

FILED
01-31-2022
CIRCUIT COURT
DANE COUNTY, WI
2021CV003007

STATE OF WISCONSIN CIRCUIT COURT
Branch 8

DANE COUNTY

AMERICAN OVERSIGHT,

Petitioner,

v.

Case No.: 21-CV-3007
Petition for Writ of Mandamus
Case Code: 30952

ASSEMBLY OFFICE OF SPECIAL COUNSEL,
ROBIN VOS, in his official capacity,
EDWARD BLAZEL, in his official capacity,
and WISCONSIN STATE ASSEMBLY,

Respondents.

**PETITIONER'S OPPOSITION TO THE OFFICE OF SPECIAL COUNSEL'S
MOTION TO QUASH**

Respondent Assembly Office of Special Counsel (OSC) has filed a motion to quash Petitioner American Oversight's Petition for Writ of Mandamus. (Doc. 98; *see also* Doc. 99 ("OSC's Motion").) For the reasons stated below, OSC's motion to quash should be denied.

INTRODUCTION

OSC's Motion offers a kitchen sink of reasons for why OSC should not be required to release all of the records responsive to American Oversight's Requests at issue in this case and thus, why the Court should quash the Petition. When analyzing whether a record is properly withheld, courts look to three basic reasons for withholding: statutory exceptions, common law exceptions, and, if neither apply, whether the authority properly found that the public interest in non-disclosure of a particular record outweighs the public interest in disclosure. *Hempel v. City of Baraboo*, 2005 WI 120, ¶ 28, 284 Wis.2d 162, 699 N.W.2d 551 (citing *Linzmeier v. Forcey*, 2002 WI 84, ¶ 11, 254 Wis.2d 306, 646 N.W.2d 811;

Woznicki v. Erickson, 202 Wis.2d 178, 192–93, 549 N.W.2d 699 (1996) (superseded by statute on other grounds)). To support its position here, OSC must establish that one of these proper grounds for withholding applied to *every* single withheld record. But OSC’s arguments regarding each of these bases for withholding records—as well as OSC’s other arguments for why the Petition supposedly should be quashed—all fail.

First, OSC waived any bases for denial that rely on factors other than a clear statutory exception by not raising them in its written response to American Oversight’s Requests. *See* Part I.A. Even if they had been properly raised, none of those arguments hold water. OSC is wrong when it suggests that the Open Records law is necessarily overridden by a contractual confidentiality clause; that novel position is unsupported and contrary to established law. *See* Part I.B.1. In addition, OSC’s Motion does not raise any meritorious common law exceptions, *see* Part I.B.2, or bases under the public interest balancing test, *see* Part I.B.3, to shield the requested records.

Second, OSC has not asserted any valid statutory bases for withholding the requested records. Apparently recognizing that it cannot rely on non-statutory reasons that were not asserted in its original denial, OSC recently doubled down on its argument under Wis. Stat. § 12.13(5). (*See* Doc. 118.) But that statute relates to investigations of the Wisconsin Elections Commission and does not apply in this case.¹ OSC’s only other statutory argument misreads the statute on multiple levels and, in fact, raises only balancing test arguments that have been waived. *See* Part II.

¹ This brief addresses the arguments regarding Wis. Stat. § 12.13(5) that were raised in OSC’s Motion at issue here, as well as the additional, arguably waived arguments raised in OSC’s Motion for Reconsideration or, in the Alternative, to Amend Scheduling Order, filed on January 27, 2022, and denied by the Court on January 28, 2022. (*See* Docs. 118, 119.)

Third, the notion that American Oversight’s Requests do not seek “records” as defined under the Open Records Law and that is a basis to quash the Petition is wrong as a matter of fact and irrelevant where it is clear that American Oversight undoubtedly seeks “records” for purposes of the Open Records law. *See* Part III.

Fourth, OSC’s argument—borrowed from the Legislative Respondents—that the Petition seeks remedies not provided for within the Open Records law is reliant on an inaccurate reading of the Petition and can be disregarded. *See* Part IV. (*See also* Petitioner’s Opposition to Robin Vos, Edward Blazel, and Wisconsin State Assembly’s Amended Motion to Quash and Amended Alternative Motion to Strike Portions of the Petition² (“Opposition to Legislative Respondents’ Motions”), Part I.A.)

Finally, OSC is wrong that it does not have a duty to retain records responsive to American Oversight’s Requests. If responsive records no longer exist due to improper destruction, that certainly is not a basis to quash the Petition, and the Court may consider such facts at an appropriate time when awarding remedies in this case. *See* Part V.

BACKGROUND³

Factual Background. In May 2021, Wisconsin State Assembly Speaker Robin Vos (“Vos”) announced that the Wisconsin State Assembly (the “Assembly”) planned to hire

² Petitioners’ Opposition to Legislative Respondents’ Motions to quash or strike is being filed on the same day as this Opposition and thus a document number has not yet been assigned by the Court.

³ OSC’s Motion and Legislative Respondents’ Motions to quash or strike address different legal arguments and Petitioner responds to those arguments and motions separately. The relevant facts and procedural background, however, substantially overlap. Thus, for ease of reference, Petitioner provides the same Factual Background and Procedural History here, in response to OSC’s Motion, and in its Opposition to Legislative Respondents’ Motions to quash or strike.

three former law enforcement officers and a supervising attorney to investigate the November 2020 election. (Doc. 5 (the “Petition”), ¶ 21.) In June, the Assembly retained former Wisconsin Supreme Court justice Michael Gableman (“Gableman”) as coordinating attorney. (*Id.* ¶ 23; *see* Doc. 36, at 2–5 (Coordinating Attorney Independent Contractor Agreement, dated June 25, 2021).) On August 30, 2021, the Assembly Committee on Assembly Organization approved Vos’s request to allow him to designate Gableman “as special counsel to oversee an Office of Special Counsel” that would “direct an elections integrity investigation, assist the [Assembly] Elections and Campaign Committee, and hire investigators and other staff to assist in the investigation.” (Doc. 5, ¶¶ 25–27.)

After the creation of the OSC, American Oversight submitted several open records requests to Vos and Assembly Clerk Edward Blazel (“Blazel”) seeking records of the Assembly’s contractors staffing the OSC, including Gableman. (*Id.* ¶ 31.) American Oversight also submitted substantively similar requests directly to the OSC seeking, among other things: contracts, invoices, plans, scope of work statements, and other documents related to the organization and structure of, and payment for, the election investigation; interim or final reports, analyses, or work product prepared by Gableman or other contractors in the course of conducting the investigation; and various communications by Gableman and the other individuals working on the election investigation, along with their calendars. (*Id.* ¶¶ 31–41, collectively referring to “American Oversight’s Requests.”)

American Oversight submitted the fourteen requests at issue in this case—seven each to the Legislative Respondents and OSC—on September 15, October 15, and October 26, 2021. (*Id.* ¶¶ 32, 37, 39.)

On December 4, OSC sent American Oversight an email partially denying American Oversight's Requests to the OSC on the grounds that: "Some documents that contain strategic information to our investigation will continue to be help [sic] until the conclusion of our investigation." (*Id.* ¶ 45.) OSC produced only 114 pages in response to American Oversight's requests and excluded numerous responsive records. (*Id.* ¶¶ 46–48.)

To date, Vos has not responded to American Oversight's Requests. (*Id.* ¶ 51.) Blazel responded by providing some records, but only those from his files and not those from Gableman or any other Assembly contractor. (*Id.* ¶¶ 52, 54.)

Procedural History. On December 20, 2021, American Oversight initiated this action against OSC, Vos, Blazel, and the Assembly by filing its Petition for Writ of Mandamus. (*See id.*) Petitioner also sought the immediate issuance of an alternative writ of mandamus ordering all Respondents to produce records in response to American Oversight's Requests that are the subject of the Petition. (Doc. 11.)

On December 21, the Court issued the Alternative Writ of Mandamus, ordering Respondents to "immediately on receipt of this writ, release the records responsive to Petitioner's request, or in the alternative to show cause to the contrary" at a hearing scheduled for January 21, 2022. (Doc. 42.)

More than four weeks later, on January 20, 2022, and after OSC unsuccessfully sought to continue the January 21 hearing (Docs. 80, 82), OSC filed a Motion to Dismiss or Quash, (Doc. 99 ("OSC's Motion"); *see also* Doc. 98 (Notice and Motion)). Also on January 20, 2022, Vos, Blazel, and the Assembly (collectively, the "Legislative Respondents") filed a Motion to Quash and Alternative Motion to Strike Portions of the Petition. (Doc. 87.) The next day, and prior to the show cause hearing, the Court issued an

order striking the Legislative Respondents' motion to quash and denying the alternative motion to strike. (Doc. 107.)

On January 21, 2022, the Court held a show cause hearing and issued several related rulings, memorialized in a January 25 Order. (Doc. 110.) Among other things, the Court required OSC to "file with the Court a copy of Special Counsel Michael Gableman's contract(s)" with the Assembly by January 24 and further required OSC to "file all records, documents, and things responsive to Petitioners' requests under the Open Records law" by January 31 for *in camera* review. (*Id.* at 2.) The Court additionally ordered Vos to, by January 31, 2022, "file responses to the Petitioners' open records requests at issue in this case that have been directed to him (Exhibits A, C, E, G, I, K, and M to the Petition)." (*Id.*) The Court also allowed the Legislative Respondents to "refile a copy of their motion to quash with citations that conform to Wis. Stat. § 809.23(3)." (*Id.*)

On January 25, the Legislative Respondents filed their Amended Motion to Quash and Amended Alternative Motion to Strike Portions of the Petition. (Doc. 111.)

On January 27, OSC filed a "Notice and Motion for Reconsideration, or, in the Alternative, to Amend Scheduling Order" (Doc. 118), seeking to avoid the Court-ordered *in camera* review. The Court denied that motion the next day. (Doc. 119.)

Petitioner now submits this brief in response to the portions of OSC's Motion that seek to quash the Petition (Doc. 99, at 2–22).⁴

⁴ OSC's Motion initially sought to dismiss this litigation due to purported lack of service in addition to seeking to quash the Petition. While OSC continued to press a service objection at the January 21 hearing, on January 26, OSC affirmed that it had accepted service and would no longer be contesting personal jurisdiction. (Doc. 116.) As such, this brief does not address the portions of OSC's Motion regarding personal jurisdiction that have been mooted.

LEGAL STANDARDS

Motion to Quash. A motion to quash a writ of mandamus⁵ “admits all facts which are well pleaded for the purpose of the motion, and it raises the issue whether any ground for relief is stated.” *State ex rel. Leuch v. Hilgen*, 258 Wis. 430, 431, 46 N.W.2d 229 (1951) (citation omitted); *see* Wis. Stat. § 783.01 (a motion to quash “shall be deemed a motion to dismiss the complaint under s. 802.06(2)”). In evaluating “whether the facts alleged in the petition for writ of mandamus state a cause of action under the public records statute . . . [the] petition should not be interpreted narrowly to defeat it.” *State ex rel. Morke v. Donnelly*, 155 Wis. 2d 521, 526, 455 N.W.2d 893 (1990) (quoting *State ex rel. Dalton v. Mundy*, 80 Wis. 2d 190, 196, 257 N.W.2d 877 (1977)). Instead, “[t]he general rule is that a pleading will be fairly and liberally construed to give effect to its object and purpose.” *Dalton*, 80 Wis. 2d at 196 (noting that this is “especially applicable” where an “action is to compel public officers to perform their prescribed statutory duties”).

The Open Records Law. The first sentences of the Open Records law declare the state’s official policy of virtually unfettered access to government information:

In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be the

In addition, on January 21, immediately before the scheduled hearing, OSC also filed an “Amended Notice and Motion of The Office of the Special Counsel to Dismiss or Quash Petition” that adds a motion to dismiss for lack of subject matter jurisdiction. (*See* Doc. 105.) OSC has not filed any brief in support of that purported ground for dismissal and did not raise it at the January 21 hearing. This brief also does not address any purported lack of subject matter jurisdiction because OSC appears to have abandoned that argument.

⁵ OSC moves “for an order dismissing the Petition” (Doc. 98, at 1) when, generally, motions to quash are directed at the writ itself. *E.g.*, *State ex rel. Johnson v. Cty. Ct., Branch II, Waukesha Cty.*, 41 Wis. 2d 188, 190–92, 163 N.W.2d 6 (1968). Despite filing its Motion apparently in anticipation of the January 21 hearing, OSC did not move to quash the Alternative Writ of Mandamus (Doc. 42) that the Court had already issued. For purposes of this response, American Oversight applies the standards for a motion to quash a writ.

public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them. Further, providing 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.

Wis. Stat. § 19.31. “This statement of public policy in § 19.31 is one of the strongest declarations of policy to be found in the Wisconsin statutes.” *Zellner v. Cedarburg Sch. Dist.*, 2007 WI 53, ¶ 49, 300 Wis. 2d 290, 315, 731 N.W.2d 240.

The presumption in favor of access creates rules for this Court’s interpretation of the law. To serve the objectives identified in Wis. Stat. § 19.31, “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,” and “*only in an exceptional case may access be denied.*”

Wis. Stat. § 19.31 (emphases added).

ARGUMENT

- I. **OSC’s Non-Statutory Bases for Withholding Records Have Been Waived And, In Any Event, Are Insufficient to Justify OSC’s Denial.**
 - A. **OSC May Not Raise New Bases for Withholding Other Than Clear Statutory Exceptions.**

OSC’s Motion ignores that it waived many of its arguments by not making them in OSC’s pre-litigation denial. Under well-settled law, an authority’s reasons for withholding records must be set forth in the initial denial of records. As the Wisconsin Supreme Court held in *Newspapers, Inc. v. Breier*:

The duty of the custodian is to specify reasons for nondisclosure and the court's role is to decide whether the reasons asserted are sufficient. It is not the trial court’s or this court’s role to hypothesize reasons or to consider reasons for

not allowing inspection which were not asserted by the custodian.

89 Wis. 2d 417, 427, 279 N.W.2d 179 (1979). The only possible bases for withholding records that can be preserved even if not initially identified are “clear statutory exceptions,” as such exemptions are “not uniquely within the custodian’s knowledge” and represent a legislative weighing of competing public interests. *State ex rel. Blum v. Bd. of Educ.*, 209 Wis. 2d 377, 387–88, 565 N.W.2d 140 (Ct. App. 1997); *see also Mastel v. Sch. Dist. of Elmbrook*, 2021 WI App 78, ¶ 14 n.3, 399 Wis. 2d 797, 967 N.W.2d 176.

The law also recognizes that requestors must be informed of the *specific* reasons for withholding requested records; beyond “provid[ing] a means of restraining custodians from arbitrarily denying access to public records,” the specificity requirement is necessary to give the requester “sufficient notice of the grounds for denial to enable him to prepare a challenge to the withholding and to provide a basis for review in the event of a court action.” *Mayfair Chrysler-Plymouth, Inc. v. Baldarotta*, 162 Wis. 2d 142, 160, 469 N.W.2d 638 (1991). “The specificity requirement is, therefore, procedural in nature.” *Id.*

In short, denials must be specific enough to give requesters notice of the reason(s) for denial, and the time for providing that full and complete justification for withholding is at the time of the withholding, not after litigation has already commenced. As such, any non-statutory arguments OSC raises in its Motion that it did not raise in its denial cannot be considered at this stage and have been waived. *See Breier*, 89 Wis. 2d at 427 (“If the custodian gives no reasons or gives insufficient reasons for withholding a public record, a writ of mandamus compelling the production of records *must* issue.” (emphasis added)).

The one-sentence partial denial of American Oversight’s Requests contained in OSC’s response stated: “Some documents that contain strategic information to our

investigation will continue to be help [sic] until the conclusion of our investigation.” (Doc. 27). This statement simply does not allow the recipient to identify any asserted common law exception to disclosure. Nor does it allow a requester to determine whether a balancing test was even performed, let alone provide grounds for a requester to challenge a determination that “the public interest in nondisclosure of the challenged information outweighs the public interest in disclosure.” *John K. MacIver Instit. for Pub. Policy, Inc. v. Erpenbach*, 354 Wis. 2d 61, 71, 848 N.W.2d 862 (2014). The denial based on “strategic information” is akin to the denial rejected in *Beckon v. Emery*, “in which a police chief refused to produce requested police reports on the grounds that the reports were ‘confidential’ and that access to them ‘would not be in the public interest’.” *Baldarotta*, 162 Wis. 2d at 158–59 (quoting 36 Wis. 2d 510, 513–14, 153 N.W.2d 501 (1967)); *see also Vill. of Butler v. Cohen*, 163 Wis. 2d 819, 826, 472 N.W.2d 579 (1991) (“mere legal conclusions that a record is ‘confidential’ or that its release would be ‘contrary to the public interest’ insufficiently justify refusal because such reasons lack specificity”).

Having made a statement entirely lacking in specificity and having cited no specific common law or balancing test principles, any argument on those bases have been waived.⁶ *See Breier*, 89 Wis. 2d at 427. To find otherwise would allow OSC another bite at the apple in contravention of the Supreme Court’s mandate in *Breier*, as well as the Open Records

⁶ OSC claims that it acted upon “erroneous advi[c]e” “of separate counsel” when it produced documents on December 4, and that it should not have produced *any* records for the reasons put forth in its Motion. (Doc. 99, at 7.) Whether OSC received good or bad legal advice is entirely irrelevant to the claims in this case and certainly has no bearing on whether it may now raise new bases to deny American Oversight’s Requests. *Breier*, 89 Wis. 2d at 427.

law's mandate to provide access to records "as soon as practicable and without delay," Wis. Stat. § 19.35(4)(a).

B. OSC's Common Law and Balancing Test Bases for Withholding the Requested Records Are Insufficient.

Having failed to identify specific reasons for withholding responsive records, OSC now attempts to shoehorn new common law and balancing test arguments into its bare-bones denial. Each of these efforts fail because they are barred under *Breier* and its progeny, *see, supra*, Part I.A, and, in any event, for the additional, independent reasons explained below.

1. *The Open Records Law Cannot Be Subverted By Contract.*

OSC's Motion raises a novel argument that OSC's records are exempt from disclosure because (1) "the Assembly has plenary authority to conduct investigations in furtherance of legislative functions" and (2) "the Assembly determined that the proper manner of investigation was to keep Investigation records confidential" (*see* Doc. 99, at 8; *see id.* at 8–14). OSC relies on language from Gableman's June 2021 contract that requires Gableman to "[k]eep all information/findings related to the services rendered under this agreement confidential, except when working with Integrity Investigators and such designee(s) of the Assembly whom the Speaker shall from time to time identify in writing." (Doc. 99, at 4 (quoting Doc. 36, at 2).) OSC's argument based on this provision is wrong as a matter of law and fact.

Most basically, this argument has been waived for two reasons. First, it is not based on a clear statutory exemption, and contractual confidentiality provisions were not raised in OSC's initial denial. (*See* Doc. 5, ¶ 45.) OSC appears to be asserting that in entering a contract with Gableman, Vos made a public interest policy determination regarding whether

OSC's records should be kept confidential, and that OSC is bound by that determination through Gableman's pre-OSC contract. Despite OSC's effort to dress up a balancing test argument in constitutional and contractual terms, that argument should have been made at the time of OSC's initial denial and has been waived. *See* Part I.A. Second, OSC *did* produce records on December 4 and thus has relinquished any argument that the legislature enjoys some form of special immunity from disclosure. *See Brunton v. Nuvel Credit Corp.*, 2010 WI 50, ¶¶ 36–38, 325 Wis. 2d 135, 785 N.W.2d 302. Notably, the Legislative Respondents—the only parties who could even arguably assert a legislative right in this case—have not *ever* asserted such a basis for denial of any of American Oversight's requests regarding the election investigation. (*See generally* Docs. 87, 111.)⁷ OSC cannot now assert the legislature's purported “plenary authority” when the legislature itself has not done so (or even suggested that such considerations apply).

