
Donor Disclosure Legislative Toolkit



Prepared by: The ALEC Civil Justice Task Force and the ALEC Center to Protect Free Speech

The Donor Disclosure Legislative Kit

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Step-By-Step Guide to Donor Disclosure Legislation






Donor disclosure and donor privacy are very important issues. Unfortunately, instead of a focus on government transparency and individual privacy, many advocates of donor disclosure are actually attempting to pass laws that would require the disclosure of personal information—like names and home addresses of Americans—in order to intimidate these donors from contributing to the causes they care about most.

The First Amendment protects freedom of speech and association, yet many donor disclosure bills are designed to intimidate people from associating with organizations and ideas that the government may not like.

As a legislator, it is imperative for you to protect the First Amendment rights of your constituents. Many times, legislators are told that donor disclosure legislation is just about electioneering communications and PACs, but when these bills are read closely, it is clear that your constituents and the organizations they care about are at risk of having their privacy and Free Speech rights violated simply for participating in the democratic process.

So what should you do if and when donor disclosure legislation comes to your legislature?

-  There are multiple efforts underway to stifle free speech through legislation. The State Policy Network (SPN) has identified five places to look for unconstitutional requirements to force nonprofit organizations to report the names and addresses of their supporters to the government or otherwise restrict their free speech rights. *(See Attachment A)*
-  The moment a new bill comes to your desk, you should pay close attention to the way certain terms are defined. *(See Attachment B)*
-  Contact an organization or firm that specializes in political speech, donor privacy or First Amendment issues and have them provide a detailed analysis of the bill. Some of the organizations to contact include:
 1. *American Legislative Exchange Council (ALEC), Center to Protect Free Speech*
 2. *Institute for Free Speech (IFS)*
 3. *State Policy Network (SPN)*
 4. *Philanthropy Roundtable*

(See Attachment D for Detailed Contact Information.)

These organizations will provide you with an objective analysis and inform you of any issues with the proposed legislation that may negatively impact First Amendment rights or pose other concerns. Donor disclosure is a very complex issue, and these organizations are able and willing to assist you.



If there is reason for concern, contact nonprofit organizations (of all different ideologies and interest areas) in your state. Send these organizations a copy of the bill, and ask them to answer the following questions:

1. How would this bill impact the privacy of your donors?
2. How would this bill impact the financial health of your organization? Would it deter people from donating to you?
3. How much would it cost your organization to comply with the requirements of this bill if it were to become law? Would it affect the quality of service you are able to provide?
4. Does the bill as written make sense? Is it something your organization could manage without spending additional resources?



Ask the nonprofits you've contacted to also share the draft legislation with their donors. If they also have comments or concerns, they should contact their legislator directly.



Ask local organizations to get involved by submitting written testimony, contacting their representatives, or asking them to testify at a hearing on the bill. Also consider how to raise awareness among grassroots activists in your community about the bill and the importance of donor privacy.



If or when a donor disclosure bill is heard in committee or on the floor, ask questions to determine whether the sponsor(s) of such legislation understand the implications of donor disclosure for constituents, social service providers, and nonprofit organizations. (See *Attachment C*)



Consider hosting a town hall with constituents, grassroots, and nonprofit organizations to keep members of your community updated on the status of the bill and educate them on donor privacy concerns.



Think of an offensive approach with media. Consider asking the questions from Step Four or *Attachment C* in an op-ed in your local paper. If you are contacted by media, be sure to point out these questions so those in support of the bill will be put on defense and be required to answer how the bill will impact privacy and First Amendment rights. The organizations listed in Step Three can assist you.

5 Places to Look for Unconstitutional Efforts to Stifle FREE SPEECH *(Attachment A)*

Here are five places to look for unconstitutional requirements to force non-profit organizations to report the names and addresses of their supporters to the government or otherwise restrict their free speech rights.

1

“Ethics” bills. Several states have grappled with legislation aimed at giving lawmakers a new code of ethics that regulates how they interact with their campaign supporters. While ethics standards are important, tucked into these bills have been provisions requiring non-profits to disclose their donors, even though current law already dictates that non-profits can’t spend money on candidate campaigns. Violating donor privacy raises more ethical concerns than it solves.

2

Bills that appoint an “Ethics Commissioner.” Like ethics bills, some states have passed legislation that gives broad and sweeping power to a new appointed government Ethics Commissioner, allowing this unelected person to subpoena the names and addresses of a non-profit’s supporters. How this person would be held accountable if he or she used the office to punish political opponents is a looming concern.

3

Bills that redefine “coordination.” Federal law prohibits non-profit organizations from coordinating with candidate campaigns. The current legal definition is clear-cut which helps non-profits remain compliant with the law. Several states have considered bills to more broadly define coordination to include two non-profit groups with similar missions communicating with each other about policy issues. Muddying the definition will confuse and ensnare non-profits, and create a much greater compliance burden.

4

“Anti-corruption” legislation. Anti-corruption legislation sounds appealing, but can open the door to unconstitutional regulation of speech and association by requiring people who want to speak out on political issues to register with the government and share the names and addresses of their supporters before they testify before a legislative committee. Needless to say, this heavy-handed suppression of ordinary citizens’ Opinions do little to address corruption.

