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Date: June 2, 2015

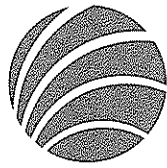
Fax To: Honorable Amy R. Smith  
Circuit Court Judge, Br. 4  
Dane County Courthouse

Recipient's Fax: 608-266-4080

From: Christa Westerberg

Number of Pages: 15 (including cover)

Cc: Assistant Attorney General Daniel Lenington, 608-267-2223



McGILLIVRAY  
WESTERBERG  
& BENDER LLC  
ATTORNEYS

June 2, 2015

*Via Facsimile (608-266-4080)*

The Honorable Amy R. Smith  
Circuit Court Judge, Br. 4  
Dane County Courthouse  
215 S. Hamilton Street, Rm 8107  
Madison, WI 53703

Re: *Freedom From Religion Foundation, Inc. et al. v. Wisconsin Office of the  
Commissioner of Insurance et al.*  
Dane County Case No. 2014CV3429

Dear Judge Smith:

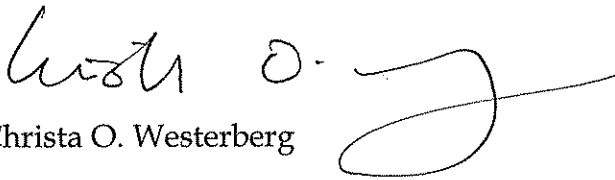
Enclosed please find Plaintiff's Notice of Motion and Motion for Clarification of the Court's May 21, 2015 Decision and Order. Also enclosed is the Affidavit of Andrew Seidel and accompanying exhibits.

If anything further is required, please advise.

Thank you.

Sincerely,

McGILLIVRAY WESTERBERG & BENDER LLC

  
Christa O. Westerberg

Encls.

Cc (via Facsimile, 608-267-2223): Assistant Attorney General Daniel Lennington

STATE OF WISCONSIN

CIRCUIT COURT  
BRANCH 4

DANE COUNTY

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FREEDOM FROM RELIGION  
FOUNDATION, INC. and  
PATRICK ELLIOTT

Plaintiffs,

v.

Case No. 14-CV-3429  
30701 Declaratory Judgment;  
30952 Petition for Writ of Mandamus

WISCONSIN OFFICE OF THE  
COMMISSIONER OF INSURANCE and  
THEODORE NICKEL,  
in his official capacity as  
Commissioner of Insurance

Defendants.

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PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR CLARIFICATION OF  
THE COURT'S MAY 21, 2015, DECISION AND ORDER

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TO: Wisconsin Office of the Commissioner of Insurance  
and Theodore Nickel  
c/o Dan Lennington, Assistant Attorney General  
Wisconsin Department of Justice  
17 W. Main Street  
P.O. Box 53707  
Madison, WI 53707

PLEASE TAKE NOTICE that Plaintiffs Freedom From Religion Foundation and Patrick Elliot ("Plaintiffs") move the Court, pursuant to Wis. Stat. 802.01(2), for clarification of its Decision on Defendants' Motion for Judgment on the Pleadings, or in the Alternative, Motion for Protective Order, and Order for In Camera Inspection, dated May 21, 2015, and filed May 22, 2015 (hereinafter, "May 21 Decision"). This Motion will be heard at a date and time set by the Court.

The grounds for this Motion are as follows, and as set forth in the accompanying Affidavit of Andrew Seidel.

**Background**

1) Plaintiffs filed their Complaint in this matter on December 17, 2014, seeking records responsive to Open Records requests dated July 22 and July 25, 2014. As evidence that Plaintiffs' requests were not satisfied, Plaintiff attached an email string Defendants should have provided with its response but did not, and that Plaintiff had obtained from another source. (Compl. Ex. G.) Plaintiffs' Complaint sought these and any other responsive records that were either not adequately searched for or not disclosed (as privileged or unprivileged), as well as any records to which Defendant improperly denied access, i.e. on the basis of privilege or other protections. (Compl. at 7-8 & Ex. E.)

2) In another example of a responsive but unprotected record, FFRF Staff Attorney Andrew Seidel submitted a memorandum to Defendant Ted Nickel by U.S. Mail and email on July 22, 2014, related to contraceptive coverage. (Seidel Aff., ¶¶ 2 & Exs. A, B.) Defendant did not produce this memorandum in response to Plaintiffs' requests, or any internal correspondence forwarding the memo to other staff, even though providing such records is typical in response to Open Records and Freedom of Information requests (*id.* ¶¶ 7), and the record would have been responsive to Plaintiffs' requests. In fact, Defendants have not mentioned it in any of their correspondence regarding this request.