In any event, OSC's argument is contrary to Wisconsin law. The Wisconsin Supreme Court has already determined that parties may not “contract away the public's rights under Wis. Stat. § 19.35(1)(a).” *Milwaukee J. Sentinel v. Wis. Dep't of Admin.*, 2009 WI 79, ¶ 53, 319 Wis. 2d 439, 768 N.W.2d 700 (holding that collective bargaining agreement ratified by legislative vote did not modify the Open Records law). “To hold otherwise would be contrary to the public interest, and would have the potential to eviscerate the Public Records Law through private agreements.” *Id.* OSC's motion should fail on this basis alone.

⁷ In *American Oversight v. Robin Vos et al.*, Dane County Case No. 21-cv-2440, the Court ordered the Legislative Respondents to “produce contractors' records” from prior to the creation of the OSC. (Westerberg Aff., Ex. H at 34–35.) The Court is currently considering Petitioner's motion for remedial sanctions because the Legislative Respondents did not fully comply with the Court's order, but Legislative Respondents never argued that the confidentiality provision OSC raises here acts as a bar to disclosure. (*See generally id.*)

None of the cases on which OSC relies have anything to do with the Open Records law.⁸ OSC's Motion nevertheless makes the bold pronouncement that the legislature's own statutory enactments can be superseded, without bicameralism or the Governor's signature, by the Assembly's "broad and plenary authority . . . to investigate . . . [and that] relevant statutes and rules cannot be seen as limits to that authority unless explicit." (Doc. 99, at 13.)⁹ But the legislature, through its constitutional law-making powers, has affirmatively subjected itself to the Open Records law, and the remedies under that law, regardless of what activity the legislature is conducting. *See* Wis. Stat. § 19.32(1) (an "[a]uthority" for purposes of the Open Records law includes an "elective official" and "the assembly or senate"); *id.* § 19.37(1) (mandamus action is means of enforcing Open Records law when any "authority withholds a record or part of a record or delays granting access"). Indeed, legislators have previously been held liable under the Open Records law for activities related to their office. *E.g.*, *Lueders v. Krug*, 2019 WI App 36, ¶¶ 2, 21, 388 Wis. 2d 147, 931 N.W.2d 898 (finding assemblyman should have released electronic copies of correspondence related to changes in state water laws); *MacIver*, 354 Wis. 2d 61, ¶ 1 (finding state senator should have released complete copies of correspondence related to Act 10).

⁸ *See, e.g.*, *Goldman v. Olson*, 286 F. Supp. 35 (W.D. Wis. 1968) (seeking declaratory and injunctive relief against a state senate-created committee to investigate activities on state university campuses); *In re Falvey*, 7 Wis. 630, 630 (1859) (addressing the Assembly holding a subpoenaed witness in contempt); *see also State ex rel. McCormack v. Foley*, 18 Wis. 2d 274, 118 N.W.2d 211 (1962) (not addressing the public records law); *Town of Beloit v. Cty. of Rock*, 2003 WI 8, 259 Wis. 2d 37, 657 N.W.2d 344 (2003) (same); *Libertarian Party of Wis. v. State*, 199 Wis. 2d 790, 546 N.W.2d 424 (same).

⁹ Repeating the mantra of the legislature's "plenary authority" is not a get-out-of-jail-free card for the legislature to do whatever it wishes. Regardless, at least one commentator has stated that due to the many limitations the Constitution places on the legislature, it "has significantly less than plenary power." Jack Stark, *THE WISCONSIN STATE CONSTITUTION*, 88 (Oxford Univ. Press 2011).

Hence, whether OSC's investigation is a proper legislative investigation (*see* Doc. 99, at 11–12) or, in general is conducted in a proper “manner” (*id.* at 12–14), is not at issue in this case. Even if the investigation is otherwise proper, the legislature has *already* determined that the Open Records law applies to (1) the legislature itself and its members and (2) that obligations under the open records law may not simply be contracted away. Wis. Stat. § 19.36(3) (requiring an authority to make available records “produced or collected” by its contractors to the same extent as records “maintained by the authority”); *see J. / Sentinel, Inc. v. Sch. Bd. of Sch. Dist. of Sherwood*, 186 Wis. 2d 443, 452–53, 521 N.W.2d 165 (Ct. App. 1994) (“The school board appellants’ argument thus resolves to whether a public body may avoid the public access mandated by the public-records law by delegating both the record’s creation and custody to an agent. Posing this question provides its answer: it may not.”). The legislature further articulated a “presumption of complete public access” to those records, the result being that only in “exceptional” cases should access be denied. Wis. Stat. § 19.31.

Moreover, OSC's Motion does not mention, let alone address, the law that *does* exist regarding confidentiality agreements and the Open Records law. In general, an agreement to maintain confidentiality can defeat disclosure if all of the following are present: a clear pledge of confidentiality; that the pledge was made to obtain the information at issue; that the pledge was necessary to obtain the information; and that in each instance the harm to the public of disclosing the confidential information outweighs the public interest in disclosure. *Baldarotta*, 162 Wis. 2d at 168. There is no indication of any of these factors here. The contractual language in fact *contemplates* sharing information with members of Vos's office, who are undoubtedly subject to the Open Records law (*see* Doc. 36, at 2)—and have

not similarly pledged to keep information confidential under the contract. And nothing in the contract suggests that the confidentiality provision was necessary for Gableman to conduct his work or obtain confidential information. Certainly, OSC has not suggested that it conducted a case-by-case balancing test with regard to any information that it asserts is covered by this clause.

OSC's argument also glosses over critical facts that entirely undermine its position. For one thing, Gableman's contract with the Assembly was signed by Vos (*id.* at 5) and there is no suggestion that the Assembly itself approved or even was made aware of the terms. Blanket exemptions to the Open Records law cannot be created by a single legislator. *See, e.g., MacIver*, 354 Wis. 2d 61, ¶ 15 ("We will not take it upon ourselves to create a rule treating legislators differently from other elected or nonelected records custodians."). And, even if one chamber could override duly enacted law, nothing in the Assembly's resolution regarding the investigation or in the mail ballots to the Assembly Committee on Assembly Organization creates a cloak of secrecy or suggests the Open Records law would not apply to the investigation. (*See Docs.* 101–03.)

In addition, OSC ignores that Gableman's contract may not even be in effect. During deposition testimony taken in a related case, neither Vos nor his general counsel, Steve Fawcett, could say whether Gableman's contract had been extended to the present, or if the document the OSC submitted to this Court (Doc. 108, the "First Amendment") had been fully executed. (Westerberg Aff., Ex. A at 51:1–52:2, 59:1–10, 66:8–67:25, B at 98:2–17, 103:1–104:17, 110:8–111:13, C, D.)¹⁰ Moreover, the First Amendment says nothing about

¹⁰ Curiously, the First Amendment does not contain Gableman's signature, but instead only a "/s/" on his signature line. (Doc. 108.) This notation generally indicates a copy and is in contrast to other documents Gableman signed with his actual signature, including the

extending the term of the original contract past its termination date of October 31, 2021, which it would have had to do in writing.¹¹ (*See generally* Doc. 108.) As such, the confidentiality provision on which OSC relies appears not to be in effect. Neither is Gableman’s authority to speak or act for the OSC.

In short, OSC’s invocation of “plenary authority” is little more than a dressed up balancing test argument that fails on several independent legal grounds and is not, as a factual matter, applicable to the issues raised in this case.

2. *Common Law Principles Related to Law Enforcement Do Not Apply to OSC’s Investigation.*

OSC next argues that “[c]ommon [l]aw [p]rinciples [e]xempt the [i]nvestigation [r]ecords from [d]isclosure” (Doc. 99, at 17), but it cites no common law principles that apply to a legislative investigation like the one OSC is undertaking. Nor could OSC cite such a principle as there is no common law exception to the Open Records law for a legislative investigation.

Perhaps recognizing this, OSC attempts to equate its investigation, operating through the legislature, to law enforcement actions. But OSC’s legislative investigation is decidedly *not* a law enforcement investigation. Any authority OSC has comes from the Assembly (*see*,

original contract he entered into with the Assembly. (Doc. 36.) At a minimum, the failure to use an actual signature raises questions about the authenticity of the First Amendment and does not satisfy Wis. Stat. §§ 910.02 and .03.

¹¹ Gableman’s contract provides: “Any modification of this Agreement will be effective only if it is in writing and signed by the other party.” (Doc. 36, at 4.) The sole reference in any of Gableman’s contracts to periods after October 31, 2021, is in the budget attached to the First Amendment (Doc. 108, at 4), but even that budget only goes through the end of December 2021. Given the Court’s Order to OSC to “file with the Court a copy of Special Counsel Michael Gableman’s contract(s) he has with the Wisconsin Assembly” by January 24, 2022 (Doc. 110), Petitioner assumes Gableman did not have any further contracts or amendments as of that date.

e.g., Docs. 101–03) and the legislature has no role in prosecuting election law violations. That authority is vested in the district attorney or attorney general. Wis. Stat. § 978.05(1). As the Wisconsin Constitution makes clear, the legislature has “authority to make laws, but not to enforce them.” *Koschkee v. Taylor*, 2019 WI 76, ¶ 11, 387 Wis. 2d 552, 929 N.W.2d 600. And more broadly, courts regularly make clear that a legislature’s “power to investigate must not be confused with any powers of law enforcement” *Quinn v. United States*, 349 U.S. 155, 161, 75 S.Ct. 668, 672 (1955); *see also Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2032 (2020). Respondents themselves have insisted that the investigation’s goal is to inform future policymaking in Wisconsin, rather than impose criminal sanctions. (*E.g.*, Doc. 101, at 2 (providing, in the Assembly Resolution authorizing the investigation, that “it is the duty of the Wisconsin Legislature *to make laws* and to exercise its oversight and investigative authority”) (emphasis added)).¹²

Still, OSC cites cases establishing a narrow exemption for prosecutorial files and says that while OSC is “not a ‘prosecutor,’ the same concepts apply.” (Doc. 99, at 17.) But the exemption for “prosecutor files,” established in *State ex rel. Richards v. Foust*, 165 Wis. 2d 429, 436 N.W.2d 608 (1991), addresses policy considerations that are not at issue outside of the law enforcement context. *See id.* at 435 (“The file may contain . . . anonymous

¹² As additional examples, when the investigation was announced, Vos stated that its purpose “was not to bring charges against anyone but rather to build evidence for potential law changes.” Scott Bauer, *Wisconsin GOP Leader Hires Retired Police to Probe Election*, AP, May 26, 2021, <https://apnews.com/article/wisconsin-police-election-2020-elections-government-and-politics-2834377781ea818b1a16cfe6830838f4>. More recently, Vos has stated that he needs a report from Gableman by the end of February to “have legislation on the floor to be able to pass no later than the end of our session which concludes in March.” *Vos on ‘UpFront’ says he wants Gableman to complete election probe by end of February*, WisPolitics, Jan. 10, 2022, <https://www.wispolitics.com/2022/vos-on-upfront-says-he-wants-gableman-to-complete-election-probe-by-end-of-february/>.

statements, informants' statements, or neighborhood investigations at the scene of the crime—all of which are to be protected if continuing cooperation of the populace in criminal investigations is to be expected.”); *see also State ex rel. Spencer v. Freedy*, 198 Wis. 388 (1929) (addressing a fire marshal's investigation that could lead to an arson arrest).¹³ Legislative investigations may uncover wrongdoing, but the Assembly itself cannot charge individuals with crimes. As such, the incentives to somehow use revealed information about the investigation to change its direction do not exist in the context of a legislative investigation in the way it might in the context of a criminal investigation. OSC's actions have been consistent with this reality, as the office has proactively published “submitted election integrity reports” on its public website and made numerous public statements regarding the investigation, including referencing “evidence” purportedly uncovered to date. (Westerberg Aff., Ex. A at 105:19–106:4, Ex. E, Ex. G at 11, 13, 14, 16, 19, 21, 24, 25; *see also* Doc. 5, ¶ 48.)¹⁴ The Court should reject OSC's efforts to conflate its legislative policy inquiry with

¹³ The other cases cited in *Foust* that OSC relies on in its brief are all, by the OSC's own admission, related to “prosecutor's files.” (Doc. 99, at 17.) Moreover, only one of those cases addresses the Open Records law—and even that case does not have applicability here except to demonstrate that the Court's reasoning in *Foust* was focused on criminal prosecutorial files. *See State v. Herman*, 219 Wis. 267, 262 N.W. 718, 721 (1935) (addressing request by criminal defendant to direct the district attorney to permit inspection of the district attorney's transcript of the testimony taken at a criminal John Doe hearing); *Wis. Fam. Counseling Servs., Inc. v. State*, 95 Wis. 2d 670, 673, 291 N.W.2d 631, 634 (Ct. App. 1980) (describing the limits of Wisconsin's public records statute so the state may “effectively prosecute and punish criminals and protect society from criminal ravaging.”); *State ex rel. Lynch v. Cty. Ct., Branch III*, 82 Wis. 2d 454, 262 N.W.2d 773 (1978) (holding that a defendant has no pre-trial right to inspect a prosecutor's files); *Britton v. State*, 44 Wis. 2d 109, 117, 170 N.W.2d 785, 789 (1969) (determining that a criminal defendant is not entitled to inspect prosecutors' files for all potentially helpful information).

¹⁴ For example, Gableman posted a video on YouTube on October 9, 2021, at <https://www.youtube.com/watch?v=352AnQI5Wgs>. At 3:26 of the video, Gableman states that “there is compelling evidence” that Wisconsin's elections laws were not “properly followed” at the state and local level in November 2020.

an investigation to enforce the law assigned by Wisconsin's constitution to a separate, coequal branch.

Even if OSC *were* a prosecutor, its conclusion that all “[i]nvestigation records are exempt from disclosure” would *still* be inaccurate. (See Doc. 99, at 18.) There is no “bright-line rule” that establishes a blanket exemption for *every* document generated by a prosecutor. *Nichols v. Bennett*, 199 Wis. 2d 268, 274, 544 N.W.2d 428, 430–31 (1996) (“A prosecutor cannot shield documents subject to the open records law simply by placing them into a ‘prosecutorial file.’”). It is the “nature of the documents” and their “substance” that determines whether they are subject to public disclosure. *Id.* at 274–75. Thus, even if OSC could appropriately avail itself of the protections afforded to records created by law enforcement, OSC would still be required to review the records and determine which contain information that should be protected, consistent with the policy considerations underlying the *Foust* exemption. Moreover, to the extent OSC argues that its work may *lead* to prosecution by a different branch of Wisconsin government, the exemption for prosecutor’s records under *Foust* applies only to records in a prosecutor’s possession—not copies of those records held in other entities or individuals’ files. See *Portage Daily Reg. v. Columbia Cty. Sheriff’s Dep’t*, 2008 WI App. 30, ¶¶ 17–18, 308 Wis. 2d 357, 746 N.W.2d 525 (noting that the *Foust* exemption cannot be asserted by the sheriff’s department because that exemption is “exclusive to the records of another custodian”).

The other cases OSC cites do not address blanket common law exemptions and in any event address policy considerations not relevant here. (See Doc. 99, at 17–18.) For one thing, *Kroepelin v. Wisconsin Department of Natural Resources* and *State ex rel. J. / Sentinel, Inc., Anne Bothwell v. Philip Arreola, Chief of Police, City of Milwaukee* both address records related to

employee disciplinary proceedings—proceedings that are not and cannot be part of OSC’s legislative investigation. Moreover, OSC’s citation to *Kroepelin*, in which the records sought *were* released, ignores that the quoted passage specifically discusses withholding documents related to employee misconduct investigations under Wis. Stat. § 19.36(10)(b)—which is not at issue here and (correctly) is not asserted by OSC. 2006 WI App 227, ¶ 31, 297 Wis. 2d 254, 725 N.W.2d 286 (“Wisconsin Stat. § 19.36(10)(b) codifies common law standards and continues our tradition . . .”).¹⁵ Similarly, *J./Sentinel, Inc.*, 207 Wis. 2d 496, 558 N.W.2d 670 (Ct. App. 1996), addressed balancing test arguments—not a blanket common law exemption—and as relevant here, addressed whether supervisory police officers’ opinions related to “potential or actual disciplinary actions.” *Id.* at 519.

3. *The Public Has a Strong Interest in Prompt Disclosure and OSC Has Not Articulated Any Countervailing Public Interest In Withholding Records.*

With respect to the balancing test, OSC’s Motion offers two policy reasons for its withholdings: “first, that the documents withheld at that time contained strategic information, and second, that the documents were necessarily withheld for the continuation of the investigation.” (Doc. 99, at 19.) These concerns have not been properly raised, *see, supra*, Part I.A, and even if they were, would not justify the OSC’s withholdings here.

“In the absence of a statutory or common law exception, the strong presumption favoring disclosure can only be overcome when there is a public policy interest in keeping the records confidential.” *Linzmeier*, 254 Wis. 2d 306, ¶ 11 (citation omitted). “The denial of

¹⁵ In addressing that specific statutory exemption, which prohibits release until “disposition of the investigation” Wis. Stat. § 19.36(10)(b), the court noted that such an investigation “achieves its disposition when the authority acts to impose discipline on an employee as a result of the investigation.” *Id.* at 277. OSC’s investigation cannot include such a disposition.

public access generally is contrary to the public interest”: it is an “exceptional case” where records will be justifiably withheld. Wis. Stat. § 19.31. Additionally, the balancing of public interests in disclosure and withholding must be applied on a record-by-record basis, *Milwaukee Journal Sentinel v. Wis. Dep’t of Admin.*, 319 Wis.2d 439, 476, 768 N.W.2d 700 (2009). Issuing “blanket exceptions” is generally unacceptable. *Id.* (citing *Linzmeier*, 2002 WI at ¶ 10). Moreover, the public’s interest is not just in disclosure, but in *prompt* disclosure. See Wis. Stat. § 19.35(4); *State ex rel. Auchinleck v. Town of LaGrange*, 200 Wis. 2d. 585, 595, 547 N.W.2d. 587 (1996) (“delay defeats the purpose of the open records” law); see also *Ctr. for Pub. Integrity v. United States Dep’t of Def.*, 411 F. Supp. 3d 5, 12 (D.D.C. 2019) (observing in relation to the federal Freedom of Information Act, “stale information is of little value”). The party seeking nondisclosure has the burden to show that “public interests favoring secrecy outweigh those favoring disclosure.” *Democratic Party of Wis. v. Dep’t of Justice*, 2016 WI 100, ¶ 9, 372 Wis. 2d 460, 888 N.W.2d 584 (citing *MacIver*, 354 Wis. 2d 61, ¶ 14).

Here, the public has a particularly strong interest in disclosure, even beyond the default presumption in favor of access in Wis. Stat. § 19.31. The records in this case are unusually significant as they relate to an investigation that the OSC itself asserts has the “potential to have state-wide implications on how elections are conducted.” (Doc. 99, at 19.) It is difficult to imagine a more critical public interest than to understand the nature, scope, and integrity of an effort that purports to examine democratic processes, the results of which may impact how future elections are run.

By contrast, OSC has offered no adequate basis for withholding the requested records. OSC has offered no evidence that a balancing test weighing the interests on both sides was ever performed, much less that it was performed on an individualized (per record)

basis. And even if OSC did perform a proper balancing test, OSC's arguments would still fail. Its proclaimed need for confidentiality until the conclusion of the investigation, (Doc. 99, at 19), is undermined by OSC's own regular, partial disclosures to the public, including statements that OSC has obtained a wide range of "evidence" that raise numerous "questions" regarding election administration and related issues. *See, supra*, page 19 & n. 13. (*See also, e.g.*, *Westerberg Aff., Ex. G*, at 11, 13, 14, 16, 19, 21, 24, 25; Doc. 5, ¶ 48.) These partial releases counter OSC's professed interest in secrecy while the investigation is being finished and ultimately support the public's need for records that can provide the full context for OSC's statements. Indeed, the fact that OSC is making public statements regarding the substance of its investigation while that investigation is underway further heightens the public interest in disclosure. Courts have long rejected efforts to simultaneously use information as a sword and attempt to shield it from disclosure. *See Whitney v. California*, 274 U.S. 357, 377, 47 S.Ct. 641, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.").