5

Bills that redefine “electioneering communications” and “political committees.” More than a dozen states have considered or passed legislation that changes the definition of electioneering communications to include the everyday activity of many non-profit groups, like issuing a non-partisan voter guide or sending a message to their email list about a bill being considered by the Legislature. The definition of political committee has been similarly broadened and complicated to include any organization, business, group of people, and even individuals who speak out on political issues.

If you have questions about whether or not a bill you’re considering would have an impact on non-profit groups, the Institute for Free Speech or the Goldwater Institute can help.

How to Define “Political Committee” – And How Not To ([Attachment B](#))

A well-written definition of “political committee” is key to protecting privacy and free speech in your state. Even minor changes to wording can make campaign regulations more fair and effective. For an example of how these definitions should be written, look to Wisconsin’s law.

Wisconsin’s Definition of “Political Committee”:

(a) Subject to par. (b), “political action committee” means any person, other than an individual, or any permanent or temporary combination of 2 or more persons unrelated by marriage that satisfies any of the following: 1. It has the major purpose of express advocacy, as specified in the person’s organizational or governing documents, the person’s bylaws, resolutions of the person’s governing body, or registration statements filed by the person under this chapter. 2. It uses more than 50 percent of its total spending in a 12-month period on expenditures for express advocacy, expenditures made to support or defeat a referendum, and contributions made to a candidate committee, legislative campaign committee, or political party. In this subdivision, total spending does not include a committee’s fundraising or administrative expenses.

(b) “Political action committee” does not include a candidate committee, legislative campaign committee, political party, or recall committee.

[Note: Other sections of Wisconsin’s law define “express advocacy” and exempt small groups from having to register or report.]

Wisconsin’s previous campaign finance laws were unconstitutionally vague and overbroad. These flaws helped enable the infamous “John Doe” scandal, in which a local prosecutor targeted groups that supported Governor Scott Walker’s collective bargaining reforms. The tactics included, among other things, a secret investigation and pre-dawn police raids on homes. After the Wisconsin Supreme Court ended the prosecution and a federal court ruled large portions of the law unconstitutional, the Legislature acted to re-write the state’s campaign finance law in 2015.

Wisconsin’s new definition of political action committee (PAC) is the best in the nation. The Badger State’s definition encompasses all aspects of a well written and First Amendment-friendly law by:

- Having a **major purpose test** to ensure that nonprofits and civic organizations are not misclassified as PACs;
- Providing **clarity** about which activities – and in what **proportion** – count toward classification as a PAC; and
- Providing a **significant exemption** before a group must register and report its activities. In this case, the amount is \$2,500 in a calendar year.

These features ensure that true political committees must register and report to the government, while nonprofits and others remain free to speak.

At the other end of the spectrum – providing an example of what not to do – is West Virginia.



West Virginia's Definition of "Political Committee":

(21) "Political action committee" means a committee organized by one or more persons for the purpose of supporting or opposing the nomination or election of one or more candidates. The following are types of political action committees:

- (A) A corporate political action committee, as that term is defined by subdivision (8) of this section;
- (B) A membership organization, as that term is defined by subdivision (18) of this section;
- (C) An unaffiliated political action committee, as that term is defined by subdivision (29) of this section.

West Virginia's law shows how not to write a PAC definition. Such poorly written laws:

- make it difficult to understand what activities count for PAC status;
- fail to indicate the portion of regulated activities that trigger PAC status;
- arguably could classify a married couple as a PAC; and
- provide a low dollar (in this case \$0) exemption before registration or reporting is required.

Fortunately, there is growing recognition in the state that its law is poorly written. In 2017, the West Virginia Senate passed Senate Bill 539, which would amend the state's campaign finance laws – including its definition of "political action committee" – to better protect the speech rights of nonprofits and civic organizations. That bill awaits consideration in the House of Delegates in 2018.

The Institute for Free Speech (IFS) is the nation's largest organization dedicated solely to defending the First Amendment's rights to freely speak, associate, assemble, publish, and petition the government. IFS is available to help legislators examine and improve laws that regulate speech and association in their state. If you have any questions or interest in improving your state's laws in this area, please contact IFS Director of External Relations Matt Nese at mnese@ifs.org.



Questions to Ask Proponents of Donor Disclosure Legislation *(Attachment C)*

In considering a donor disclosure proposal, it is important to examine the underlying motivation for reform and get feedback from your local nonprofits and constituents about how the proposal may adversely impact their participation. The questions below can be helpful in framing those conversations, as well more formal committee hearings and floor debates. *See the Step by Step Guide to Donor Disclosure Legislation in this packet for additional guidance.*

Many state proposals take different approaches and target certain organizations more than others. Before using all of the questions presented below, be sure to look at the details of the legislation as some of the questions may not be relevant. For suggested questions specific to your state's proposal, reach out to ALEC and other organizations that specialize in free speech issues and request a thorough analysis of your state's proposal. (See Attachment B for detailed contact information.)