3) Plaintiffs served Defendants with discovery requests dated January 26, 2015, to understand the extent of Defendants' search for responsive records in July 2014, based on Plaintiffs' first-hand knowledge that the search was incomplete and other records responsive to its requests had been withheld. (*See* Def's Mot. for Judgment on the Pleadings, Ex. 2.)

4) After a phone scheduling conference with the Court on February 18, 2015,<sup>1</sup> Defendant filed a Motion for Judgment on the Pleadings or, Alternatively, Motion for Protective Order to relieve it from the obligation to respond to any of Plaintiffs' discovery requests. Per the Court's Order, responses were stayed until Defendants' motion was resolved. (Order, 2/23/15.)

5) In the May 21 Decision, the Court dismissed Plaintiff's Complaint to the extent it sought a declaratory judgment, and to the extent it sought mandamus relief for the email string attached to the Complaint. (May 21 Decision at 6-7.)<sup>2</sup> It ordered Defendant produce for *in camera* review its copy of the email string, as well as "the documents that [OCI's legal counsel Molly Zito] identified in her August 27, 2014, letter, but which were withheld for various reasons." (*Id.* at 8.) Further, "[d]ue to the claimed protected nature of these documents," the Court indicated the records would be sealed pending the Court's review. (*Id.*) It denied Defendants' motion to dismiss Plaintiffs' mandamus claim "regarding documents withheld other than the July 24, 2014 email string." (*Id.*)

6) The Court also determined that because the *in camera* review would resolve whether mandamus relief ought to issue, discovery would not be relevant to the remaining issues in the case and granted Defendants' motion for a protective order. (*Id.*) While it granted the motion, the Court also stated that no discovery would be taken pending the Court's *in camera* review. (*Id.* at 9.)

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<sup>1</sup> The May 21, 2015 Decision refers to the February 18, 2015, phone conference as a "hearing" (*see* page 3, n.3) but the conference was not noticed as a hearing, and Defendants at that time had filed no motion for a protective order or any other motion that would allow them relief from timely responding to pending discovery requests. Rather, they had sought the advice of the Court how to proceed by requesting a "conference" with the Court.

<sup>2</sup> By not seeking clarification on these or other portions of the May 21 Decision, Plaintiff does not waive any right to appeal any issues raised therein.

7) Defendants produced records to the Court for *in camera* review by letter dated May 27, 2015. Defendants' letter does not identify the number of documents, the nature of the records, the date of the records, the privileges claimed, or any other descriptive information about the records being produced for review, and Plaintiffs are therefore left to guess about what was produced.

**Issue for Clarification #1: To Which Records Does the May 21 Decision Apply?**

8) Plaintiffs' Complaint sought not just records Defendants withheld as "protected," but *other* responsive records Defendant may not have searched for or identified at the time of Plaintiffs' requests. (Compl. ¶ 23; *see also* Pls' Resp. to Mot. for Judgment, 3/25/15, at 2, 6-7, 9-12.)

9) The email chain attached to Plaintiffs' Complaint as Exhibit G is evidence that such records exist. It is a responsive and clearly not "protected" document. The memo provided to Defendant Ted Nickel by Plaintiff on July 22, 2014, is another such record. (Seidel Aff., Exs. A, B.)

10) Defendants have claimed through counsel that the email chain is the only "unprotected" record that it withheld and that it was inadvertently omitted from its Open Records response to Plaintiff (*e.g.*, Ltr. to Hon. Amy Smith fr. AAG Lennington, 2/5/15), but no one with personal knowledge has affirmed or testified to this effect, or described the extent of Defendants' search. While Plaintiffs understand the Court's order as to the email string, this does not resolve whether other non-privileged records have been withheld.

11) Plaintiff's discovery requests were intended to elicit information about records Defendant withheld as protected, *and* any other records that may be responsive but were impermissibly withheld or not searched for to begin with. (*See* Def's Mot. for

Judgment on the Pleadings, Ex. 2.)<sup>3</sup> The email chain and July 22 memo may be the only two records that Defendants did not produce, or they may be two of many. (*See* Pls' Resp. to Mot. for Judgment, 3/25/15, at 2, 6-7, 9-12.) This question is within the scope of discovery and relevant to the claims asserted by the Plaintiffs. Rather than speculation, Plaintiffs have cited first-hand knowledge that Defendants' search was incomplete.