In sum, OSC has not taken the necessary steps to justify its withholdings and even if it did, the reasons provided would not defeat the public's manifest interest in the timely disclosure of records related to the election investigation.

II. OSC Does Not Cite Any Statutory Exemptions That Could Shield the Requested Records.

A. Wis. Stat. § 12.13 Does Not Apply.

OSC claims that the records at issue here are exempt under Wis. Stat. § 12.13(5), which provides:

Except as specifically authorized by law and except as provided in par. (b), no investigator, prosecutor, employee of an investigator or prosecutor, or member or employee of the commission may disclose information related to an investigation or prosecution under chs. 5 to 10 or 12, or any other law specified in s. 978.05(1) or (2) or provide access to any record of the investigator, prosecutor, or the commission that is not subject to access under s. 5.05(5s) to any person other than an employee or agent of the prosecutor or investigator or a member, employee, or agent of the commission prior to presenting the information or record in a court of law.

Id.; (see Doc. 99, at 14–16). Since filing the instant Motion to quash, OSC also invoked § 12.13(5) in its request for reconsideration of the Court’s order to produce documents for *in camera* review. (Doc. 118, at 4–7.) OSC appears to advance different arguments regarding Wis. Stat. § 12.13(5) in its two motions, but both are equally and fatally flawed.¹⁶ Wis. Stat. § 12.13(5) simply does not apply to the records at issue in this case.

In its motion to quash, OSC appears to be arguing that Wis. Stat. § 12.13(5)’s reference to a “commission” refers to something other than the Wisconsin Elections Commission (“WEC”). OSC argues that “Special Counsel Gableman and the OSC’s *commission* is to investigate the election” and that “Gableman’s *commission* is an election-related investigation” and those facts are evidence that § 12.13(5) “prevents the OSC from

¹⁶ While OSC arguably forfeit its new arguments in its motion for reconsideration by not raising them in its Motion to quash, Petitioner addresses those arguments here in the abundance of caution.

disclosing information related to the [i]nvestigation.” (Doc. 99, at 15 (emphases added).) These claims reflect an effort to read “commission” in § 12.13(5) in the sense of the “commission” given to an officer. But the “commission” referenced in § 12.13(5) is not a commission to do something, as implied by OSC’s argument, but instead expressly defined in Wis. Stat. § 12.01(2) as the “elections commission”, or WEC. Wis. Stat. § 12.01(2); *see* Wis. Stat. §§ 5.05; 15.61 (WEC is a specific, bi-partisan state agency that regulates Wisconsin elections).

In OSC’s motion for reconsideration, OSC seems to acknowledge that the reference to a “commission” in § 12.13(5) is to WEC but argues instead that “this section applies to more than just the Commission,” and that OSC is undertaking an investigation within the meaning of the provision. (Doc. 118, at 4.) OSC’s argument rests on the erroneous assumption that § 12.13(5) applies to Gableman as an “investigator” irrespective of who or what has engaged him and what he has been engaged for. (*See id.*) But, as this Court noted in denying OSC’s motion for reconsideration (*see* Doc. 119), this argument ignores the plain meaning of the statute in context, as confirmed by a 2009 opinion of the Wisconsin Attorney General. Former Attorney General J.B. Van Hollen analyzed the question of whether Wis. Stat. § 12.13(5), which at the time referred to WEC’s predecessor (the GAB), extended to records of law enforcement and district attorneys and found:

The statute’s prohibitions on disclosure cover only disclosures made by an “investigator, prosecutor, employee of an investigator or prosecutor, or member or employee of the board. . . . While the generic terms “prosecutor” and “investigator” can have a broad connotation when taken out of context, the text and structure of Wis. Stat. § 12.13(5) demonstrate that the legislature used those terms in a more limited sense, to refer exclusively to the prosecutors and investigators who are *either employed by, or are retained by, the GAB.*”

Att’y Gen. Op., OAG 7-09 ¶¶ 10, 33; *see* 2015 Wisconsin Act 118 (changing the name of the “Government Accountability Board” to the “Elections Commission”).

Without addressing the Attorney General’s opinion,¹⁷ OSC attempts to provide several reasons why, in its view, this provision means something different from what the statutory scheme indicates. These arguments all rest on a faulty understanding of WEC’s authority and an erroneous effort to conflate OSC’s factual inquiry to inform legislative policymaking with WEC’s authority to actually enforce Wisconsin election law. For one thing, OSC argues that WEC does not employ a prosecutor and thus the provision must refer to something more than WEC employees. (Doc. 118, at 4.) But WEC’s implementing statute specifically refers to its civil prosecutorial authority (and its investigatory authority). *See* Wis. Stat. § 5.05(2m) (“The commission shall investigate violations of laws administered by the commission and may prosecute alleged civil violations of those laws . . .”). In the same vein, OSC states that Chapter 12 governs more than just the Commission. (Doc. 118, at 4.) Yet WEC is the authority tasked with administering the Chapter, Wis. Stat. § 5.05, and thus, when Wis. Stat. § 12.13(5) refers to enforcement actions, it logically refers to actions taken under the auspices of WEC, the actor explicitly charged with administering the relevant laws. It would not make sense for this statutory provision to encompass actions undertaken by the OSC, which has no general enforcement authority whatsoever, let alone authority to carry out enforcement of Chapter 12 specifically. Third, OSC claims that the narrower reading of the statute creates surplusage. (Doc. 118, at 4–5.) It does not; WEC

¹⁷ As the Court noted in its Decision and Order denying reconsideration, the Wisconsin Attorney General’s opinion has “particular importance” and persuasive value when interpreting the Open Records law. (Doc. 119, at 4 (quoting *State v. Beaver Dam Area Dev. Corp.*, 2008 WI 90, ¶37, 312 Wis. 2d 84, 752 N.W.2d 295 and citing *Schill v. Wisconsin Rapids Sch. Dist.*, 2010 WI 86, ¶¶ 106–16, 327 Wis. 2d 572, 786 N.W.2d 177).)

investigations and prosecutions may involve more than just WEC employees. Wis. Stat. § 5.05(2m) (WEC may be aided by “agents”). Finally, OSC misunderstands § 12.13(5)(b)(2), when it argues that sub-provision would be unnecessary if § 12.13(5) only applied to WEC or law enforcement. (Doc. 118, at 5.) That sub-provision merely allows the covered individuals to discuss otherwise confidential information with individuals outside of the investigation.

Indeed, Wis. Stat. § 12.13(5), by its express terms, applies only to information “related to an investigation or prosecution under chs. 5 to 10 or 12, or any other law specified in s. 978.05(1) or (2).” But OSC is not empowered to conduct an investigation under these provisions. This Court should reject OSC’s efforts to conflate its factual investigation for legislative policymaking purposes with investigations by WEC, which is empowered by law to investigate and enforce these provisions through appropriate civil prosecutions.

Finally, the Open Records law’s “presumption of complete public access,” Wis. Stat. § 19.31, indicates that any questions as to whether a particularly statutory provision applies, Wis. Stat. § 12.13(5) or otherwise, should be resolved in favor of disclosure. *See* Att’y Gen. Op. OAG 7-09, ¶ 6.

B. Any Policy Considerations Under Wis. Stat. § 19.85 Have Been Waived.

OSC appears to argue that exemptions governing Wisconsin’s Open Meetings law under Wis. Stat. § 19.85 are incorporated into the Open Records law as statutory exemptions. (Doc. 99, at 16–17; *see also id.* at 14 (including discussion of Wis. Stat. § 19.85 as support for the proposition that “[s]tatutory exemptions prohibit disclosure, or permit withholding, of the Investigation records”).) But that is not what the statute says; nowhere

does the Open Records law state, or a court decision hold, that the exemptions in the Open Meetings law can be universally applied in the public records context. Instead, Wis. Stat. § 19.35(1) states: “The exemptions to the requirement of a governmental body to meet in open session under s. 19.85 are *indicative of public policy*” and may “only” be used as a basis to withhold access to a record if an authority “makes a specific demonstration that there is a need to restrict public access at the time that the request is made” *Id.* (emphases added). Thus, if explained at the time a denial was issued, exemptions to the Open Meetings Law could be considered as public policy reasons to withhold records under the public interest balancing test. *Id.* But, as previously explained, no such reasons were provided as part of the original justifications for withholding records and it is too late for OSC to assert them now. *See, supra*, Part I.A.

In any event, even if policy considerations under the Open Meetings law had not been waived, OSC cites no support for its apparent interpretation that Wis. Stat. § 19.85(1)(c) and (h) operate as blanket exemptions for all of the requested records. (*See* Doc. 99, at 16–17.) Nor, in fact, do either of those provisions appear to apply *at all* in this case, where OSC is not considering any issues related to its own employees, *see id.* § 19.85(1)(c) (allowing a closed session when a governmental body is “considering employment, promotion, compensation or performance evaluation data of any public employee over which the governmental body has jurisdiction or exercises responsibility”), nor is it, as a non-legal legislative body, engaged in providing advisory opinions to the elections commission or any ethics board or commission, *see id.* § 19.85(1)(h) (allowing a closed session when a governmental body is considering “requests for confidential written

advice from the elections commission under s. 5.05 (6a) or the ethics commission under s. 19.46 (2), or from any county or municipal ethics board under s. 19.59 (5).”).

Having asserted no valid statutory bases that justify withholding—and having waived any other arguments by not properly raising them in its initial denial—OSC has not articulated any basis to withhold the requested records, and they must be released.

III. The Requested Records Are “Records” As Defined by the Open Records Law.

As an alternative basis to quash the Petition, OSC argues that the office’s “internal work product and resources” are not “records” under the Open Records law. (Doc. 99, at 21.) While it is possible that some responsive records are, for example, drafts that could be exempt under Wis. Stat. § 19.32(2), that is not a basis to quash the Petition where, as OSC has already represented, some responsive records have been withheld not because they are not “records” but because they “contain strategic information.” (Doc. 5, ¶ 45; *see also* Doc. 99, at 20 (stating that “*most* of the documents Petitioners demand are not ‘records’”).) In any event, American Oversight’s Requests ask for many records that are not the types of documents that OSC suggests are not “records,” such as communications with external parties and weekly reports required to be created under Gableman’s contract.¹⁸ Even the

¹⁸ While the definition of “record” in the Open Record law excludes some “drafts, notes, preliminary computations and like materials,” these drafts must also be “prepared for the originator’s personal use or prepared by the originator in the name of a person for whom the originator is working.” Wis. Stat. § 19.32(2). Common sense and logic dictate that not every preliminary record created is prepared in the name of a superior. Summ. J. Decision and Order, *Center for Media and Democracy*, No. 15-CV-1289, (Wis. Cir. Ct. Dane Cty. May 27, 2016), at 10, attached at Appendix A (calling such broad a definition “*untenably massive*.”). Some records created by the OSC may very well be drafts or notes created for personal use or in a superior’s name, but that analysis must be done timely and on a case-by-case basis. The statutory language does not support OSC’s sweeping withholding of all records created before a final published report.

records that the OSC produced on December 4 demonstrably fail to include records that are not “drafts,” such as resumes attached to emails and complete copies of email chains. (*E.g.*, Doc. 28 at 14; Doc. 30 at 8–12, 15–16, 21, 24; Doc. 31 at 4, 9, 11–12, 17.)

Moreover, OSC’s argument that only “publishe[ed]” “finished work product” is a “record” (Doc. 99, at 21), is essentially an assertion of a deliberative process privilege—a privilege not recognized by Wisconsin law. While the federal Freedom of Information Act (“FOIA”) exempts “documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated,” *United States Fish & Wildlife Serv. v. Sierra Club, Inc.*, 141 S. Ct. 777, 785, 209 L. Ed. 2d 78 (2021) (quotation omitted), no such privilege exists in Wisconsin. In fact, this Court has expressly rejected the argument that the Wisconsin Open Record’s law incorporates an equivalent exemption. Summ. J. Decision & Order, *Center for Media and Democracy v. Walker*, No. 15-CV-1289, at 7 (Wis. Cir. Ct. Dane Cty. May 27, 2016) (finding that a deliberative process privilege “could conceal records from the public relating to any and all deliberations made by public employees, which is inconsistent with the long-standing principles of Wisconsin’s Open Records Law”).¹⁹ And, in 2015, the legislature considered but declined to create such a statutory exemption.²⁰

Finally, it is again improper for OSC to be raising this argument at all because it did not do so in its initial denial. *See, supra*, Part I.A. This argument should be rejected.

¹⁹ A copy of this decision is attached to this brief at Appendix A.

²⁰ *See* Patrick Marley & Mary Spicuzza, *Scott Walker’s Office Pushed for Language to Gut Open Records Law*, Milwaukee J. Sentinel, July 29, 2015, <https://archive.jsonline.com/news/statepolitics/brad-schimmel-kicks-off-open-government-summit-b99546843z1-319422891.html>.

IV. OSC is Wrong that the Petition Seeks Improper Remedies.

OSC adopts the Legislative Respondents' argument that the Open Records law "does not contemplate a declaratory judgment action" and thus the Court should quash the Petition. (Doc. 99, at 8.) For the reasons explained in response to the Legislative Respondents' Motion, this assertion misreads the Petition and should be disregarded. (*See* Opposition to Legislative Respondents' Motions, Part I.A.)

V. OSC May Not Destroy the Requested Records.

OSC claims that it has no duty to retain records under the Open Records law and that, as a result, there is no claim against OSC for failing to retain certain records. (*See* Doc. 99, at 21–22 ("[T]he public records law does not require custodians or authorities retain records. . . . Accordingly, any argument that suggests that the OSC was to retain certain records fails.")). It is not clear why OSC raises this point—and it does not appear to assert that this is a basis to quash the Petition, but, regardless, whether OSC has improperly destroyed records certainly is relevant to the Petition and the remedies it seeks.

OSC is not correct that it may destroy records. As an initial matter, OSC's statement that the "public records law does not require custodians or authorities [to] retain records" is baffling in light of Wis. Stat. § 19.35(5), which *expressly* bars destruction of records subject to the Open Records law. Once a request has been received, "[n]o authority may destroy any record at any time . . . until after the request is granted or until at least 60 days after the date that the request is denied." *Id.* § 19.35(5); *see also id.* (imposing further limits on destroying records if litigation is filed). American Oversight sent the requests at issue in this litigation to OSC on September 15, October 15, and October 26. (Doc. 5, ¶¶ 32, 37, 39.) Thus, OSC has

been obligated to retain responsive records since September 15, October 15, and October 26—and even well before those dates.²¹

Despite these obligations, OSC has strongly suggested that it is in fact deleting investigation records. Although OSC's declarations in its Motion brief do not place facts in the record on this point, OSC states in its Motion:

The OSC does not have a [sic] unlimited space nor a robust filing system or database. Accordingly, the OSC does not keep any unnecessary documents or records. Instead, the OSC's standard procedure is to only keep[] documents and records that are essential and necessary to the Investigation and its recommendations.

(Doc. 99, at 4; *see also id.* at 22.) To the extent OSC is arguing that it may not have many responsive records and is providing an explanation for why that is, that is certainly not a basis to quash the Petition. Rather, it may be a basis for seeking discovery regarding what records were destroyed and when, and it may affect the damages Petitioner seeks. *See Scheffler v. County of Dunn*, No. 08-cv-622-bbc, 2009 WL 3241876 (W.D. Wis. Sept. 29, 2009) (denying defendant's motion for summary judgment in plaintiff's diversity action under the Open Records law where defendant failed to provide a copy of the requested record because

²¹ OSC's records retention obligations are actually *greater* than Vos's or any other legislator's. As the Wisconsin Legislative Council found in early October, the OSC is covered by the Open Records law *and*, unlike individual legislators, is subject to the Open Records Retention Law, Wis. Stat. § 16.61, *et seq.* (Westerberg Aff., Ex. F.) That is because "records and correspondence of any *member* of the Legislature" are excluded from the Public Records Retention Law's definition of "records," Wis. Stat. § 16.61(2)(b)(1) (emphasis added), but there is no similar exemption for records of legislative bodies other than "members." As such, OSC was and is required to retain its records in accordance with Wis. Stat. § 16.61, which in turn prohibits the destruction of records outside of compliance with record retention schedules and policies of the Public Records Board. Wis. Stat. § 16.61(4). Those obligations are in addition to the independent obligation that OSC has to retain records requested under the Open Records law. *See* Wis. Stat. § 19.35(5).

defendant had deleted it after the request was made and describing available damages).²² In short, OSC cannot avoid its obligations under the Open Records law by violating it. As such, if the Court finds that responsive records have been improperly destroyed or if there are obvious gaps in the records it is provided it may, at a minimum, consider that finding in ordering remedies under the Open Records law, Wis. Stat. § 19.37.

CONCLUSION

For the reasons stated above, OSC's Motion to quash the Petition (Docs. 98, 99) should be denied and the Court should order release of the requested records.

Respectfully submitted this 31st day of January, 2022.

PINES BACH LLP

Electronically signed by:
Christa O. Westerberg

Christa O. Westerberg, SBN 1040530
Aaron G. Dumas, SBN 1087951
122 West Washington Ave
Suite 900
Madison, WI 53703
(608) 251-0101 (telephone)
(608) 251-2883 (facsimile)
cwesterberg@pinesbach.com
adumas@pinesbach.com

AMERICAN OVERSIGHT

Electronically signed by:
Sarah Colombo

Melanie Sloan*
Sarah Colombo*
1030 15th Street NW, B255
Washington, DC 20005
(202) 869-5246

²² A copy of this case is attached to this brief at Appendix B.

msloan@americanoversight.org
sarah.colombo@americanoversight.org

**Appearing Pro Hac Vice*

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 4

COUNTY OF DANE

CENTER FOR MEDIA & DEMOCRACY,
KATHLEEN METER LOUNSBURY,
THE PROGRESSIVE, INC., AND
JUD LOUNSBURY,

Plaintiffs,

v.

Case No.: 15 CV 1289

SCOTT WALKER, OFFICE OF THE
GOVERNOR, WISCONSIN
DEPARTMENT OF ADMINISTRATION,
AND SCOTT NEITZEL,

Defendants.

SUMMARY JUDGMENT DECISION AND ORDER

Before the Court are cross-motions for summary judgment, which have been briefed as described below. On August 24, 2015, Defendants filed a motion for summary judgment. On September 23, 2015, Center for Media & Democracy (“CMD”) and the remaining Plaintiffs (“Lounsbury Plaintiffs”) filed two separate motions for summary judgment. Determinations as to all summary judgment motions are consolidated within this Decision.

For the reasons summarized herein, Plaintiffs’ motions for summary judgment are granted in part and denied in part, and Defendants’ motion for summary judgment is

granted in part and denied in part. The Court consequently grants mandamus relief under the terms described below.

MOTION TO EXCEED PAGE LIMITS

The Court pauses to briefly address a related motion before the Court: Plaintiffs' Motion to Exceed Page Limits filed on November 23, 2015. On February 29, 2016, Defendants noted that they did not object to this Motion. The Court therefore grants the Motion. The pages in excess of the local rule limits are therefore considered by the Court in rendering its decision.

BACKGROUND

This is a consolidated case stemming from two public record requests. On February 3, 2015, the Joint Committee on Finance introduced, by request of Governor Scott Walker, the 2015-17 Budget Bill. On February 5, 2015, CMD requested from the Office of the Governor ("OOG"):

"[a]ll communications or contacts between the Office of the Governor, and the following individuals regarding the 2015-17 Executive Budget Bill's changes to ch. 36 of the Wisconsin statutes: Nathan Schwanz, Michael Heifetz, Mike Huebsch."

On February 6, 2015, Ms. Lounsbury made a similar request via email to the Department of Administration ("DOA") for:

"all records, which either of you sent, received, or created anytime between October 1, 2014 and February 3, 2015, and which have anything to do with the language contained in sec. 36.01 of the Wisconsin Statutes, including any discussions or proposals whether that language should be changed."