General Questions on the Proposal and Its Impact on Donor Privacy:

- 1) How would this bill affect the privacy of donors to nonprofit organizations?
 - Would nonprofits ever be required to disclose the personal information of those who donate to them?
- 2) What are your primary motivations in advancing this bill, and can the sponsors point to any 501(c)(3) nonprofit educational organization that has participated in any of the actions this bill is supposed to address?
- 3) What organizations have lobbied your office in support of this bill?
 - Are these organizations willing to reveal the names of their donors?
- 4) Would an employer be able to access this information?
 - Are you concerned an employee could be discriminated against if an employer found out the employee donated to a cause or organization they do not agree with?



Questions Related to Anonymous Giving:

- 1) Can you explain to us why it is any of our business as government officials to know who and what organizations our constituents donate to?
 - Does not the First Amendment protect the people's right to speech and association?
- 2) There are many individuals who choose to donate anonymously to charities. Have you thought about how this proposal would restrict the rights of those wishing to be anonymous benefactors?
- 3) Are you familiar with the *NAACP vs. Alabama* case in which the U.S. Supreme Court found that requiring the disclosure of donors to the NAACP would have created an unreasonable threat to their livelihood and therefore found that Alabama's law violated the privacy and free speech rights of donors to the NAACP?
 - Does this legislation not threaten those same rights?



Questions on the Impact of the Proposal on Charitable Activities and Donations:

- 1) Are you concerned about the impact these new regulations would have on charitable donation rates?
- 2) Are you concerned about the impact on the bottom lines of organizations that supplement government social services and step in when our budget restricts social services spending?
 - What would homeless shelters, churches, veterans associations, and other organizations be required to disclose under your bill?
- 3) What does this legislation do to separate actual election activities from the everyday work of our nonprofit organizations?
- 4) If a charitable organization like the Red Cross or my local chapter of the Kiwanis Club or church speaks up on a [ballot initiative, legislation, policy issue] because it is directly related to the mission of the group, do you think it is reasonable to require them to disclose all of their donors' personal information?
- 5) Charitable organizations cannot spend money on campaigns. They can't get involved in campaigns for candidates. Why should charities be required to disclose donor information when they don't engage in the activity intended to be regulated by this bill?

- 6) Is what you're doing here drafted narrowly enough to target your stated goals, or is the bill going to impact other activities and organizations?
- 7) Does this bill lump in purely educational activities with activities that are much more clearly election or advocacy related?
 - How would "Get Out the Vote" campaigns be impacted?
 - How about neutral voter guides and other democracy-amplifying activities?



Questioning Poorly Written Definitions in the Legislation:

- 1) Where this legislation redefines political committees and coordinated expenditures, how do these definitions differ from federal standards?
 - Are you aware that the Federal Government has adopted more specific definitions and importantly "safe harbors" to protect citizens and groups and provide clear guidance?
 - Would those differences create costly uncertainties for our nonprofit organizations?
- 2) Have other states defined these terms in the way the bill proposes to define them?
 - What was the result?
 - Has the language created any problems or ambiguities? This is a complex area of law that is ripe for regulatory overreach. Untested, ambiguous definitions risk punishing our charitable givers.
- 3) As written, are you worried that the definitions in this legislation would require non-election and non-advocacy-related activities to be regulated and disclosed?
- 4) Based on our discussion thus far today, it sounds like there's some uncertainty about when and to whom these new regulations would apply. If the legislative sponsors of this bill are uncertain about the implications, I'm concerned about the lack of instruction we would be giving to nonprofit organizations. Are you worried that the expense and complexity of compliance with this regulation would inherently force some organizations to abstain from exercising their constitutionally-protected free speech rights to avoid spending scarce resources on an army of legal experts and attorneys?

Contact Information for Donor Disclosure Information and Analysis (*Attachment D*)

Shelby Emmett

Director, Center to Protect Free Speech
American Legislative Exchange Council (ALEC)
2900 Crystal Drive, Suite 600
Arlington, VA 22202
Direct: (202) 809-1381
Office: (571) 482-5012
Email: SEmmett@ALEC.org
Website: www.ALEC.org

Matt Nese

Director of External Relations
Institute for Free Speech (IFS)
124 S. West St., Suite 201
Alexandria, VA 22314
Direct: (703) 894-6835
Email: mnese@ifs.org
Website: www.ifs.org

Amy Kjose Anderson

Director, Civil Justice Task Force
American Legislative Exchange Council (ALEC)
2900 Crystal Drive, Suite 600
Arlington, VA 22202
Direct: (202) 870-1110
Email: AKjoseAnderson@ALEC.org
Website: www.ALEC.org

Starlee Coleman

Senior Policy Advisor
State Policy Network (SPN)
1655 North Fort Myer Drive, Suite 360
Arlington, VA 22209
Phone: (602) 758-9162
Email: Coleman@SPN.org
Website: www.spn.org

Sean Parnell

Vice President of Public Policy
Philanthropy Roundtable
1120 20th Street NW, Suite 550 South
Washington, DC 20036
Phone: (202) 822-8333
Email: sparnell@philanthropyroundtable.org
Website: www.philanthropyroundtable.org