12) Plaintiffs seek clarification of the May 21 Decision, to understand whether the Court's denial of Defendants' Motion for Judgment on the Pleadings extends to records Defendant may have impermissibly withheld but were not denied on the basis of privilege or other protections. If Plaintiffs' Complaint is still live as to these records, Plaintiffs believe their discovery requests remain appropriate and seek clarification that they will be able to obtain discovery regarding these records at the conclusion of the Court's *in camera* review of records Defendants currently claim as protected. (*See* May 21 Decision at 9.)

**Issue for Clarification #2: Status of Plaintiff's Discovery Requests**

13) As noted above, the Court granted the Defendants' alternative motion for protective order, but also stated that no discovery shall be taken pending the Court's *in camera* review. (*Id.* at 8-9.)

14) Defendants have not produced any evidence, either through affidavit or testimony of anyone with personal knowledge, that responding to Plaintiffs' current discovery requests would be unduly burdensome or oppressive. They have failed to provide the requisites for a protective order on these grounds. *See* Wis. Stat. § 804.01(3)(a).

15) Plaintiffs seek to clarify that, should the Court's *in camera* review or any other

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<sup>3</sup> The May 21 Decision characterizes Plaintiffs' discovery requests as seeking "other documents not sought in their original requests." Plaintiffs' requests were intended to seek documents about Defendants' *search* for records at the time of their records response.

information reveal an incomplete Open Records response to Plaintiffs, any stay on discovery shall be lifted.

**Issue for Clarification #3: Procedure for the Court's *In Camera* Review**

16) Plaintiffs' Complaint alleges that Defendants failed to explain the specific reasons for denial of Plaintiffs' Open Records request, failed to identify the records withheld, and failed to separate and provide non-privileged portions of responsive records. (Compl. at 8 & Ex. E.)

17) Defendants' reasons for denial remain unclear (*see* Pls' Resp. to Def's Mot for Judgment at 16-21), as are the number and nature of records withheld, and the records Defendant has produced to the Court with its May 27, 2015, letter.

18) Plaintiffs have not had the opportunity to brief the standard for withholding records from disclosure. Section 19.31, Wis. Stats., states the presumption in favor of access, and courts have affirmed that all exceptions to the Open Records law must be "extremely narrow and well-defined," *Journal/Sentinel, Inc. v. Sch. Bd. of the Sch. Dist. of Shorewood*, 186 Wis. 2d 443, 447, 521 N.W.2d 165 (Ct. App. 1994).

19) To the extent Defendant has cited attorney-client privilege and the work product doctrine as reasons for non-disclosure, these exceptions are narrowly construed as obstacles to investigation of the truth. *Juneau County Star-Times v. Juneau County*, 2011 WI App 150, ¶ 36, 337 Wis. 2d 710, 807 N.W.2d 655 (citing *Lane v. Sharp Packaging Sys., Inc.*, 2002 WI 28, ¶ 21, 251 Wis. 2d 68, 640 N.W.2d 788), *aff'd* 2013 WI 4. The attorney-client privilege protects communications "only if disclosure . . . would directly or indirectly reveal the substance of the client's communications to the attorney." *Id.* Attorney work product



includes only materials, mental impressions, and strategies an attorney compiles in preparation for litigation. *Id.* ¶ 48, n.8.

20) Even if portions of the records Defendants have withheld are appropriately privileged, Defendant has a duty to separate and provide any non-privileged portions of the records, including sender and recipient, date, and general subject. Wis. Stat. § 19.35(4); *see also* Pls' Resp. to Mot. for Judgment at 22-24. If the whole document is not protected, a redacted document should be produced. *See Milwaukee Journal Sentinel v. City of Milwaukee*, 2012 WI 65, ¶¶ 20-21

21) Additionally, if a record is privileged or otherwise protected, Wis. Stat. § 19.37(1)(a) specifies that “[t]he court may permit the parties or their attorneys to have access to the requested records under restrictions or protective orders as the court deems appropriate.”

22) Based on the May 21 Decision, it is unclear whether the Court will permit any further briefing from the parties based on its *in camera* review in the event the Court finds some or all of the documents *may* be privileged. Prior to any order permitting Defendant to withhold all of or portions of any record the Court has reviewed *in camera*, Plaintiffs respectfully request the opportunity to respond to and brief the nature of any claimed privilege or protection from disclosure for the Court's consideration.