On May 8, 2015, DOA and OOG provided documents to each requester; however, as to each requester, DOA withheld 60¹ pages while OOG withheld 35 pages plus a 167 page attachment. In its letter² to Ms. Lounsbury, DOA explained that some documents were withheld because they were drafts, and because the balancing test analysis, informed principally, if not exclusively, by the preliminary or deliberative nature of the documents, weighed in favor of nondisclosure. In its letter to CMD, OOG stated it withheld documents for the same reasons, with an added claim subsequently abandoned, that some of the withheld documents constituted attorney-client communications.³

Defendants provided a description of the withheld documents:

“communications between the Budget Analyst, Team Leader, Deputy Budget Director, Budget Director, and Office of the Governor containing deliberations such as: asking for direction on how to proceed on details of the UW budget, explaining the strengths and weaknesses of various options, making recommendations, explaining the impact of tentative incremental decisions, discussing and drafting wording of the executive budget bill, and discussing content for Office of the Governor briefings. Defendants declined to provide materials that would reveal details regarding what options for the Governor’s executive budget were being considered, when, and by whom, prior to the point in time that the decision-making on the executive budget was final . . . [t]hus the decision-making on the executive budget was not complete until then.”

The Lounsbury Plaintiffs and CMD filed separate complaints for mandamus on May 19, 2015⁴ and May 27, 2015⁵, respectively. On June 22, 2015, the Court consolidated the two cases into Case Number 15 CV 1289.

¹DOA initially stated that it withheld 58 pages, but has since clarified that 60 pages were withheld.

²Defendants’ letters relating to withheld documents may be referred to as the “denial letters”.

³Given Defendants’ Answer to CMD’s Complaint and the subsequent summary judgment arguments presented to the Court, the Court understands that Defendants have abandoned the attorney-client privilege as a reason to withhold documents, so the Court will not address it further.

⁴Case Number 15 CV 1289.

⁵Case Number 15 CV 1367.

On August 24, 2015, Defendants filed a motion for summary judgment. On September 23, 2015, both groups of Plaintiffs filed a motion for summary judgment and a response to Defendants' motion for summary judgment. On November 9, 2015, Defendants filed a response to Plaintiffs' motions for summary judgment as well as a reply brief regarding Defendants' motion. Finally, on November 23, 2015, both groups of Plaintiffs filed sur-reply briefs in support of their motions for summary judgment and reply briefs in opposition to Defendants' summary judgment motion. Also on November 23, 2015, the Lounsbury Plaintiffs asked the Court to conduct an *in camera* review of the withheld documents, and further sought access to these documents pursuant to Wis. Stat. §19.37(1)(a).

On January 28, 2016, the Court ordered Defendants to produce the withheld documents for purposes of an *in camera* review, but denied the Lounsbury Plaintiffs' request for access to the withheld documents. Defendants timely produced these documents to the Court on February 29, 2016. The Court has maintained these documents under seal and has carefully reviewed them, and has considered Defendants' reasons for nondisclosure.

Altogether, Defendants produced for *in camera* inspection 262 pages of withheld documents. Many of the pages include duplicative documents that appear several times. For simplicity's sake, the Court distills the 262 pages into 9 attachments and 12 email strings. The Court also notes that, of the 262 withheld pages, some appear to be among the documents already disclosed by Defendants.

In drafting this Decision, the Court deliberately uses limited descriptive information as to the withheld documents. In so doing, the Court hopes to share sufficient information to provide context to the Court's determinations, while simultaneously recognizing a complete, detailed discussion of the documents could improvidently disclose rightfully withheld records and could possibly frustrate any meaningful appellate review of this Decision. Because the information within the withheld documents is already known to Defendants, a more detailed description of the withheld documents is attached to Defendants' copy of this Decision and is also placed under seal in the Court's file in the event it may assist any appellate review of this Decision.

SUMMARY JUDGMENT METHODOLOGY

"A court shall grant a motion for summary judgment when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Wis. Stat. §802.08(2); *Johnson Controls, Inc. v. London Market*, 2010 WI 52, ¶23, 325 Wis. 2d 176, 784 N.W.2d 579.

DISCUSSION

The Wisconsin legislature and Wisconsin courts place great weight on the role of open records law informing the people of Wisconsin of the affairs of government.

"In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be the public policy of this state that all persons are entitled to the greatest possible information

regarding the affairs of government and the official acts of those officers and employees who represent them . . . 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.

The Wisconsin Supreme Court regards the above as one of the strongest declarations of policy found in the Wisconsin statutes. *Zellner v. Cedarburg Sch. Dist.*, 2007 WI 53, ¶49, 300 Wis. 2d 290, 731 N.W.2d 240. The policy favors the broadest practical access to government. *Hempel v. City of Baraboo*, 2005 WI 120, ¶22, 284 Wis. 2d 162, 699 N.W.2d 551. Its goal is to provide access to records that assist the public in becoming an informed electorate. *Milwaukee Journal Sentinel v. City of Milwaukee*, 2012 WI 65, ¶40, 341 Wis. 2d 607, 815 N.W.2d 367. The records custodian must balance the strong public interest in disclosure of the record against the public interest favoring nondisclosure. *State ex rel. Journal Co. v. County Court for Racine County*, 43 Wis. 2d 297, 305, 168 N.W.2d 836 (1969). Defendants in open records mandamus cases are limited to the reasons for denying access originally stated by the custodian. *Osborn v. Board of Regents of the Univ. of Wis. Sys.*, 2002 WI 83, ¶16, 254 Wis. 2d 266, 647 N.W.2d 158.

The parties do not raise any genuine issues as to any material fact. The parties, however, disagree on two issues of law. First, the parties disagree as to whether the withheld documents, as a matter of law, constitute records under Wis. Stat. §19.32(2).

Second, the parties argue whether the balancing test favors disclosure or nondisclosure of the withheld records.

The Court finds that, except with regards to three attachments, Defendants have failed to establish that the withheld documents constitute non-records under Wis. Stat. §19.32(2). In the Court's view, Defendants' argued definition of drafts and like materials is overly broad and could conceal records from the public relating to any and all deliberations made by public employees, which is inconsistent with the long-standing principles of Wisconsin's Open Records Law. The Court concludes that the appropriate definition of non-records is much narrower than that advocated by Defendants.

The Court also finds that the balancing test favors disclosure with regards to all of the remaining withheld documents. Wisconsin law places a great importance on the presumption for disclosure. That presumption is only overridden by stronger public interests in nondisclosure. In this case, Defendants' public interest arguments, all related to the documents' "deliberative" status, do not outweigh the public policy interest in disclosure. Defendants invite the Court to permit documents to be withheld from public view solely because they may reflect governmental deliberations. The Court declines that invitation and concludes that to do so would be in contravention of the letter and spirit of Wisconsin's Open Records Law. Instead, the Court considered, *inter alia*, the deliberative nature of the records at issue in applying the balancing test. For the reasons summarized below, the Court concludes the strong presumption of disclosure outweighs any public interest in nondisclosure.

I. Whether the documents are records.

The Wisconsin statutes state that: “[r]ecord’ does not include drafts, notes, preliminary computations and like materials prepared for the originator’s personal use or prepared by the originator in the name of a person for whom the originator is working . . .” Wis. Stat. §19.32(2). In other words, if a custodian withholds documents due to the documents’ non-record status, the custodian must prove that the documents were (1) “drafts, notes, preliminary computations and like materials” and (2) “prepared for the originator’s personal use or prepared by the originator in the name of a person for whom the originator is working.” *Id.*

Defendants concede that several of the above examples do not apply to the withheld documents in this case. Defendants do not argue that the withheld documents constitute notes. In the denial letters, Defendants do not claim that the withheld documents were prepared for the originator’s personal use. Defendants therefore must show that the withheld documents constitute drafts, preliminary computations or like materials that all were prepared by the originator in the name of a person for whom the originator is working.

“[P]repared by the originator in the name of a person for whom the originator is working”, or as the Court characterizes, prepared by the originator in the name of a superior, has been defined by the Wisconsin Attorney General. 77 Op. Att’y Gen. 100 (1988) (“the AG Opinion”). The Plaintiffs and Defendants all cite to the AG Opinion for a definition of this key statutory phrase, and the Court considers it the most persuasive authority on the subject. The AG Opinion provided three examples that sketch out a

definition of “prepared by the originator in the name of a superior”. First, the exclusion applied to a draft in the name of a bureau director if the draft was circulated only amongst bureau colleagues under the bureau director. Second, the exclusion covered the same bureau staff employee’s draft for a division administrator, even if the draft was circulated amongst several bureaus, so long as the circulation remained within the jurisdiction of the division administrator. Third, a document made in the name of a department secretary remained a draft insofar as it was not circulated beyond the department.

While the Opinion did not go one step further—from a department secretary to the governor—there is no indication within the AG Opinion to suggest why the same analysis would not apply. Through the affidavits presented to the Court, Defendants have shown that several public entities, including the Legislative Reference Bureau (“LRB”), OOG, and DOA, work together in drafting the Budget Bill that is eventually introduced by the Joint Committee on Finance by request of (*i.e.*, in the name of) the Governor.

It is not enough, however, that a withheld document be simply related to the drafting process for an executive Budget Bill to constitute a draft. In applying the analysis laid out by the AG Opinion, the Court notes an important term used in both in the AG Opinion and in Wis. Stat. §19.32(2): the phrase “in the name of”. This is an additional requirement beyond proving how many employees or institutions work on certain documents, and it is a fact that Defendants must establish for withheld documents to be considered drafts.

Defendants must therefore show, for each withheld document, that the document was drafted or prepared “in the name of” a superior—applied in this case, as Defendants

argue, in the name of the Governor. The Court determines that, if emails or attachments were not intended to be documents drafted in the name of the Governor, these documents do not constitute non-records under Wis. Stat. §19.32(2). To the contrary, such documents are completed communications by others, and constitute records under Wisconsin Open Records Law.

To illustrate further, a DOA employee communicating with another DOA, LRB or OOG employee is not speaking on behalf of the governor via every attachment created or email sent. Likewise, presentation materials used by a DOA employee in a meeting to discuss Budget Bill updates do not constitute a document within the Wis. Stat. §19.32(2) exclusions. Questions posed by DOA to OOG, although perhaps relevant to ongoing drafts, do not constitute drafts in and of themselves. Unless the draft document was intended to be eventually finalized into a document in the name of a superior (here, the Governor), the document is not a draft, preliminary computation or like material.

To withhold all of the documents asked by Defendants under their analysis would be to recognize a definition of “in the name of a [superior]” that is untenably massive in scope. Accepting Defendants’ argument would potentially create a blanket exception for any communication or document that had any relevancy to ongoing Budget Bill debates. In effect, such a definition would constitute a protection identical to a deliberative process privilege, which has not been recognized in Wisconsin and flies in the face of long-held policies underlying Wisconsin’s Open Records Law.

The Court finds that all of the withheld emails constitute records. The emails consist of communications between DOA, OOG, and LRB. They are, on the whole,

communications about the Budget Bill. None of the withheld emails constitute a draft, preliminary computation or like material because none of the emails were written with the intent to be finalized in the name of the Governor. Indeed, the emails are all discreet, final versions of communications between sender(s) and recipient(s), and are therefore records under Wisconsin's Open Records Law.

The analysis regarding the withheld attachments is not as simple. There are 9 attachments included in the withheld documents. Some of the attachments are copied in several places within the withheld documents.

The Court offers an observation that applies, to varying degrees, to every attachment. For nearly all of the attachments, the Court can not reliably determine the author. For some of the attachments, the Court is at a loss as to its precise purpose or substance. Wisconsin Open Records Law requires custodians to explain the reasons for nondisclosure for *each* withheld document. Based on the information furnished by Defendants, the Court concludes it has at best an incomplete understanding as to the nature of some of the withheld attachments. The Court analyzes the available information to determine whether Defendants have satisfactorily established that any or all of the attachments constitute drafts, preliminary computations, or like materials.

a. ATTACHMENT 1⁶

This attachment is a 3 page document, which appears to have been disclosed to Plaintiffs as a response to the original open records request. The document is seemingly an edit of a statute—most likely intended to be part of the final Budget Bill—with some text crossed out and some text underlined.

The Court is satisfied that the attachment is a draft made in the name of the Governor. The Court concludes that the document was made with the intention for it to be part of the eventual final Budget Bill submitted by the Governor. Therefore, it is a draft prepared in the name of a superior and not a record under Wis. Stat. §19.32(2).

b. ATTACHMENTS 2⁷ AND 3⁸

These attachments are two lists of questions compiled by DOA employees intended for OOG. The Court analyzes them together because the documents were sent together and because the documents appear to serve identical purposes. The lists were clearly not intended to have a future use in the name of the Governor. Rather, the documents were communications tangentially related to the drafting of the Budget Bill. One of the two lists appears to even be questions directed *at* the Governor, not questions made on his behalf. Therefore, the lists of questions were not prepared in the name of a superior, and Defendants have failed to meet their burden to establish that these attachments are drafts. Attachments 2 and 3 are therefore records under Wisconsin Open Records Law.

⁶Located at Bates stamp page numbers 0025-0027, 0030-0032, 0034-0036, and 0065-0067.

⁷Located at Bates stamp page numbers 0037 and 0068.

⁸Located at Bates stamp page numbers 0038 and 0069.

c. ATTACHMENT 4⁹

The attachment is a set of columns consisting of comments from the UW to DOA and then DOA to OOG regarding potential changes to Budget Bill edits. The document is 20 pages. On each page, the word “draft” is stamped. The Court notes that, with exception to a single rightmost column, Attachment 4 was previously disclosed by Defendants; therefore, the Court focuses its analysis on that column.

Labeling each page of a document “draft” does not indefinitely qualify a document as a draft for public records purposes. *Fox v. Bock*, 149 Wis. 2d 403, 417, 438 N.W.2d 589 (1989). Furthermore, the rightmost column includes language, for example, “checking to see if this is necessary” or “Deny”, it is evident that the drafters did not intend that language to be made in the name of the Governor. Instead, the document appears to be an internal communication between the drafters, commenting on proposed changes. While the proposed changes might arguably be drafts, the commentary on the changes is not.

Defendants have failed to establish that Attachment 4 is a draft. It is therefore a record under Wisconsin Open Records Law.

d. ATTACHMENT 5¹⁰

The attachment is a single page document. The document was sent as an attachment from DOA to OOG per OOG’s request. The document includes a table of numbers with bullet point notes.

⁹Located at Bates stamp page numbers 0040-0059.

¹⁰Located at Bates stamp page number 0063.

It is not clear how the document constitutes a draft, preliminary computation or like material. On one hand, the table might have been used in the Budget Bill drafting process, with the numbers acting as preliminary computations used by the Governor. On the other hand, the Court has no information provided by Defendants regarding the contextual use of the document. The Court finds that Defendants have failed to meet their burden to establish that this specific document constitutes a draft, preliminary computation or like material made in the name of a superior. It is therefore a record under Wisconsin Open Records Law.

e. ATTACHMENT 6¹¹

The document appears to be a table of numbers sent from DOA to OOG. Accompanying emails indicate that the attachment was eventually sent to the UW. In the email, a DOA employee sends the attachment to OOG with no text. OOG responded with the message: “Yep. Fine to send to UW”. The Court notes again that this document already appears to have been disclosed.

The Court is satisfied that Attachment 6 is a preliminary computation. The table of numbers was likely intended to be used in the final Budget Bill prepared in the name of the Governor. While the document was later sent to the UW, as it was presented to the Court, it was sent between two state employees working on the Budget Bill for part of the submission in the name of the Governor. Therefore, because of its preliminary computation status, Attachment 6 is a draft and was properly withheld.

¹¹Located at Bates stamp page number 0071.

f. ATTACHMENT 7¹²

This attachment is a 13 page Powerpoint authored by someone other than the Governor. The substance of the Powerpoint appears to be connected with the Budget Bill, though to what extent is not exactly clear. Based on the accompanying email string, it appears that the Powerpoint was intended as a presentation by DOA to OOG regarding its progress with the Budget Bill or other projects.

The Court is not satisfied that this attachment is a draft, preliminary computation, or like material made in the name of a superior. Attachment 7 is therefore a record under Wisconsin Open Records Law.

g. ATTACHMENT 8¹³

This attachment is one page, with eight bullet points. The bullet points discuss general comments on either the final Budget Bill or some preliminary version of the Bill. The attachment is clearly not a preliminary computation. The Court can not see how the document is a draft. The most reasonable inference is that this document was a communication of talking points or something similar from DOA to OOG, and not a draft of a speech or communication for the Governor himself.

Defendants have not established that the document constitutes a draft. The Court therefore finds that this attachment constitutes a record under Wisconsin Open Records Law.

¹²Located at Bates stamp page numbers 0074-0086.

¹³Located at Bates stamp page number 0088.

h. ATTACHMENT 9¹⁴

This attachment is a draft created in the name of a superior and therefore is not a record under Wisconsin Open Records Law. From the title of the document and its substance, this document appears to be a draft of the Budget Bill eventually finalized and submitted in the name of the Governor. The attachment includes no other information except a draft of the Budget Bill itself. Therefore, the Court is satisfied that the document constitutes a draft made in the name of the Governor.

To summarize, the Court finds that three of the withheld attachments, Attachment 1, Attachment 6 and Attachment 9, constitute non-records and were therefore properly withheld by Defendants. The Court further finds that the remaining withheld documents (Attachments 2, 3, 4, 5, 7, and 8 and the emails) are records under Wisconsin Open Records Law and not drafts.

The Court now proceeds to apply the balancing test as to only those withheld documents determined to be records.

II. Whether the balancing test tips in favor of disclosure or nondisclosure.

For the reasons summarized below, the Court determines that the balancing test weighs in favor of disclosure for all of the withheld records.¹⁵ As stated previously, Wisconsin places great importance on the role of open records disclosure informing the people of Wisconsin on the affairs of government. That policy directly informs, and gives great weight to, the public interest component of the balancing test. On the other

¹⁴Located at Bates stamp page numbers 0090-0256.

¹⁵As noted above, "withheld records" in Section II only encompasses the withheld documents that the Court has defined as records in Section I.

side of the scale, assessing the weight of the public interest in nondisclosure, the Court declines Defendants' invitation to, in essence, adopt a deliberative process privilege. The Court instead finds that the balancing test weighs heavily in favor of disclosure of all of the withheld records.

Policy favors the broadest practical access to government. *Hempel*, 2005 WI 120, ¶22. The presumption favoring disclosure is strong, but not absolute. *Id.* at ¶28. The records custodian must balance the strong public interest in disclosure of the record against the public interest favoring nondisclosure. *Journal Co.*, 43 Wis. 2d at 305.

Upon a demand for inspection, the custodian of withheld documents “must state specific public-policy reasons for the refusal. These reasons provide a basis for review in the event of court action.” *Fox*, 149 Wis. 2d at 416, (citing *Beckon v. Emery*, 36 Wis. 2d 510, 516, 153 N.W.2d 501 (1967); *State ex rel. Youmans v. Owens*, 28 Wis. 2d 672, 682, 137 N.W.2d 470 (1965)). “If the custodian states no reason or insufficient reasons for refusing to disclose the information, the writ of mandamus compelling disclosure must issue.” *Osborn*, 2002 WI 83, ¶16.

Unlike federal law and law in other states, Wisconsin has not recognized a deliberative process privilege. *Sands v. Whitnall Sch. Dist.*, 2008 WI 89, ¶¶60-70, 312 Wis. 2d 1, 754 N.W.2d 439. The federal Freedom of Information Act does not apply to states except for purposes of informing the common law balancing test. *State ex rel. Hill v. Zimmerman*, 196 Wis. 2d 419, 538 N.W.2d 608 (Ct. App. 1995); *Linzmeier v. Forcey*, 2002 WI 84, ¶¶32-33, 254 Wis. 2d 306, 646 N.W.2d 811.

Generally there are no blanket exemptions, and the balancing test must be applied with respect to each individual record. *Milwaukee Journal Sentinel*, 2012 WI 65, ¶56. The records custodian must determine whether the surrounding circumstances create an exception that overcomes the strong presumption of openness. *Hempel*, 2005 WI 120, ¶120. The existing public availability of a document weakens any argument for withholding the same information under the balancing test. *Milwaukee Journal Sentinel*, 2012 WI 65, ¶62.

