legislative Liaison & Public Information Officer
Office of the Commissioner of Insurance
jp.wieske@wisconsin.gov
(608) 266-2493

From: Patrick, Laurel - GOV
Sent: Thursday, July 24, 2014 12:46 PM
To: Wieske, JP - OCI
Subject: Quick chat

Hi JP,

I'm stepping into a meeting at 1, but could you shoot me an email when you have time to chat? I'll step out and give you a call.

Laurel Patrick | Press Secretary
Office of Governor Scott Walker
(o) 608-267-7303



From: Wieske, JP - OCI
To: Webster, Jocelyn - GOV; Wenjie, Cullen J - DOA
Subject: Fwd: Contraceptive coverage
Date: Thursday, July 24, 2014 5:06:22 PM

JP Wieske
JP.wieske@wisconsin.gov
608-266-2493

Begin forwarded message:

From: Jason Stein <jstein@jrn.com>
Date: July 24, 2014 at 5:00:05 PM CDT
To: "Wieske, JP - OCI" <JP.Wieske@wisconsin.gov>, Dana Ferguson <dferguson@jrn.com>
Cc: "dhaynes@jrn.com" <dhaynes@jrn.com>
Subject: Re: Contraceptive coverage

JP,

Thanks for your note. We are in the process of reporting a story that would make clear the alternate procedure for employees in these cases to receive contraceptive coverage.

In the case of your other objections, I would note that the story laid out the narrow grounds of the pre-emption as you see it and its source. Nowhere does the story say enforcement of the state law was being dropped entirely. In fact, it goes out of its way to state the opposite. Let me know if you have other concerns.

On Thu, Jul 24, 2014 at 4:50 PM, Wieske, JP - OCI
<JP.Wieske@wisconsin.gov> wrote:

Jason

I want to express my dismay with the inaccurate stories posted Monday and Wednesday on jsonline.com. The posted story claimed that Wisconsin was not enforcing the state contraceptive mandate. This is not true, but it also misleads consumers into believing that they would not have access to insurance coverage for contraceptives. It is important to note that the federal rules ONLY apply narrowly to employers who assert the religious exemption and there has been no change in OCI policy since we began reviewing Affordable Care Act policies last year.

What I specifically explained was that essentially nothing has changed relative to Wisconsin's contraceptive mandate from the Hobby Lobby decision except the scope of the religious exemption. Under federal rules, insurers are required to issue policies without contraceptive coverage to employers who assert a religious exemption. Insurers are also required to issue a no-cost (to employer or employee) contraceptive only plan to the employees of those asserting a religious exemption. In order for our insurers to comply with the federal requirements under the Affordable Care Act, Wisconsin was required to review these separate insurance policies.

In short, our law was preempted by federal law but employees at religious firms continue to receive contraceptive coverage through the required separate contraceptive-only insurance policy.

The details in any news story need to be complete and accurate. Unfortunately, the story posted on your website and printed in your paper was neither.

Sincerely

JP

J.P. Wieske, FLMI

Legislative Liaison & Public Information Officer

Office of the Commissioner of Insurance

jp.wieske@wisconsin.gov

[\(608\) 266-2493](tel:(608)266-2493)

--

Jason Stein | State Capitol reporter

.....
Milwaukee Journal Sentinel

608-258-2262

jstein@jrn.com

<http://www.jsonline.com>