WHEREFORE, Plaintiffs respectfully request that the Court provide clarification as follows:

1. Clarify whether under the Court's May 21 Decision, Plaintiffs may

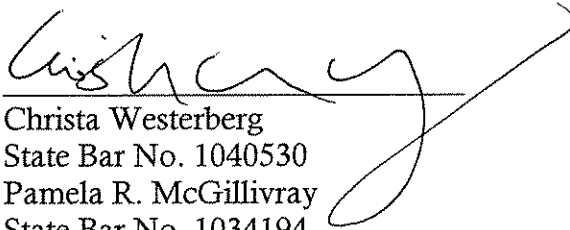
proceed on their claim that Defendants have impermissibly withheld documents in addition to those produced for the Court's *in camera* review and, if so, whether Plaintiffs may seek responses to their pending discovery requests at the conclusion of the Court's *in camera* review of records Defendants claim as protected.

2. Clarify whether, should the Court's *in camera* review reveal an incomplete records response to Plaintiffs, any stay on discovery shall be lifted.

3. Clarify whether after its *in camera* review, if the Court finds some or all of the records may be privileged, the Court will order the Defendants to describe or produce to Plaintiffs the records, with information the Court finds to be possibly privileged redacted, and afford Plaintiffs the opportunity to respond to and brief the nature of any claimed privilege or protection for the Court's consideration.

Dated this 2<sup>nd</sup> day of June, 2015.

**MCGILLIVRAY WESTERBERG & BENDER LLC**  
Attorneys for Plaintiffs



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Pamela R. McGillivray  
State Bar No. 1034194  
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STATE OF WISCONSIN

CIRCUIT COURT  
BRANCH 4

DANE COUNTY

FREEDOM FROM RELIGION  
FOUNDATION, INC. and  
PATRICK ELLIOTT

Plaintiffs,

v.

Case No. 14-CV-3429  
30701 Declaratory Judgment;  
30952 Petition for Writ of Mandamus

WISCONSIN OFFICE OF THE  
COMMISSIONER OF INSURANCE and  
THEODORE NICKEL,  
in his official capacity as  
Commissioner of Insurance

Defendants.


AFFIDAVIT OF ANDREW L. SEIDEL

STATE OF WISCONSIN        )  
  ) ss  
COUNTY OF DANE            )

Andrew L. Seidel, being duly signed and sworn, states as follows to the best of his knowledge:

1. I am a Staff Attorney employed by the Freedom From Religion Foundation ("FFRF").
2. I emailed and mailed a letter on July 22, 2014 to the Wisconsin Commissioner of Insurance, Ted Nickel, concerning the non-enforcement of contraceptive coverage by the Office of the Commissioner of Insurance ("OCI").
3. Exhibit A is a true and correct copy of the email that I sent on July 22, 2014.


4. Exhibit B is a true and correct copy of the letter that was mailed and attached to the July 22, 2014 email to Ted Nickel.
5. I regularly send open records and Freedom of Information Act requests to government agencies as part of my duties as a Staff Attorney at FFRF.
6. The records produced by government agencies in response to these requests typically include internal correspondence forwarding letters, memos, and other records to staff members, including but not limited to correspondence from the requester.
7. I understand that OCI did not produce similar correspondence to FFRF in response to its July 22 and July 25, 2014 requests for public records, or the memorandum I mailed and emailed to Mr. Nickel.



Andrew L. Seidel

State of Wisconsin  
County of Dane

This instrument was signed and affirmed before me on June 2, 2015 by Andrew L. Seidel.



Rebecca Markert  
Notary Public  
My commission does not expire.



**From:** Andrew Seidel aseidel@ffrf.org  
**Subject:** Error in law in new OCI order  
**Date:** July 22, 2014 at 2:45 PM  
**To:** Ted.Nickel@wi.gov

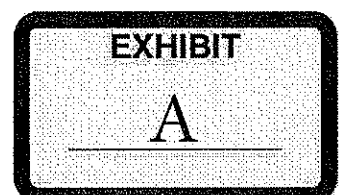


Dear Commissioner Nickel,

Please find attached an important letter regarding an egregious legal error made by the OCI in a recent policy change.

Warmest,

Andrew L. Seidel  
Attorney  
Freedom From Religion Foundation, Inc.  
PO Box 750  
Madison, WI 53701  
(608) 256-8900



# FREEDOM FROM RELIGION *foundation*

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

July 22, 2014

**SENT VIA U.S. MAIL AND EMAIL to:** [Ted.Nickel@wi.gov](mailto:Ted.Nickel@wi.gov)

Commissioner Theodore Nickel  
Office of the Commissioner of Insurance  
125 South Webster Street  
Madison, WI 53703-3474

Re: Failure to enforce Wisconsin law requiring contraception coverage

Dear Mr. Nickel:

I am writing on behalf of the Freedom From Religion Foundation (FFRF) regarding reports that this office will no longer enforce Wisconsin laws requiring contraception coverage in health plans. FFRF is a national nonprofit organization with 21,000 members, including more than 1,300 in Wisconsin. We protect the constitutional separation between state and church and represent the views of American freethinkers.