Following *Fox* and related cases, the Court reviews the specific reasons outlined by Defendants in the two May 8, 2015 denial letters sent to Plaintiffs. The first letter is from DOA to the Lounsbury Plaintiffs. The second is from OOG to CMD. Although the letters are not exactly the same, each letter's text relevant to the balancing test contains identical language. Each denial letter states:

“A candid, complete, and creative evaluation of the state's finances within DOA and within the Governor's office is inherent to the development of the Governor's executive budget. Making these internal discussions just as open to disclosure as the final version of the budget would inhibit the free exchange of ideas, opinions, proposals, and recommendations among those involved in deciding what to include in the final legislation. Disclosure of this narrow category of records—limited to discussions within DOA, within the Governor's office, and between the two—would discourage frank internal discussion and harm the quality of the final executive decision. Further, it would disincentivize the free exchange of emails and written documentation necessary to hone the precise language and calculations that are key to proper budget development. Without a doubt, this would significantly inhibit the efficiency and efficacy of the employees who develop the detailed language and financial calculations for the budget. In addition, disclosure would risk public confusion as a result of publishing non-final proposals, which may not ultimately have been adopted.”

As to the denial letters' arguments for public policy for disclosure, each letter states that "[a]ll legislation is publicly available once it is introduced, and numerous documents are produced and released to the public explaining and justifying the specifics of the executive budget".

The Court applies the balancing test to all of the withheld records under a single analysis, as Defendants' arguments for nondisclosure under the balancing test were identical for every withheld email and attachment.

Wisconsin Open Records Law has long-held that the public interest in disclosure—the right of the people of Wisconsin to know what their government is doing—is a strong presumption for every record. Plaintiffs ask the Court to recognize that this case has an even higher public interest towards disclosure. To that end, Plaintiffs have supplied the Court with many newspaper and interest articles discussing the importance of the Budget Bill and issues surrounding it. The Court recognizes that the withheld documents, if released, would serve to inform the electorate with information regarding how Wisconsin created its most recent Budget Bill.

Defendants' arguments against disclosure are insufficient to overcome the presumption for disclosure. Defendants offer two main arguments: (1) that disclosure would have a chilling effect on the drafters to create a budget, harming the quality of the final product and (2) that disclosure would confuse the public as to understanding what document was the final Budget Bill.

The Court places very little if any weight with the latter, "confusion" argument. Most of the withheld documents presently before the Court subject to the balancing test

are emails and attachments that were not in any form or substance similar to a Budget Bill. To in essence assert that the public would not be able to differentiate between a piece of legislation and an email or Powerpoint presentation is not persuasive or logical. To the extent Defendants argue that readers of these records may misunderstand them, it seems to the Court that Defendants may be underestimating those readers. In any case, this argument is insufficient to support nondisclosure.

The Court considers the concerns behind deliberative process issues under the balancing test, and finds that these concerns are insufficient to outweigh the presumption of disclosure. Because Defendants use this rationale uniformly for all of the withheld documents, and because it is the only remaining argument against disclosure for the whole balancing test analysis, their argument in the Court's view is an attempt to recognize a deliberative process privilege.

There is no recognized deliberative process privilege recognized in Wisconsin. It has been all but rejected in *Sands v. Whitnall Sch. Dist.* To the extent that the federal system or other states have adopted such a privilege, the Court recognizes that the nature of documents created during a deliberative process may be considered in applying the balancing test. The concerns Defendants raise are valid public interest issues; they are, however, not enough to override the public interest in disclosure as applied here.

The Court notes that the document requests and the respective denials all occurred *after* the Budget Bill was finalized. This fact may be important here. To the extent that any chilling effect or any other negative consequence might befall a public entity from disclosing a preliminary deliberative document, such effects and consequences largely

evaporate once the Budget Bill or other final document has already been released to the public.

To the extent Defendants argue that future budget deliberations might be impacted, the Court makes these observations. Such a possible impact is insufficient to outweigh the strong presumption of disclosure, and is speculative at best. The Court further observes that, in its review of the withheld records, the records facially appear to be professional communications and information. They do not appear to be of a type that, if disclosed, would detract somehow from future exchanges of ideas, recommendations, etc.

Hempel instructs court to only allow nondisclosure in “extraordinary” cases. The Court finds that Defendants have not established an overriding public interest supporting nondisclosure for the withheld documents. It is certainly possible that under different circumstances some deliberative documents might be properly withheld under the balancing test. However, branding the withheld records in this case as deliberative documents does not in and of itself make those documents extraordinary and therefore immune from disclosure.

CONCLUSION AND ORDER

Upon review and analysis of the withheld documents, the Court determines that, of the 12 email strings and 9 attachments, all 12 email strings and 6 of the 9 attachments were records erroneously withheld by Defendants. Three attachments were properly withheld by Defendants. The Court accordingly grants Plaintiffs’ Motions for Summary Judgment in part and denies in part, and grants Defendants’ Motion for Summary

Judgment in part and denies in part. Mandamus should therefore issue as to the erroneously withheld documents.

The Court grants mandamus relief accordingly. Defendants are therefore ordered to release all of the withheld documents except Attachment 1, Attachment 6 and Attachment 9. Using the Bates stamp pagination, Defendants are therefore ordered to release pages 0001-0024, 0028-0029, 0033, 0037-0064, 0068-0070, 0072-0089, and 0257-0262.

Given the parties' possible interest in appealing this Decision, or seeking a stay of this Order, the Order is made effective 7 days from the Court's signing of this Decision and Order. **SO ORDERED.** This is a final order for purposes of appeal.

Dated this 27th day of May, 2016.

BY THE COURT:



Hon. Amy R. Smith
Circuit Court Judge, Branch 4

c: Attorney Gregory David Murray
Attorney Brendan Fischer
Attorney April Rockstead Barker
Attorney Elisabeth Eve Winterhack
Attorney David J. Rabe

Attachment: Attachment A is appended only to Defendants' copy of the Decision and Order, and placed under seal for reasons stated herein.

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 4

COUNTY OF DANE

CENTER FOR MEDIA & DEMOCRACY,
KATHLEEN METER LOUNSBURY,
THE PROGRESSIVE, INC., AND
JUD LOUNSBURY,

Plaintiffs,

v.

Case No.: 15 CV 1289

SCOTT WALKER, OFFICE OF THE
GOVERNOR, WISCONSIN
DEPARTMENT OF ADMINISTRATION,
AND SCOTT NEITZEL,

Defendants.

SEAL ORDER

For the reasons stated in the Summary Judgment Decision and Order issued on today's date, Attachment A to that Decision and Order is hereby placed under SEAL until further order of the Court.

SO ORDERED. Dated this 27th day of May, 2016.

BY THE COURT:



The Honorable Amy R. Smith

c: Attorney Brendan Fischer
Attorney April Rockstead Barker
Attorney Gregory David Murray
Attorney Elisabeth Eve Winterhack
Attorney David J. Rabe

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

TROY K. SCHEFFLER,

Plaintiff,

v.

COUNTY OF DUNN,

Defendant.

OPINION AND ORDER

08-cv-622-bbc

Plaintiff Troy K. Scheffler is proceeding in forma pauperis on his claim that defendant County of Dunn violated Wisconsin's open records laws, Wis. Stat. §§ 19.21-19.39, by failing to provide plaintiff with a copy of the video recording from his time in the Dunn County jail on June 5, 2008. This case is before the court on defendant's motion for partial summary judgment. Jurisdiction is present. 28 U.S.C. § 1332.

Defendant contends that regardless whether it violated Wisconsin's open records laws, plaintiff cannot recover actual or punitive damages because its violation was not willful or intentional and it did not act arbitrarily and capriciously as required under Wis. Stat. §§ 19.37(2)(b) & (3). Defendant's motion will be denied because I conclude that a reasonable jury could find that plaintiff is entitled to actual and punitive damages.

I note that plaintiff filed a motion seeking leave to file a sur-reply. Dkt. #57. His motion will be denied. Defendant did not raise any new issues in its reply brief that had not been raised in its initial brief, which means that a sur-reply is not necessary. Further, plaintiff has defeated defendant's motion without the material in his sur-reply.

From the facts proposed by the parties, I find that the following facts are material and undisputed.

UNDISPUTED FACTS

A. Parties

Plaintiff Troy Scheffler is a citizen of Minnesota, living in Coon Rapids, Minnesota. Defendant County of Dunn is a political subdivision of the state of Wisconsin and thus, a citizen of Wisconsin for diversity purposes. Indiana Port Commission v. Bethlehem Steel Corp., 702 F.2d 107, 109 (7th Cir. 1983). In his complaint, plaintiff requests \$120,000 in damages.

B. Defendant's Video Surveillance System

In March 2007, the Dunn County jail was equipped with a motion-activated video surveillance system. There are cameras throughout the jail, including in the pre-booking hallway, pre-booking area, interview rooms, booking area and holding cells. Because the

cameras are motion-activated, the activity level in the area determines how often the camera is recording.

The jail's DVR (Digital Video Recording) system records over previously recorded material unless the previous recorded material is preserved. The more often a camera is activated and recording, the sooner it will record over previous material. Thus, each camera's recordings exist on the DVR system between 20 to 40 days, depending on the camera's activity level.

In general, to preserve recorded material, a person must physically go to the DVR room, search the DVR that is connected to the camera or cameras for the requested area and then make a DVD of the desired material. When searching the DVR, one looks for the proper camera, which is labeled according to the specific area it covers. Each camera is linked to a corresponding recorder and video window. The video window shows a calendar indicating whether the camera made any recordings on a given day. The person clicks the date in question to view the footage recorded on that date. If there is footage for the requested date and time, the person can save the recording on a DVD. When footage is not saved to a DVD, it will be recorded over because the DVR system reuses the hard drive space for new recordings.

C. Plaintiff's Request for Video Footage

Plaintiff was arrested twice on June 5, 2008. Both times he was booked into the Dunn County jail. Twenty-six days later, on July 1, 2008, he returned to the jail to make an oral request for copies of the video footage from his time in the jail after his arrests on June 5. Plaintiff spoke with Sergeant Greg Moen of the Dunn County Sheriff's Department. Moen had been promoted to sergeant in September 2007 and was trained and authorized to record footage from the jail's DVR system. When plaintiff made his request, Moen believed that the requested footage existed for 30 days, as was the case with footage of the jail pods, and he told plaintiff this. (Defendant attempts to split hairs by saying that Moen "may" have told plaintiff about the 30-day deadline. This is a distinction without a difference. Moen believed that the footage would be recorded over after 30 days and plaintiff asserts that Moen told him this. It is implausible to think that plaintiff made up the 30-day deadline when Moen himself believed that it was the deadline.) Moen told plaintiff that he would look into the request. (The parties dispute whether Moen told plaintiff that he would preserve the tapes that same day and whether Moen told plaintiff that he would call plaintiff that night after preserving the requested footage.)

On July 2, 2008, plaintiff left Moen a voicemail asking about the requested video footage. Moen did not return plaintiff's phone call. On July 3, 2008, plaintiff returned to the jail to speak with Moen about obtaining the video footage. Moen was not on duty that

day. Sergeant Brenda LaForte was the sergeant on duty and she called Moen at home to ask him about plaintiff's request. LaForte had a message relayed to plaintiff that Moen was aware of the need to retrieve the footage plaintiff requested before it was recorded over but that Moen needed approval from his supervisor, Jail Administrator Barbara Reid, to release the footage. Moen indicated further that he had not spoken to Reid yet and that she was off duty until the beginning of the following week, July 7, 2008. Plaintiff was told that Moen would call plaintiff at the beginning of the next week about his request. Moen did not call plaintiff the next week.

On July 7, 2008, Moen spoke with Reid about whether the video footage plaintiff requested was subject to Wisconsin's open records laws. Neither Moen or Reid had previously received an outside request for video footage. Reid was not sure whether the video footage was subject to the open records laws. She said that the matter should be answered by Dunn County's corporation counsel, Scott Cox. After speaking with Reid, Moen believed that she would handle all further aspects of plaintiff's records request, including talking to corporation counsel. (Neither side adduced any facts about Moen's expectations of who would save a copy of the footage from the DVR system.) Reid believed that Moen had already saved the requested video footage on a DVD and was only consulting her about whether the footage should be released and she believed that Moen would talk to Cox.

Throughout July 2008, plaintiff made several calls to Moen about the requested video footage. Believing that Reid was handling plaintiff's request, Moen did not return plaintiff's phone calls. On July 25, 2008, the Dunn County District Attorney's Office called the jail and spoke with correctional officer Owens about plaintiff's requested video footage. Owens relayed the district attorney's inquiry to the jail's sergeants and Reid. Moen responded to the request by explaining that the jail was waiting to hear back from corporation counsel about the protocol for releasing such footage under open records laws. On July 27, 2008, Reid learned that Moen was still waiting for a response from Cox. On July 29, 2008, Reid went to speak with Cox about releasing the footage to plaintiff and discovered that Moen had never spoken to Cox. Reid proceeded to inform Cox about plaintiff's request. Cox explained that Reid could either verbally respond to plaintiff's request or ask that he clarify what footage he wanted through a written request.

On July 30, 2008, Moen called plaintiff and left him a message advising him to submit a written request for the footage he wanted. On August 6, 2008, Moen called plaintiff and told him that he could fax the written request to Reid, which he did on August 7, 2008. After receiving plaintiff's request, sergeant Douglas Ormson searched the DVR for the requested June 5, 2008 footage but found none in the system. On August 12, 2008, Reid wrote to inform plaintiff that the jail's DVR system had recorded over the footage from June 5, 2008 and that no footage from June 5 existed.

OPINION

In moving for summary judgment, defendant does not deny that it violated Wisconsin's open records laws. For purposes of summary judgment, I assume that it did. Specifically, I assume that the requested footage was destroyed after plaintiff made his oral request, which violates the following prohibition on record destruction:

No authority may destroy any record at any time after the receipt of a request for inspection nor copying of the record under sub. (1) until after the request is granted or until at least 60 days after the date that the request is denied

Wis. Stat. § 19.35(5).

Failure to comply with an open records request comes with consequences. Once a request has been denied, a requester may seek a record through a court action. Wis. Stat. § 19.37. If the requester is successful in proving a violation, he shall be awarded actual damages if the court finds that the authority's failure to comply with open records law was "willful or intentional." Wis. Stat. § 19.37(2)(b). Further, "[i]f a court finds that an authority or legal custodian under s. 19.33 has arbitrarily and capriciously denied or delayed response to a request or charged excessive fees, the court may award punitive damages to the requester." Id. § 19.37(3).

Defendant requests summary judgment on two issues: whether plaintiff is entitled to actual damages and whether he is entitled to punitive damages. The answer depends on whether defendant acted (1) willfully or intentionally and (2) arbitrarily and capriciously,

respectively. Defendant contends that at most, its employees acted negligently, not willfully, intentionally or arbitrarily and capriciously, in delaying their response to plaintiff and then denying his request for video footage. However, the undisputed facts make it plausible that a reasonable jury could find otherwise.

Applying open records law to undisputed facts is a question of law. Zellner, at ¶17, 300 Wis. 2d at 299-300, 731 N.W.2d at 244. In this case, the material facts are undisputed. On July 1, 2008, plaintiff verbally sought a copy of video footage of his arrest and booking at the Dunn County jail that had been recorded on June 5, 2008. Plaintiff made his request to sergeant Moen, who was both authorized and trained in saving video footage from the jail's DVR system by searching the system and copying relevant footage to a DVD. Moen believed that any video footage not copied from the DVR system to a DVD within 30 days from when the footage was initially recorded would be destroyed because the DVR system would record over the footage by then. Despite plaintiff's July 1 request and his July 3, 2008 follow-up request, Moen did not search the DVR system or make any DVD of any recorded footage from June 5, 2008. He waited until July 7, 2008, to discuss with Reid whether any video footage relevant to plaintiff's request could be *released* to plaintiff under open records laws. Reid believed that Moen had already saved the requested video footage on a DVD and was consulting her only about the propriety of release of the footage to plaintiff. In early August 2008, after a misunderstanding about who would speak with

the Dunn County corporation counsel about whether the footage could be released, a search for any relevant footage from June 5, 2008 revealed that any such footage no longer existed on the jail's DVR system.

Defendant focuses incorrectly on the "misunderstanding" regarding the release of video footage to plaintiff. The misunderstanding or miscommunication between Moen and Reid is immaterial to the denial of plaintiff's request. Regardless of the misunderstanding, plaintiff's request was denied because the record had been destroyed. The proper issue is whether defendant's failure to save the requested video footage was willful, intentional, as well as arbitrary and capricious.

Under Wisconsin law, "[t]he principal difference between negligent and intentional conduct is the difference in the probability, under the circumstance known to the actor and according to common experience, that a certain consequence or class of consequences will follow from a certain act." Matter of Findings of Contempt in State v. Shepard, 189 Wis. 2d 279, 286-88, 525 N.W.2d 764, 767-68 (Ct. App. 1994) (quoting Gouger v. Hardtke, 167 Wis. 2d 504, 512, 482 N.W.2d 84, 88 (1992)). In discussing the intent element of an intentional tort, the Wisconsin Supreme Court has explained as follows:

The man who fires a bullet into a dense crowd may fervently pray that he will hit no one, but since he must believe and know that he cannot avoid doing so, he intends it. The practical application of this principle has meant that where a reasonable man in the defendant's position would believe that a particular result was substantially certain to follow, he will be dealt with by the jury, or even by the court, as though he

had intended it.

Gouger, 167, Wis. 2d at 513-14, 482 N.W.2d at 88 (quoting Pachucki v. Republic Insurance Co., 89 Wis. 2d 703, 711, 278 N.W.2d 898, 902 (1979) (internal quote omitted)). In this case, a jury could find that Moen's failure to act evidences an intent similar to that held by man firing a bullet into a dense crowd. He believed that footage would be destroyed on the DVR system 30 days after the initial recording. (The parties say nothing about when the footage was destroyed. For purposes of summary judgment, I must draw all reasonable inferences in favor of the non-movant, plaintiff. Thus, I assume that the footage was destroyed after plaintiff's request.) The parties do not dispute that on both July 1 and July 3, plaintiff made it clear that he was requesting footage from June 5. Further, on his July 3 visit, plaintiff reiterated the need to obtain the footage before it was recorded over and was told that Moen was aware of the time frame surrounding plaintiff's request. Believing that plaintiff's requested footage would be recorded over in 30 days and knowing that plaintiff was seeking footage recorded 26 days earlier, a reasonable jury could find that any reasonable man in Moen's position would believe that it was substantially certain that the footage would be recorded over unless he took action before July 7, when Moen intended to speak with Reid about releasing the footage.

Moreover, when Moen spoke with Reid on July 7 about releasing the footage, she believed that Moen had already saved the requested footage. Her belief would lend further

supports to the conclusion that a reasonable officer would have been substantially certain that the requested June 5 footage would be destroyed by July 5 unless saved to a DVD. Therefore, in light of the evidence, a reasonable jury could find that defendant's destruction of the footage was intentional, entitling plaintiff to actual damages.

Regarding punitive damages, when the facts are undisputed, whether a decision is arbitrary or capricious is a question of law. State ex rel. Young v. Shaw, 165 Wis. 2d 276, 294, 477 N.W.2d 340, 347 (Ct. App. 1991). "A decision is arbitrary and capricious if it lacks a rational basis or results from an unconsidered, willful and irrational choice of conduct." Id.; Eau Claire Press Co. v. Gordon, 176 Wis. 2d 154, 163, 499 N.W.2d 918, 921 (Ct. App. 1993). However, "an inadvertent act cannot be arbitrary and capricious within the meaning of [Wisconsin open records law]." State ex rel. Ledford v. Turcotte, 195 Wis. 2d 244, 252 n.4, 536 N.W.2d 130, 133 n.4 (Ct. App. 1995).

A reasonable jury could find that Moen's decision not to search for plaintiff's footage and save it onto a DVD after plaintiff's request lacked a rational basis. Defendant contends that Moen's actions had a rational basis because he had never handled an open records request from someone not in jail, he did not know if the footage was subject to an open records request and he believed he had to speak with Reid before he could release the footage. However, a jury looking at the circumstances surrounding plaintiff's request could find that Moen's actions lacked a rational basis.

Moen believed that footage existed for 30 days and he was authorized and trained to record footage from the DVR system. Moen was aware that plaintiff was requesting footage that was already 26 days old. Instead of searching for and saving the footage, Moen made the irrational choice to wait past the 30-day deadline so that he could speak with Reid about the request. A reasonable jury could find that Moen's choice was not an inadvertent act, such as trying to record the footage to a DVD and mistakenly pushing the erase button instead of the record button. It is undisputed that Moen knew that plaintiff might be entitled to the footage he requested and he believed the footage would be destroyed within 4 days after plaintiff made his request. Despite this knowledge, Moen stood idly by awaiting an opportunity to speak with Reid about how the request should be handled. It would be reasonable to find that such a response was irrational. Therefore, a reasonable jury could find that defendant's destruction of the footage was arbitrary and capricious, entitling plaintiff to punitive damages.

On a final note, defendant addresses allegations in plaintiff's complaint that relate to some possible conspiracy between defendant and the City of Menomonie Police Department. This is a non-issue. Plaintiff was never granted leave to proceed on a conspiracy claim. The only claim in this case is his open records claim.

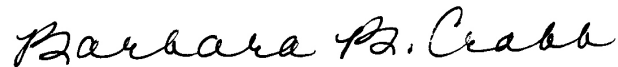
ORDER

IT IS ORDERED that:

1. Plaintiff Troy Scheffler's motion for leave to file a sur-reply, dkt. #57, is DENIED;
- and
2. Defendant County of Dunn's motion for partial summary judgment, dkt. #19, is DENIED as well.

Entered this 29th day of September, 2009.

BY THE COURT:



BARBARA B. CRABB

District Judge

FILED
01-31-2022
CIRCUIT COURT
DANE COUNTY, WI
2021CV003007

STATE OF WISCONSIN CIRCUIT COURT
Branch 8

DANE COUNTY

AMERICAN OVERSIGHT,

Petitioner,

v.

Case No.: 21-CV-3007
Petition for Writ of Mandamus
Case Code: 30952

ASSEMBLY OFFICE OF SPECIAL COUNSEL,
ROBIN VOS, in his official capacity,
EDWARD BLAZEL, in his official capacity,
and WISCONSIN STATE ASSEMBLY,

Respondents.

**PETITIONER’S OPPOSITION TO ROBIN VOS, EDWARD BLAZEL, AND
WISCONSIN STATE ASSEMBLY’S AMENDED MOTION TO QUASH AND
AMENDED ALTERNATIVE MOTION TO STRIKE PORTIONS OF THE PETITION**

Respondents Robin Vos, Edward Blazel, and Wisconsin State Assembly (the “Legislative Respondents”) have filed an amended motion to quash Petitioner American Oversight’s Petition for Writ of Mandamus and an amended alternative motion to strike portions of the Petition. (Doc. 111 (“Legislative Respondents’ Motions”).) For the reasons stated below, both of Legislative Respondents’ Motions should be denied.

INTRODUCTION

Legislative Respondents’ Motions to quash and strike repeatedly misconstrue the Petition, applicable law, or both. With respect to their primary motion to quash, Legislative Respondents first argue that Petitioner seeks remedies not available under the Open Records law and that the Petition should be quashed on that basis. (Doc. 111, at 3–8.) But that is simply not the case; the Petition seeks to enforce the Open Records law through the

remedies available under Wis. Stat. § 19.37. *See* Part I.A. Legislative Respondents then turn to two related arguments, each of which is untethered to the facts underlying the Petition or relevant law: Contrary to Legislative Respondents’ assertions, the Petition does not concern the same cause of action as any other ongoing litigation, *see* Part I.B, and the parties have not already litigated any issue in this case such that issue preclusion would apply, *see* Part I.C. Finally, Legislative Respondents are wrong that they are not “authorities” with respect to Petitioner’s requests seeking records of their contractors under Wis. Stat. § 19.36(3). *See* Part I.D. In sum, because Legislative Respondents offer no basis to quash the Petition, their Motion must be denied.

Legislative Respondents’ Motion to strike is similarly fatally flawed and also must be denied. *See* Part II.

BACKGROUND¹

Factual Background. In May 2021, Wisconsin State Assembly Speaker Robin Vos (“Vos”) announced that the Wisconsin State Assembly (the “Assembly”) planned to hire three former law enforcement officers and a supervising attorney to investigate the November 2020 election. (Doc. 5 (the “Petition”), ¶ 21.) In June, the Assembly retained former Wisconsin Supreme Court justice Michael Gableman (“Gableman”) as coordinating attorney. (*Id.* ¶ 23; *see* Doc. 36, at 2–5 (Coordinating Attorney Independent Contractor

¹ Respondent Assembly Office of Special Counsel’s motion to quash (Docs. 98, 99) and Legislative Respondents’ Motions address different legal arguments and Petitioner responds to those arguments and motions separately. The relevant facts and procedural background, however, substantially overlap. Thus, for ease of reference, Petitioner provides the same Factual Background and Procedural History here, in response to Legislative Respondents’ Motions, and in its Opposition to The Office of The Special Counsel’s Motion to Quash (“Opposition to OSC’s Motion”). Petitioner’s Opposition to OSC’s Motion is being filed on the same day as this Opposition and thus a document number has not yet been assigned by the Court.

Agreement, dated June 25, 2021).) On August 30, 2021, the Assembly Committee on Assembly Organization approved Vos's request to allow him to designate Gableman "as special counsel to oversee an Office of Special Counsel" (OSC) that would "direct an elections integrity investigation, assist the [Assembly] Elections and Campaign Committee, and hire investigators and other staff to assist in the investigation." (Doc. 5, ¶¶ 25–27.)

After the creation of the OSC, American Oversight submitted several open records requests to Vos and Assembly Clerk Edward Blazel ("Blazel") seeking records of the Assembly's contractors staffing the OSC, including Gableman. (*Id.* ¶ 31.) American Oversight also submitted substantively similar requests directly to the OSC seeking, among other things: contracts, invoices, plans, scope of work statements, and other documents related to the organization and structure of, and payment for, the election investigation; interim or final reports, analyses, or work product prepared by Gableman or other contractors in the course of conducting the investigation; and various communications by Gableman and the other individuals working on the election investigation, along with their calendars. (*Id.* ¶¶ 31–41, collectively referring to "American Oversight's Requests.") American Oversight submitted the fourteen requests at issue in this case—seven each to the Legislative Respondents and OSC—on September 15, October 15, and October 26, 2021. (*Id.* ¶¶ 32, 37, 39.)

On December 4, OSC sent American Oversight an email partially denying American Oversight's Requests to the OSC on the grounds that: "Some documents that contain strategic information to our investigation will continue to be help [sic] until the conclusion of our investigation." (*Id.* ¶ 45.) OSC produced only 114 pages in response to American Oversight's requests and excluded numerous responsive records. (*Id.* ¶¶ 46–48.)

To date, Vos has not responded to American Oversight's Requests. (*Id.* ¶ 51.) Blazel responded by providing some records, but only those from his files and not those from Gableman or any other Assembly contractor. (*Id.* ¶¶ 52, 54.)

Procedural History. On December 20, 2021, American Oversight initiated this action against OSC, Vos, Blazel, and the Assembly by filing its Petition for Writ of Mandamus. (*See id.*) Petitioner also sought the immediate issuance of an alternative writ of mandamus ordering all Respondents to produce records in response to American Oversight's Requests that are the subject of the Petition. (Doc. 11.)

On December 21, the Court issued the Alternative Writ of Mandamus, ordering Respondents to "immediately on receipt of this writ, release the records responsive to Petitioner's request, or in the alternative to show cause to the contrary" at a hearing scheduled for January 21, 2022. (Doc. 42.)

More than four weeks later, on January 20, 2022, and after OSC unsuccessfully sought to continue the January 21 hearing (Docs. 80, 82), OSC filed a Motion to Dismiss or Quash. (Doc. 99 ("OSC's Motion"); *see also* Doc. 98 (Notice and Motion).) Also on January 20, 2022, Vos, Blazel, and the Assembly filed a Motion to Quash and Alternative Motion to Strike Portions of the Petition. (Doc. 87.) The next day, and prior to the show cause hearing, the Court issued an order striking the Legislative Respondents' motion to quash and denying the alternative motion to strike. (Doc. 107.)

On January 21, 2022, the Court held a show cause hearing and issued several related rulings, memorialized in a January 25 Order. (Doc. 110.) Among other things, the Court required OSC to "file with the Court a copy of Special Counsel Michael Gableman's contract(s)" with the Assembly by January 24 and further required OSC to "file all records,

documents, and things responsive to Petitioners' requests under the Open Records law" by January 31 for *in camera* review. (*Id.* at 2.) The Court additionally ordered Vos to, by January 31, 2022, "file responses to the Petitioners' open records requests at issue in this case that have been directed to him (Exhibits A, C, E, G, I, K, and M to the Petition)." (*Id.*) The Court also allowed the Legislative Respondents to "refile a copy of their motion to quash with citations that conform to Wis. Stat. § 809.23(3)." (*Id.*)

On January 25, the Legislative Respondents filed their Amended Motion to Quash and Amended Alternative Motion to Strike Portions of the Petition. (Doc. 111.)

On January 27, OSC filed a "Notice and Motion for Reconsideration, or, in the Alternative, to Amend Scheduling Order" (Doc. 118), seeking to avoid the Court-ordered *in camera* review. The Court denied that motion the next day. (Doc. 119.)

Petitioner now submits this brief in response Legislative Respondents' Motions to quash and strike, as amended on January 25, 2022 (Doc. 111).

LEGAL STANDARDS

Motion to Quash. A motion to quash a writ of mandamus² "admits all facts which are well pleaded for the purpose of the motion, and it raises the issue whether any ground for relief is stated." *State ex rel. Leuch v. Hilgen*, 258 Wis. 430, 431, 46 N.W.2d 229 (1951) (citation omitted); *see* Wis. Stat. § 783.01 (a motion to quash "shall be deemed a motion to

² Legislative Respondents move "for an order quashing the Petition" (Doc. 111, at 1) when, generally, motions to quash are directed at the writ itself. *E.g.*, *State ex rel. Johnson v. Cty. Ct., Branch II, Waukesha Cty.*, 41 Wis. 2d 188, 190–92, 163 N.W.2d 6, 7–8 (1968). Despite filing their Motions apparently in anticipation of the January 21 hearing and at one point in their brief referring to quashing "this writ" (*id.* at 8), Legislative Respondents did not move to quash the Alternative Writ of Mandamus (Doc. 42) that the Court had already issued. For purposes of this response, American Oversight applies the standards for a motion to quash a writ.

dismiss the complaint under s. 802.06(2)"). In evaluating "whether the facts alleged in the petition for writ of mandamus state a cause of action under the public records statute . . . '[the] petition should not be interpreted narrowly to defeat it.'" *State ex rel. Morke v. Donnelly*, 155 Wis. 2d 521, 526, 455 N.W.2d 893 (1990) (quoting *State ex rel. Dalton v. Mundy*, 80 Wis. 2d 190, 196, 257 N.W.2d 877 (1977)). Instead, "[t]he general rule is that a pleading will be fairly and liberally construed to give effect to its object and purpose." *Dalton*, 80 Wis. 2d at 196 (noting that this is "especially applicable" where an "action is to compel public officers to perform their prescribed statutory duties").

Motion to Strike. A motion to strike may be granted if a pleading presents "any insufficient defense or any redundant, immaterial, impertinent or scandalous, or indecent matter." Wis. Stat. § 802.06(6). In evaluating a motion to strike, courts must "liberally construe[] [the challenged material] with a view to achieving substantial justice." *First Nat. Bank of Wis. Rapids v. Dickinson*, 103 Wis. 2d 428, 432 N.W.2d 910 (Ct. App. 1981) (citing Wis. Stat. § 802.02(6) and *Halker v. Halker*, 92 Wis. 2d 645, 650, 285 N.W.2d 745 (1979)).

The Open Records Law. The first sentences of the Open Records law declare the state's official policy of virtually unfettered access to government information:

In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them. Further, providing 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.

Wis. Stat. § 19.31. “This statement of public policy in § 19.31 is one of the strongest declarations of policy to be found in the Wisconsin statutes.” *Zellner v. Cedarburg Sch. Dist.*, 2007 WI 53, ¶ 49, 300 Wis. 2d 290, 315, 731 N.W.2d 240.

The presumption in favor of access creates rules for this Court’s interpretation of the law. To serve the objectives identified in Wis. Stat. § 19.31, “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,” and “*only in an exceptional case may access be denied.*” Wis. Stat. § 19.31 (emphases added).

ARGUMENT

I. Legislative Respondents’ Motion to Quash Should Be Denied.

A. The Petition Seeks Remedies Under the Open Records Law.

Legislative Respondents argue Petitioner seeks improper remedies under the Open Records law and thus the Petition should be quashed (Doc. 111, at 3–8), but that argument can be disregarded based on even a cursory reading of the Petition.

As a threshold matter, by issuing the Alternative Writ of Mandamus, this Court has *already* found that the Petition states a prima facie case. (See Doc 42); *see also, e.g.*, 9 Wis. Pleading & Practice Forms, § 85.37 (5th Ed., June 2021 Update) (“The usual practice, if a prima facie case is made out by the petition or application, is to issue an alternative writ of mandamus . . .”).

But, even if that were not so, Legislative Respondents are wrong that the Petition “seeks remedies not provided for under the Public Records Law.” (Doc. 111, at 3.) As Legislative Respondents acknowledge, Wis. Stat. § 19.37 “always authorizes a mandamus action to compel a custodian to release an improperly withheld record or to compel the

custodian to respond to the request that has not been responded to.” (Doc. 111, at 4.) This is exactly what Petitioner seeks from Legislative Respondents in this case: the release of their contractors’ records that have been improperly withheld, including a response to the requests that have not yet been fulfilled or denied. (See Doc. 5, ¶¶ 71–82.) The relief requested in the Petition explicitly includes “[a] mandamus order under Wis. Stat. § 19.37(1)(a) compelling Respondents to immediately produce to Petitioner copies of the requested records without further delay and improper withholdings,” along with other remedies available under Wis. Stat. § 19.37. (Doc. 5, at 24.) As part of granting this relief, the Court must first find or “declar[e]” that “Respondents violated Wisconsin’s Open Records law,” and the Petition asks the Court to make this declaration. (See *id.*) But contrary to Legislative Respondents’ assertions, Petitioner has not “requested this Court to enter a declaratory judgment.” (See Doc. 111, at 2.) Legislative Respondents do not, and cannot, cite to anywhere in the Petition where Petitioner asks for a declaratory judgment or seeks relief under the Uniform Declaratory Judgments Act, Wis. Stat. § 806.04.

Finally, Legislative Respondents’ position that the “Petition fails to identify any particular record that has been withheld by Vos, Blazel, or the Assembly” (Doc. 111, at 7) is nonsensical in light of the Petition’s clear statements that they have “improperly withheld and delayed access to the Assembly’s contractors’ records” (Doc. 5, ¶ 58). The Petition also attaches as exhibits the Open Records requests to which Legislative Respondents have failed to respond or completely respond.³ As Legislative Respondents appear to concede,

³ Legislative Respondents appear to recycle arguments that they unsuccessfully raised in the course of seeking a protective order against discovery in a different case that is not seeking records from the Assembly’s contractors. See *American Oversight v. Robin Vos*, Dane County Case No. 21-CV-2521, Hon. Valerie Bailey-Rihn presiding.

contractor records responsive to Petitioner's requests have not been provided to Petitioner. (*E.g.*, Doc. 111, at 11–15 (arguing that Legislative Respondents are not responsible for producing contractors' records in response to American Oversight's Requests at issue in this case).)

In short, Legislative Respondents misconstrue the Petition, over-complicating the issues it presents. This effort fails for the simple reason that the Petition is clear that it seeks remedies available to all requesters seeking public records: prompt and full release of records from the authorities responsible for doing so.

B. The Petition Does Not Raise the Same Cause of Action As Any Other Pending Case.

Legislative Respondents are wrong when they say that the writ should be quashed because “this same cause of action is already pending” in Dane County Case No. 21-CV-2440, Hon. Valerie Bailey-Rihn presiding. (*See* Doc. 111, at 8.) Legislative Respondents argue that this case and Case No. 21-CV-2440 are “between the same parties for the same cause” (*id.*) but that is simply not true. In addition to this case naming an additional and different respondent (the OSC), the Open Records law keys a mandamus action to individual *requests*. Wis. Stat. § 19.37(1) (stating that a requester may pursue a mandamus action if an authority withholds or delays granting access to a record “after a written request for disclosure is made”). By Legislative Respondents' admission, the requests at issue in this case and Case No. 21-CV-2440 are different—they were sent on different dates and seek records for different time periods (Doc. 111, at 8–9)—and, thus, the causes of action are different, too. Moreover, while it is true that the requests at issue in both cases relate to similar subject matter, this Court had a chance to consider the claims in both cases when responding to Petitioner's motion to consolidate the two cases and determined that the

actions should proceed separately. (*See* Doc. 76 (Order Denying Motion to Consolidate Cases).) As the Court has already concluded, the cause of action in this litigation is distinct from any other case, and thus there is no basis to quash on these grounds.

Beyond the simple question of whether the same cause of action is asserted in both cases, Legislative Respondents appear to be suggesting that they have not responded to American Oversight's Requests at issue in this case because they are simultaneously litigating similar requests in a separate case. (Doc. 111, at 9 ("Thus, if the requests have not yet been responded to in 21-cv-2440, the subsequent requests for the same records in this case are subsumed within the requests in [] 21-cv-2440.")) If Legislative Respondents are saying that they cannot respond to the requests at issue here because they and the requests that precede them are in litigation, that position is consistent with recent testimony from Respondent Vos's counsel. (*See* Westerberg Aff., Ex. B, at 61:12–62:5.) However, it is contrary to Wisconsin law, which contains no excuse for responding to a request just because that request is subject to litigation. *See* Wis. Stat. §§ 19.31–37; *Friends of Frame Park, U.A. v. City of Waukesha*, 2020 WI App 61, ¶ 29, 394 Wis. 2d 387, 411–12, 950 N.W.2d 831, 843, *pet. for rev. granted* (noting Open Records law requires timely access to records and reviewing case law on when voluntarily producing records after litigation begins permits an award of attorneys fees to plaintiff). The Petition asserts that Legislative Respondents have improperly delayed responding to American Oversight's Requests (Doc. 5, ¶¶ 58, 80) and if one reason they have done so is that a litigation regarding separate requests is pending, that is an independent basis to sustain the Petition, issue the writ, and impose remedies, Wis. Stat. § 19.37.

C. Issue Preclusion Does Not Apply.

Legislative Respondents go on to state, again inaccurately, that the parties have already litigated the issue of whether Legislative Respondents are “authorit[ies]” under the Open Records law and thus “issue preclusion” applies. (*See* Doc. 111, at 10.) Specifically, Legislative Respondents assert that in Case No. 21-CV-2440:

Judge Bailey-Rihn definitively determined in that case that prior to September 1, 2021, records relating to Justice Gableman and the Office of Special Counsel’s investigation were “contractor’s records” within the meaning of Wis. Stat. § 19.36(3). Likewise, Judge Bailey-Rihn determined that after September 1, 2021, the Office of Special Counsel was the “authority” responsible for these records. *See* [21-cv-2440, Doc. 58, 65[]].