According to news reports, your office has halted “enforcement of a state contraceptive mandate in cases of employers with religious objections.”<sup>1</sup> The reports continue:

A spokesman for the state Office of the Commissioner of Insurance said that state officials had no choice in light of the 5-4 ruling by the nation's highest court last month in the Hobby Lobby Stores case. ... As a result, the insurance commissioner's office will no longer enforce in such cases a state law requiring insurers to cover contraception as part of their overall health plans. “It's as you would expect,” agency spokesman J.P. Wieske said. “We are federally pre-empted. We don't have any decision-making.”

The alleged reason for violating Wisconsin women's rights is absurd. The *Hobby Lobby* decision was based on an overturned federal law. It has no bearing on Wisconsin law. As you know Wisconsin law, specifically Wis. Stat. Ann. § 609.805 and §632.895(17), requires insurers to provide contraceptives and services, not federal law.

Even the most cursory reading of *Burwell v. Hobby Lobby Stores, Inc.*, reveals that the decision hinges on the Religious Freedom Restoration Act (RFRA). 42 U.S.C.A. § 2000bb et seq. The Court mentions RFRA nearly 200 times. RFRA does not apply to state law and state action. “This chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.” 42 U.S.C.A. § 2000bb-3(a). Even if RFRA did apply to state laws executing provisions of the ACA, which it does not,

<sup>1</sup> Jason Stein, “Wisconsin makes exception for enforcement of contraceptive mandate,” *Milwaukee Journal Sentinel* (July 21, 2014) available at <http://www.jsonline.com/news/statepolitics/wisconsin-makes-exception-for-enforcement-of-contraceptive-mandate-b99315515z1-268019571.html>

EXHIBIT

B

the Wisconsin legislature mandated contraceptive coverage in June of 2009, *before* the Affordable Care Act. *See* 2009 Wisc. Act 28. The mandate cannot implement a law it predates.

RFRA was struck down by the Supreme Court in 1997 in another case, *City of Boerne v. Flores*. 521 U.S. 507 (1997). The Court held that **RFRA, as it applied to the states, violates the Constitution.** *Id.* Specifically, Justice Kennedy wrote, “[RFRA] is a considerable congressional intrusion into the States’ traditional prerogatives and general authority to regulate for the health and welfare of their citizens.” *Id.* at 534.

Governor Walker agrees with this view of states’ rights and limited federal power:

...for years people like me and others have complained the federal government is encroaching on state’s rights — health care is a good example. If not spelled out in the Constitution in the 10th Amendment, then it’s the state’s rights. To me it’s hard to justify arguing that the federal government takes on too many of the state’s rights ....<sup>2</sup>

In fact, Walker views health insurance programs “instinctively as a states’ rights issue.”<sup>3</sup>

It is curious, some might even say hypocritical, to claim that there is a federal preemption issue with Wisconsin’s contraception mandate. Gutting mandatory contraceptive coverage is not required by the *Hobby Lobby* decision, as any staunch states’ rights defender must know.

Failure to enforce this mandate has nothing to do with religious freedom and everything to do with imposing conservative religious beliefs on women. The Wisconsin Attorney General’s Office has noted that not providing contraception coverage violates Wisconsin law, even amounting to sex discrimination. *See* Atty. Gen. Op. 1-04 (August 16, 2004).

In short, there is absolutely no reason for the Office of the Commissioner of Insurance to fail to enforce Wisconsin law regarding contraception coverage. We request that your office immediately rescind this misguided decision.

Sincerely,



Andrew L. Seidel  
Attorney  
Freedom From Religion Foundation

<sup>2</sup> Lisa Seiser, “A few minutes with gubernatorial candidate Scott Walker,” *Lake Geneva News* (May, 13, 2010) available at <http://www.lakegenevanews.net/Articles-i-2010-05-13-242833.114135> A few minutes with gubernatorial candidate Scott Walker.html

<sup>3</sup> Sharif Durhams, Jason Stein, Guy Boulton, “Walker won’t create health care exchange, defers to feds,” *Milwaukee Journal Sentinel*, (Nov. 6, 2012) available at <http://www.jsonline.com/news/statepolitics/walker-wont-create-health-care-exchange-defers-to-feds-3d7m2et-179663491.html>