(Doc. 111, at 10–11.) This characterization of Judge Bailey-Rihn’s ruling in Case No. 21-CV-2440 is inaccurate. In contrast to the instant litigation, every request at issue in Case No. 21-CV-2440 predated the creation of OSC on August 30, 2021. (*See* Doc. 5, ¶¶ 8, 30.) Judge Bailey-Rihn did find that Vos, the Assembly, and Blazel must “produce contractors’ records” in response to those requests and through August 30. (Doc. 94 (Case No. 21-CV-2440, Order for Mandamus Relief); *see also* Westerberg Aff., Ex. H at 35 (“And that’s what I’m going to order, that the records that were generated by Justice Gableman while he was special counsel or whatever his title was between May and . . . August 27th, his records, subject to that open records request, be turned over to the petitioner.”).)

But the issue of which entity or entities are the proper authority or authorities for Gableman and the other Assembly contractors’ records after the creation of the OSC was not relevant or necessary to decide in Case No. 21-CV-2440. Thus, the issue could not have been “actually litigated and decided”—a required predicate to issue preclusion. *Jensen v. Milwaukee Mut. Ins. Co.*, 204 Wis. 2d 231, 235, 554 N.W. 2d 232 (Ct. App. 1996). Nor, of

course, was that issue actually litigated or decided. Contrary to Legislative Respondents' mischaracterization, Judge Bailey-Rihn *explicitly* reserved the question of whether records from after the creation of the OSC could properly be requested from Legislative Respondents, stating that it is "a separate issue that will be addressed in a different matter." (Westerberg Aff., Ex. H at 35; *see also id.* at 27 ("Maybe the subunit is the proper recipient of the request versus the contractor situation when there is only one authority." (emphasis added))); Doc. 5, ¶ 30.) Issue preclusion does not apply.

D. Legislative Respondents Are "Authorities" Required to Release Their Contractors' Records.

Legislative Respondents' final argument is that they are "not authorities or custodians of the requested records." (Doc. 111, at 11.) But the plain language of the Open Records law makes clear that this is not so. Wis. Stat. § 19.36 states:

Each authority shall make available for inspection and copying under s. 19.35(1) any record produced or collected under a contract entered into by the authority with a person other than an authority to the same extent as if the record were maintained by the authority.

Wis. Stat. § 19.36(3). Consequently, Vos, Blazel, and the Assembly—who do not dispute that they are "authorities" as that term is defined under the Open Records law—must produce their contractors' records. Gableman and other contractors acting as staff to the OSC are contractors of the Assembly. (*See, e.g.*, Doc. 36, at 2–5; *see also* Doc. 5, ¶ 26 (mail ballot authorizing Gableman to "hire investigators and other staff to assist in the investigation"). OSC is an authority, *see* Wis. Stat. § 19.32(1) (including in the definition of "authority" a "formally constituted subunit" of the Assembly); (Westerberg Aff. Ex. F), but, at most, Gableman is a *custodian* of public records—not an "authority." *See, e.g.*, Wis. Stat. § 19.33(7) ("The designation of a legal custodian does not affect the powers and duties of an

authority under this subchapter.”).As such, Legislative Respondents are appropriately “authorities” responsible for records of Gableman and the other contracted investigators within OSC.⁴

Legislative Respondents make several arguments to the contrary, but they are unavailing. As explained above, that OSC, itself, is an authority does not change whether Legislative Respondents *also* are authorities and proper respondents in this action. While OSC may exist as a formal sub-unit, that office is wholly staffed by contractors or subcontractors to the Assembly, and none of those contractors are, themselves, authorities. Legislative Respondents do not dispute, as a factual matter, that the individuals staffing OSC are contractors contracted by the Assembly. By the plain language of § 19.36 the Assembly is responsible for the records of its contractors. Further, Gableman’s contract with the Assembly (not OSC) *expressly* contemplates the creation of records pursuant to contract (*See* Doc. 36, at 2 (among other things, Gableman is to “[r]eceive investigative reports . . . and keep a weekly report” and “[r]outinely consult with investigators”).) These clearly are records “produced or collected under a contract entered into by” the Assembly and Vos, Wis. Stat. § 19.36(3), and responsibility for producing such records ultimately rests with those authorities. *See WIREdata, Inc. v. Vill. of Sussex*, 2008 WI 69, ¶ 87, 310 Wis. 2d 397,

⁴ Legislative Respondents argue that Vos specifically has no responsibility for the contractor records at issue. (Doc. 111, at 15.) But contracts with Gableman were “entered into by” Vos, Wis. Stat. § 19.36(3). Vos is the sole signatory on behalf of the Assembly and Vos and his legal counsel are listed as the designated contacts. (*See* Doc. 36, at 2–5.) The mail ballots passed by the Committee on Assembly Organization gave Vos responsibility for overseeing the contractors. (Doc. 102, 103.) Moreover, Clerk Blazel testified before Judge Bailey-Rihn on January 24, 2022, that responsibility for liaising with election-investigation contractors falls to Speaker Vos’s office. (Transcript forthcoming.)

443, 751 N.W.2d 736, 757 (“the municipalities had contracted with the independent assessors to collect and maintain the records . . .”).

Legislative Respondents also raise a number of “[p]ractical realities” that they say support the notion that they are not “authorities” for the purpose of American Oversight’s Requests. (Doc. 111, at 13–15.). But the law recognizes that authorities may be required to seek records from their contractors in the course of complying with Wis. Stat. § 19.36(3). *See J. / Sentinel, Inc. v. School Bd. of School Dist. of Shorewood*, 186 Wis. 2d 443, 452–53, 521 N.W.2d 165, 170 (Ct. App. 1994); *Juneau County Star-Times v. Juneau County*, 345 Wis. 2d 122, 138–39, 824 N.W.2d 457, 465 (2013) (avoiding a reading of Wis. Stat. § 19.36(3) that would “permit an authority and contractor to draft a contract to evade [that provision] by delegating a record’s creation and custody to an agent”). That Legislative Respondents are “not involved in the day-to-day activities” or privy to various actions or decisions of OSC (Doc. 111, at 13–14) is entirely irrelevant to their obligations under the Open Records law. It is the duty of the authority, not the individual custodian, to make determinations on withholdings. Wis. Stat. § 19.35(4) (“Each *authority*, upon request for any record, shall, as soon as practicable and without delay, either fill the request or notify the requester of the *authority’s* determination to deny the request in whole or in part and the reasons therefor.” (emphases added)).

Regardless, the specific concerns that Legislative Respondents raise are irrelevant here. Legislative Respondents cite concerns related to “criminal actions” and “law enforcement” activities (Doc. 111, at 13–14), but OSC is conducting a legislative investigation, which by its nature is not for law enforcement purposes (*see* Petitioner’s Opposition to OSC’s Motion, Part I.B). And the invocation of the work product doctrine is

similarly nonsensical in this context: the attorney work product doctrine only privileges an attorney's work in preparation for litigation, *Lane v. Sharp Packaging Sys.*, 2002 WI 28, ¶ 61, 251 Wis.2d 68, 640 N.W.2d 788, which has never been suggested as a goal of the investigation, nor is it within its purview (*see* Docs. 101–03). Finally, Legislative Respondents' reference to the existence of possible confidentiality agreements entered by OSC staff members (Doc. 111, at 14) actually underscores that a government authority must remain responsible for their records because a government official must ultimately weigh the public's interest in disclosure against an alleged agreement for confidentiality. (*See* Petitioner's Opposition to OSC's Motion, Part I.B.3.) Similarly, the apparent absence of a currently effective contract between any OSC staff and the Assembly also signals that the Legislative Respondents are responsible for the records at issue. (*See id.*, Part I.B.1.)

At the same time, there are good policy reasons for why, here, it is appropriate to treat Legislative Respondents as authorities responsible for the records of their contractors pursuant to Wis. Stat. § 19.36. As currently constituted, there are no public employees employed by OSC. Rather, OSC is entirely staffed by contractors or subcontractors of the Assembly. (*See* Doc. 5, ¶ 2.) In enacting the Open Records law, the legislature assigned authorities important responsibilities to evaluate the public interests in disclosure and nondisclosure of records and more generally to promote timely transparency of government operations. Allowing Legislative Respondents to eschew responsibility for their contractors would vitiate these important public considerations.

In short, there is no reason why there cannot be multiple authorities in this instance. Of course, American Oversight only needs one production of the requested records to effectuate the practical goal of this litigation. But the Legislative Respondents must remain

responsible for the contractors they engage. Wis. Stat. § 19.36(3) mandates that result and the Open Records law’s “presumption of complete public access,” Wis. Stat. § 19.31, indicates that any doubt regarding an authority’s obligations is resolved in favor of Petitioner.

II. Legislative Respondents’ Motion to Strike Should Be Denied.

Legislative Respondents’ motion to strike portions of the Petition (Doc. 111, at 15–17) should be denied as frivolous. While any “pleading challenged by a motion to dismiss or to strike should be liberally construed with a view to achieving substantial justice,” *Dickinson*, 103 Wis. 2d at 432, such a broad reading is not even required to recognize that the motion to strike must fail.

After this motion was initially rejected by this Court in its Decision and Order, dated January 21, 2022 (Doc. 107, at 6–7), Legislative Respondents amended their request to describe the paragraphs they seek to strike. These new paragraphs do not address the Court’s concern that “[t]he Legislative Respondents do not explain *why* the Petition is ‘replete with matters that are immaterial, impertinent, [or] scandalous’” (*id.* (emphasis added)), and, instead, the amended motion to strike only serves to further undercut Legislative Respondents’ position.

Legislative Respondents seek to strike facts alleged regarding the origins of the Assembly’s election investigation (*see* Doc. 111, at 16 (seeking to strike paragraphs 16–28 of the Petition)), but those facts explain, among other things, the public interest in the records at issue (*e.g.*, Doc. 5, ¶¶ 16–20); the nature of the investigation and thus what types of records exist (*id.* ¶¶ 21–28); and the individuals, entities, and contracts *directly at issue in this case* (*id.*). Legislative Respondents’ characterization of these facts as “extraneous”—and

“immaterial or impertinent”—is absurd. Moreover, the motion to strike suggests a fundamental misunderstanding of the Open Records law and the issues in this case; key issues raised by these facts include whether Wis. Stat. § 19.36(3) applies, and what interest the public has in disclosure, Wis. Stat. § 19.31.

In addition, this Court previously declined to strike any paragraphs from the Petition as hearsay, because Legislative Respondents “do not explain their one-sentence argument for why the ‘hearsay’ rule applies to pleadings.” (Doc. 107, at 7.) Legislative Respondents have not made any attempt to further explain why paragraphs 56 and 57 of the Petition constitute “hearsay” and why that would mean they should be stricken. (*See* Doc. 111, at 16.) In any event, Respondent Vos’s own statement to Wisconsin media about when the Assembly plans on releasing records from this investigation (*see* Doc. 5, ¶¶ 56–57) goes directly to whether records have been wrongly withheld under Open Records law—the core issue in this action. Even if hearsay were somehow relevant to a motion to strike, Vos recently affirmed under oath that he made those very statements. (*See* *Westerberg Aff.*, Ex. A at 120:19–121:11.) They are not hearsay. Wis. Stat. §§ 908.01(4)(a), (b).

CONCLUSION

For the reasons stated above, Respondents Vos, Blazel, and the Assembly’s Motions to quash the Petition and, alternatively, to strike portions of the Petition (Doc. 111) should be denied and the Court should order release of the requested records.

Respectfully submitted this 31st day of January, 2022.

PINES BACH LLP

*Electronically signed by:
Christa O. Westerberg*

Christa O. Westerberg, SBN 1040530

Aaron G. Dumas, SBN 1087951
122 West Washington Ave
Suite 900
Madison, WI 53703
(608) 251-0101 (telephone)
(608) 251-2883 (facsimile)
cwesterberg@pinesbach.com
adumas@pinesbach.com

AMERICAN OVERSIGHT

*Electronically signed by:
Sarah Colombo*

Melanie Sloan*
Sarah Colombo*
1030 15th Street NW, B255
Washington, DC 20005
(202) 869-5246
msloan@americanoversight.org
sarah.colombo@americanoversight.org

**Appearing Pro Hac Vice*

Circuit Court Case No. 21-CV-2521, with one redaction applied by the Petitioner. The signed copy is not yet available but can be provided to the Court as needed.

5. Attached hereto as Exhibit C a true and correct copy of the Coordinating Attorney Independent Contractor Agreement, dated June 25, 2021, which was marked as Exhibit 21 at the depositions of Robin Vos and Steve Fawcett on January 12, 2022.

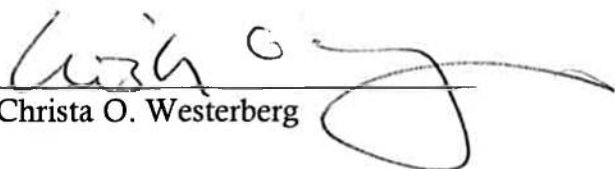
6. Attached hereto as Exhibit D is a true and correct copy of the First Amendment to Agreement, dated August 20, 2021, which was marked as Exhibit 22 at the depositions of Robin Vos and Steve Fawcett on January 12, 2022.

7. Attached hereto as Exhibit E is a true and correct copy of a printout of the www.wifraud.com website, which was marked as Exhibit 38 at the depositions of Robin Vos and Steve Fawcett on January 12, 2022.

8. Attached hereto as Exhibit F is true and correct copy of a Legislative Council Memo dated October 1, 2021, from Dan Schmidt, Deputy Director to Representative Gordon Hintz, which my firm obtained through a request to the legislature.

9. Attached hereto as Exhibit G is a true and correct copy of the Office of Special Counsel's First Interim Report, dated November 10, 2021, which I obtained from the www.wifraud.com website.

10. Attached hereto as Exhibit H is a true and correct copy of the transcript of a November 5, 2021, hearing before Judge Bailey-Rihn in American Oversight v. Robin Vos et al., Dane County Case No. 21-CV-2440.


Christa O. Westerberg

Subscribed and sworn to before me
this 31st day of January, 2022.

Alan Dimes

Notary Public, State of Wisconsin

My commission is permanent



01-31-2022
CIRCUIT COURT
DANE COUNTY, WI
Page 3
2021CV003007

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
 BRANCH 3

AMERICAN OVERSIGHT,
 Plaintiff,
 -vs- Case No. 21-CV-2521
 Case Code: 30952
ROBIN VOS, in his official capacity,
 Defendant.

VIDEOTAPED REMOTE DEPOSITION OF ROBIN VOS
 Wednesday, January 12, 2022
 1:04 p.m.
 Videotaped by: TODD CAMPBELL
 Reported by: SANDRA L. McDONALD

1 * * * * *
2 I N D E X
3 Examination By:
4 Attorney Westerberg 7
5 Attorney Stadler --
6 * * * * *
7 E X H I B I T S
8 Exhibit Nos.: Identified:
9 1 - 05/28/21 Public Records Law Request 74
10 2 - 05/28/21 Public Records Law Request 75
11 3 - 05/28/21 Public Records Law Request 82
12 4 - 07/15/21 Public Records Law Request 74
13 5 - 07/15/21 Public Records Law Request 76
14 6 - 07/15/21 Public Records Law Request 125
15 7 - 08/13/21 Public Records Law Request 64
16 8 - 08/13/21 Public Records Law Request 68
17 9 - 08/13/21 Public Records Law Request 70
18 10 - 09/15/21 Public Records Law Request 71
19 12 - Notice of Deposition of Robin Vos 10
20 13 - Defendant's Answer to Plaintiff's First
21 Set of Interrogatories and Requests for
 Production of Documents 23
22 21 - Coordinating Attorney Independent
23 Contractor Agreement with Consultare, LLC 51
24 22 - First Amendment to Agreement with
 Consultare, LLC 66
25

1 REMOTE VIDEOTAPED DEPOSITION of ROBIN VOS, a
2 witness in the above-entitled action, taken at the
3 instance of the plaintiff, under the provisions of
4 Chapter 804 of the Wisconsin Statutes, pursuant to
5 notice, before SANDRA L. McDONALD, a Notary Public in
6 and for the State of Wisconsin, from various remote
7 locations, on the 12th day of January, 2022,
8 commencing at 1:04 p.m.

9 * * * * *
10 A P P E A R A N C E S
11 CHRISTA O. WESTERBERG,
12 PINES BACH, LLP
13 122 West Washington Avenue, Suite 900
 Madison, Wisconsin 53703
14 cwesterberg@pinesbach.com
 appearing by videoconference on
 behalf of the plaintiff;
15 SARAH COLOMBO and MELANIE SLOAN,
16 AMERICAN OVERSIGHT
 1030 15th Street NW, B255
 Washington, DC 20005
17 sarah.colombo@americanoversight.org
 msloan@americanoversight.org
18 appearing by videoconference on behalf
 of the plaintiff;
19 RONALD S. STADLER,
20 KOPKA PINKUS DOLIN
 N19W24200 Riverwood Drive, Suite 140
21 Waukesha, Wisconsin 53188
 rstadler@kopkalaw.com
22 appearing by videoconference on behalf
 of the defendant.
23 Also Present: RACHEL BARON, Law Fellow with
24 American Oversight, by Zoom
25

1 EXHIBITS: (Continued)
2 Exhibit Nos.: Identified:
3 23 - 05/28/21 memo to Members of the Committee
4 on Assembly Organization from Speaker Vos 43
5 25 - 08/26/21 email to Robin Vos, et al. from
6 Steve Fawcett 80
7 26 - 07/19/21 email to Michael Gableman from
8 Harry Wait with preceding chain 122
9 27 - 07/28/21 email to Rep Vos, et al. from
10 Mary Jo Newburg with preceding emails 26
11 32 - Complaint 20
12 33 - Defendant's Answer to Complaint 109
13 34 - Response to Plaintiff's Requests for
14 Documents 10
15 35 - 12/21/21 retainer letter to Speaker Vos
16 from Attorney Stadler 11
17 36 - Wisconsin State Assembly 2021-2022 Policy
18 Manual 11
19 37 - Speaker Robin Vos Twitter account excerpts 94
20 38 - Wisconsin Election Fraud Reporting
21 Platform from wifraud.com 105
22 39 - 09/30/21 letter with subpoena duces tecum
23 to Claire Wodall-Vogg from Mike Gableman 101
24 * * * * *
25 (Original transcript filed with Attorney Westerberg)

1 THE VIDEOGRAPHER: We are on the
 2 record. This is Media No. 1 of the remote
 3 video-recorded deposition of Robin Vos taken
 4 pursuant to notice at the instance of the
 5 Plaintiff in the matter of American Oversight
 6 versus Robin Vos, in his official capacity,
 7 Defendant, pending in the Circuit Court of
 8 Dane County, State of Wisconsin,
 9 Case No. 21-CV-2521.

10 This deposition is taking place by
 11 means of remote audiovisual equipment with
 12 participants in remote locations. The deponent
 13 is physically located in Key West, Florida. The
 14 date is January 12, 2022. The time is 1:04 p.m.

15 I am Todd Campbell, videographer with
 16 Highlander Media Productions. The court
 17 reporter is Sandy McDonald with Madison
 18 Freelance Reporters. Would counsel please first
 19 introduce themselves starting with the
 20 Plaintiff?

21 MS. WESTERBERG: Christa Westerberg of
 22 Pines Bach for the Plaintiff, American
 23 Oversight.

24 MS. SLOAN: Melanie Sloan with
 25 American Oversight.

5

1 MS. COLOMBO: Sarah Colombo with
 2 American Oversight.

3 MS. SLOAN: We also have Rachel Baron
 4 with us, and she's our legal fellow.

5 MS. BARON: Thanks.

6 MR. STADLER: Good afternoon.
 7 Ron Stadler of Kopka Pinkus Dolin appears on
 8 behalf of Mr. Vos.

9 And I would note for the record that
 10 Mr. Vos, in the spirit of cooperation, is
 11 appearing voluntarily today. We're not waiving
 12 any legislative immunity under Articles 15 and
 13 16 of the Wisconsin Constitution.

14 Mr. Vos wants to make an effort to
 15 respond to questions that are relevant and
 16 direct to your pending case. We reserve the
 17 right, though, that if the deposition starts to
 18 delve into areas that are unproductive,
 19 irrelevant and unlikely to lead to the discovery
 20 of relevant evidence that we will invoke
 21 legislative immunity and adjourn the deposition.
 22 Thank you.

23 (Discussion off the record)

24 THE VIDEOGRAPHER: Would the court
 25 reporter please swear in the witness?

6

1 ROBIN VOS,
 2 having first been duly sworn on oath,
 3 was examined and testified as follows:

4 THE VIDEOGRAPHER: Thank you. Please
 5 proceed.

6 MS. WESTERBERG: Thank you.

7 EXAMINATION

8 BY MS. WESTERBERG:

9 Q Mr. Vos, we've met off the record. I'm
 10 Christa Westerberg with Pines Bach. Can you
 11 please state your full name for the record?

12 A Robin Vos.

13 Q What is your address?

14 A [REDACTED]

15 Q And I think you said earlier you're appearing from
 16 Florida today. Is there anyone present in the room
 17 with you?

18 A My chief of staff is here.

19 Q Okay. I would ask that you not communicate with your
 20 chief of staff during this deposition either by
 21 verbal or nonverbal cues.

22 A Sure.

23 MS. WESTERBERG: In fact, it might be
 24 preferable to have -- well, or that she -- is it

7

1 necessary that she be in the room? I think we
 2 talked about, Ron, with the judge that only
 3 witnesses and parties and counsel be in the
 4 room, and I do not believe the chief of staff
 5 has a role in any of those capacities.

6 MR. STADLER: That is probably
 7 technically correct.

8 MR. VOSS: Okay. Leave, Jenny.

9 MS. TOFTNESS: Bye.

10 MS. VOSS: Bye.

11 Q Also, I happen to know you've been deposed at least
 12 once before; is that correct?

13 A Yes.

14 Q Have you been deposed at any other time besides in
 15 the One Wisconsin Now case regarding Twitter?

16 A No.

17 Q That's a no?

18 A Correct.

19 Q Okay. So that case was not a Zoom deposition, so I
 20 just want to go over a few ground rules since this
 21 will be a little different. I'll ask you that you
 22 not communicate with anybody via cell phone or
 23 another computer screen or monitor during the
 24 deposition today. Is that all right?

25 A Yes.

8

1 Q Do you understand that? And you will let me know
 2 if someone tries to communicate with you in one of
 3 those ways?
 4 A Sure.
 5 Q Okay. And as per usual, we'll need to avoid talking
 6 over each other so that the court reporter can get a
 7 clean record. Do you understand that?
 8 A Yes.
 9 Q And it is helpful if you can give verbal answers like
 10 yes and no rather than a head nod or an uh-huh or
 11 something like that, okay?
 12 A Okay.
 13 Q And I might have to ask you to speak up a little bit
 14 because you sound a little muted.
 15 A Okay.
 16 Q Oh, that's better. If you don't understand a
 17 question at any time, will you please let me know?
 18 A Yes.
 19 Q And if you need a break at any point, please let me
 20 know. But if we have a question that is pending, I
 21 would ask that you finish the question that we're on
 22 and then we can take the break, okay?
 23 A Okay.
 24 Q So I'm going to show you what's been marked as
 25 Exhibit 12.

9

1 (Exhibit 12 is shared on the video screen)
 2 Q This is the notice of deposition we provided to you.
 3 Have you seen that before?
 4 A Yes.
 5 Q Okay. And this asks that you bring a number of
 6 documents to your deposition. Do you see that? I'm
 7 kind of scrolling through this exhibit.
 8 A Yes, but I do not have those documents in front of
 9 me.
 10 Q Do you understand that your attorney has provided us
 11 some records in response to these requests before
 12 today?
 13 A Yes, I understand my staff did.
 14 Q Okay. I would like to ask you about a few of those.
 15 And you'll have to bear with me as I manage the
 16 screen here.
 17 (Exhibit 34 is shared on the video screen)
 18 Q All right. This is one of the items your attorney
 19 provided to us, this Exhibit 34 as we've marked it.
 20 Is that something you've seen before?
 21 A I have not seen that document.
 22 Q Okay. Do you have any reason to believe that the
 23 answers that are provided are not accurate and
 24 correct?
 25 A No, I'm sure they are.

10

1 Q I'm going to show you now what's been marked as
 2 Exhibit 35.
 3 (Exhibit 35 is shared on the video screen)
 4 Q This is another document that was provided in
 5 response to the notice of deposition today. Have you
 6 seen this before?
 7 A I have not.
 8 Q So this is a contract that is addressed to you by the
 9 law firm Kopka Pinkus Dolin, and on the third page
 10 there it has your -- is that your signature?
 11 A That's my stamp, yep.
 12 Q Okay. So that's something your staff might have
 13 applied; is that what you are saying?
 14 A It could have been. I don't want to say one way or
 15 another.
 16 Q What's your normal way of signing contracts?
 17 A The normal way is my staff stamps it.
 18 Q Would you have had to approve a contract before you'd
 19 authorize your staff to stamp it?
 20 A In general, but not always.
 21 (Exhibit 36 is shared on the video screen)
 22 Q Okay. And then lastly, this document was provided in
 23 response to the requests that we've made today,
 24 Exhibit 36. Is this a document that you're familiar
 25 with, the Assembly Policy Manual?

11

1 A In general, yes.
 2 Q Okay. And this was provided in response to requests
 3 for, you know, policies that your office might follow
 4 in respect to responding to open records requests.
 5 Is that consistent with your understanding?
 6 A Sure, yep.
 7 Q Did you -- in response to these document requests
 8 that are back in the notice of deposition, so I'm
 9 flipping back to Exhibit 12, how did you search for
 10 records that were responsive to these requests?
 11 A We get so many open records requests from American
 12 Oversight, we have a normal policy where our staff
 13 searches everything, so they -- I direct my staff to
 14 fulfill any requirements under the open records
 15 requests, and then they follow up by giving whoever
 16 has requested documents the information.
 17 Q And we'll get back to that in a minute, but this is
 18 actually not an open records request, it's a
 19 discovery request. Did you search for these
 20 documents in any other fashion other than what you
 21 just identified?
 22 A No, it's the normal process we utilize.
 23 Q Okay. Did you personally search for any records?
 24 A I get so many open records requests, frankly, the
 25 normal process is my staff does it. In this one

12

1 circumstance, I believe, but I'm not 100 percent
 2 certain, that I did the open records -- or the
 3 requests on my phone and my personal documents and
 4 that the staff did it on our all our official
 5 documents.
 6 Q Okay. How do you supervise the search of the staff
 7 who are conducting records requests on your behalf?
 8 A I do not.
 9 Q Okay. So --
 10 A I have people that I hire -- I have people that I
 11 hire and trust that are experts at it. They do it
 12 often.
 13 Q Okay. So you give it to them, they handle it, and
 14 that's sort of the end of it as far as you're
 15 concerned?
 16 A Correct.
 17 Q Okay. And that would be true for responding to open
 18 records requests as well as this discovery request?
 19 A Correct.
 20 Q Do you know why you weren't able to produce a
 21 contract with the von Briesen & Roper law firm that's
 22 identified here on the bottom of Page 2?
 23 MR. STADLER: Counsel, I'll just note
 24 that we provided you with a written response to
 25 your requests, and we objected to that request.

1 Subject to and without waiving that request, we
 2 did product the contract with Kopka Pinkus
 3 Dolin.
 4 MS. WESTERBERG: Right, so you
 5 produced that, the Kopka Pinkus Dolin one, so
 6 I'm asking about the von Briesen one.
 7 MR. STADLER: It's objected to.
 8 MS. WESTERBERG: Yeah, so I'm still
 9 asking the witness why that wasn't produced -- I
 10 understand your objection -- if he knows.
 11 A I do not.
 12 Q With respect to this notice of deposition -- and at
 13 this point I'm not asking about the content of any
 14 conversations, but can you tell me with whom you
 15 discussed this notice?
 16 A Steve Fawcett, the legal counsel in our office,
 17 Mr. Stadler, and that's pretty much it, other than
 18 saying that I was having one, right, not what was
 19 going to be talked about or anything else.
 20 Q Okay. And with whom did you discuss this deposition
 21 today, that you were going to be in the deposition,
 22 apart from the notice?
 23 A Mr. Fawcett and Mr. Stadler were the two gentlemen
 24 that I had conversations with about the deposition.
 25 Q And what did you do to prepare for this deposition

1 besides have those conversations?
 2 A Nothing. There was probably a grand total of
 3 several minutes.
 4 Q Did you at any point talk with Jenny Toftness about
 5 the deposition?
 6 A Telling her that we were doing one, yes.
 7 Q Was she in any meetings where you were preparing for
 8 the deposition?
 9 A No, at least not that I knew of.
 10 Q Sorry?
 11 A Not that I knew of, right.
 12 Q Okay. And her role, as I understand it, is as your
 13 chief of staff?
 14 A Correct.
 15 Q Okay. And the -- and that is chief of staff to your
 16 office as speaker; is that correct?
 17 A Right.
 18 Q Okay. She doesn't have any separate role vis-a-vis
 19 the Assembly; is that correct?
 20 A That is her role in the Assembly.
 21 Q Is as your chief of staff?
 22 A Correct.
 23 Q So she is chief of staff to the speaker of the
 24 Assembly. Does she take instruction from anybody but
 25 you?

1 A I don't believe so.
 2 Q Sorry?
 3 A I don't believe so. I'm sorry. I don't believe so.
 4 Q Okay. Yeah, we couldn't hear you at all on that for
 5 some reason initially, but we got your answer the
 6 second time around. Just by way of background, you
 7 were elected to the Wisconsin State Assembly in 2004;
 8 is that right?
 9 A Yes.
 10 Q And you represent the 63rd Assembly District?
 11 A Yes.
 12 Q And you've served in the Assembly ever since you were
 13 first elected?
 14 A Yes.
 15 Q And you became speaker in 2013; is that right?
 16 A Correct.
 17 Q All right. Now, you have a number of staff working
 18 for you; is that right?
 19 A Yes.
 20 Q Okay. And do all of them work for you -- bear with
 21 me here -- in your capacity as speaker and
 22 representative of the 63rd Assembly District?
 23 A I think -- I don't know the answer to that for sure.
 24 I think that when you become the speaker, that is the
 25 title that you hold, so I think they work for you in

1 that capacity. I don't think there's a
 2 differentiation, but I don't know the answer to that
 3 for sure.
 4 Q Okay. So for the purposes of how your office
 5 functions, those functions are essentially merged,
 6 right?
 7 A Yes.
 8 Q Okay. And today when I say the word you, did you do
 9 X, Y or Z, I'm going to be referring to your office
 10 unless I indicate otherwise and I might say you
 11 individually. Does that make sense?
 12 A Yep, so I should assume it's always my staff, okay.
 13 Q And you.
 14 A Yep, yep, uh-huh.
 15 Q So you individually, though, you're familiar with the
 16 open records law of Wisconsin, generally speaking;
 17 would you agree?
 18 A Yes.
 19 Q And some call it the public records law, but I'm
 20 going to refer to it today as the open records law
 21 because that's what I usually do, okay?
 22 A Yep.
 23 Q And you'll understand I'm talking about the same
 24 thing?
 25 A Okay.

17

1 Q And you individually have been subject to the
 2 Wisconsin open records law the whole time you've been
 3 in the Legislature; is that fair?
 4 A Yes.
 5 Q Okay. And before you joined the Legislature you were
 6 in other government service, correct?
 7 A Yes.
 8 Q Okay. So you were on the Racine County Board; is
 9 that right?
 10 A Yes.
 11 Q And you were on the -- was it the Board of Regents?
 12 A Yes.
 13 Q Okay. And you also had to observe the open records
 14 law in those capacities too, correct?
 15 A Yes.
 16 Q Okay. And during your time in government service
 17 have you ever gone to any trainings on the open
 18 records law?
 19 A I don't recall.
 20 Q Okay. Do you have a designated custodian of records
 21 for your office besides yourself?
 22 A I believe that the one who is in charge of filling
 23 the open records requests is Steve Fawcett, but I
 24 don't know if he is legally the custodian or not.
 25 Q Okay.

18

1 MR. STADLER: Christa, could you take
 2 the exhibit down if you're not using it so we
 3 have the full screen for the video?
 4 MS. WESTERBERG: Yes. Thank you for
 5 reminding me there. Feel free to keep chiming
 6 in with that.
 7 Q So how many -- if you can estimate, how many open
 8 records requests does your office receive each week
 9 on average?
 10 A I don't know for sure, but I would say it's somewhere
 11 between a half a dozen and more.
 12 Q And --
 13 A Many from you.
 14 Q Sorry?
 15 A Many from you.
 16 Q Me?
 17 A Well, from American Oversight.
 18 Q What percentage of your time, individually now I'm
 19 saying, each week is devoted to searching for and
 20 responding to open records requests on average, not
 21 your staff, but you personally?
 22 A I would say 15 to 20 minutes at most.
 23 Q Okay.
 24 A Depending on the week and what the request says, you
 25 know.

19

1 Q Are you -- have you reviewed the Complaint in this
 2 matter that was filed with the circuit court?
 3 A Which Complaint?
 4 Q The -- I can pull it up here, essentially the
 5 lawsuit.
 6 A I have not been keeping daily track of it.
 7 Q Okay. So I did not catch your answer again on that
 8 one. Can you say that again?
 9 A I have not been keeping regular track of it.
 10 (Exhibit 32 is shared on the video screen)
 11 Q Okay. Have you reviewed this? This is the Complaint
 12 I mentioned before. Do you recall ever reviewing
 13 this Complaint? It's been marked as Exhibit 32, and
 14 I'll just scroll through it, and tell me to stop at
 15 any point if you want.
 16 A I'm sure at some point I looked at it. I don't
 17 recall when.
 18 Q Okay. And are you generally familiar with the
 19 allegations of this Complaint, that it's seeking to
 20 enforce the open records law as to records in your
 21 office's possession regarding the Assembly's
 22 investigation of the 2020 election?
 23 A I understand that's what you're alleging.
 24 Q Okay. So this suit does not seek records of the
 25 Assembly's contractors, it's just for the records of

20

1 your office. And so is that understood?
 2 A That's my understanding.
 3 Q Okay. Have you reviewed the Answer to this Complaint
 4 that was filed on your behalf?
 5 A I have not.
 6 Q Is it fair -- you mentioned before that you've gotten
 7 requests before from American Oversight. Is it fair
 8 to say that American Oversight is not the only entity
 9 that's made open records requests to your office
 10 regarding the investigation of the 2020 election?
 11 A I don't know that for a fact, but I'm sure it's
 12 probably true.
 13 Q You might have gotten them from news media or other
 14 entities like that?
 15 A Correct.
 16 Q Yeah.
 17 A They don't usually tell me who the open records
 18 request is from. They just tell me these are the
 19 parameters, search for those, et cetera.
 20 Q Okay. And by the election investigation, I'm going
 21 to be referring to the investigation that was
 22 initiated in May, the end of May of 2021 by the
 23 Assembly regarding the 2020 November election. Is
 24 that understood?
 25 A Yes.

21

1 Q The one that's currently being conducted by
 2 Michael Gableman.
 3 A Yes.
 4 Q I mean, generally speaking, would you agree that this
 5 election investigation is a high-profile issue?
 6 A The open records request of it?
 7 Q No, the investigation itself.
 8 A Oh, yes.
 9 Q Okay. Does your office save all records regarding
 10 the election investigation as a matter of course?
 11 A I do not know that answer.
 12 Q Speaking for yourself, do you save all communications
 13 regarding the election investigation as a matter of
 14 course?
 15 A In general, but I also know that we are not required
 16 to, correct?
 17 Q You're not required to retain all records --
 18 A Right.
 19 Q -- is that what you're asking? I can't answer your
 20 question because this is your deposition, but you're
 21 saying in general you might have retained them but
 22 you might have also deleted some; is that fair?
 23 A Yeah, I don't think I'm required to keep those, but
 24 yes, whenever there's an open records request,
 25 they're retained.

22

1 Q Okay, when there's an open records request. If
 2 there's not been an open records request made, do you
 3 retain them in that event?
 4 A You'd have to ask my staff. They retain all the
 5 records.
 6 Q We'll discuss that a little bit more in the future, a
 7 little bit later here. But, well, let me kind of
 8 back up and ask you this. I want to understand all
 9 the devices and accounts that you use for
 10 communication, and I'm going to refer you to what
 11 we've marked as Exhibit 13, which is the Responses to
 12 Interrogatories and Document Requests that your
 13 office has -- or that your counsel has provided to us
 14 in this case.
 15 (Exhibit 13 is shared on the video screen)
 16 Q So there it is up on the screen, Exhibit 13. Can you
 17 see that, Speaker Vos?
 18 A I can.
 19 Q Okay. Have you reviewed this document before? And
 20 again, I'm scrolling through it. If you need me to
 21 stop anywhere, just let me know.
 22 A Yep, I have not.
 23 Q But it's fair to say that you provided information
 24 for it; is that right?
 25 A Yes. I mean, I'm sure I did if someone was asking.

23

1 Q And one of the questions that we asked in these
 2 interrogatories was to identify all official State
 3 email accounts from which you and other individuals
 4 working in your office have sent or received
 5 responsive records. And by responsive records, we
 6 mean records responsive to the 10 open records
 7 requests that are at issue in this case, okay?
 8 A Okay.
 9 Q And we've got two email addresses listed for you.
 10 One of them is Rep.Vos@legis.wisconsin.gov, and one
 11 is Robin.Vos with the same footer. So can you tell
 12 me what the difference is between those two accounts?
 13 A The State gives you two accounts, one that has Rep as
 14 your first name, and the other one is that Robin.Vos.
 15 Q Okay. So the Robin.Vos, is this like your account as
 16 an employee of the State essentially?
 17 A I don't know.
 18 Q We couldn't hear you. Sandy --
 19 A I don't know. I'm not a tech person. I don't know.
 20 MS. WESTERBERG: Okay. Am I the only
 21 one not hearing some of these answers?
 22 (Discussion off the record)
 23 Q So just briefly, we also asked who communicates
 24 in your office using these accounts, and there's a
 25 number of people listed here on Page 2 of this

24

1 exhibit. Can you tell me just briefly who these
 2 people are starting with Tyler Clark?
 3 A Tyler, Abbey and Moriah are in our policy office.
 4 They are policy staffers. Steve is our in-house
 5 legal counsel. Angela Joyce and Adam King work in
 6 our communications office or department.
 7 Q Okay. And then at the top of Page 3 there, can you,
 8 starting with Alex, tell me who these people are?
 9 A Alex does our constituent relations and that area.
 10 Kelly is in our communications. Jenny is my chief of
 11 staff. Jake is a policy staffer.
 12 Q Okay. And so Alex Richter, you said, was constituent
 13 communications?
 14 A Correct.
 15 Q So if a member of the public wants to write you --
 16 writes you about something, would Alex typically be
 17 the one responding to that?
 18 A Not typically. Many times if it's a certain area one
 19 of the policy staffers will help or else respond.
 20 Q Okay. When it comes to communications with other
 21 members of the Legislature and their staffs, who
 22 would be the primary people doing that?
 23 A You'd have to ask them. I don't know.
 24 Q Okay. Do you communicate with other members of the
 25 Legislature by email?

25

1 A Very, very rarely.
 2 Q Why is that?
 3 A Because I usually call people on the phone.
 4 Q When you get constituent communications or
 5 communications from members of the public, do they go
 6 to this Robin.Vos address, do you know?
 7 A Occasionally but rarely.
 8 Q Okay. It's the Rep.Vos is really the primary one
 9 then?
 10 A Correct.
 11 Q So I'm going to show you now what we've marked as
 12 Exhibit 27.
 13 (Exhibit 27 is shared on the video screen)
 14 Q Can you see that?
 15 A Yes.
 16 Q And the first page of this exhibit is a communication
 17 from -- I'm assuming it's a member of the public --
 18 Mary Jo Newburg to Rep.Vos and a few other
 19 legislators. Do you see that?
 20 A Yes.
 21 Q And you'll agree with my characterization?
 22 A Yep. We get a lot of them.
 23 Q Okay. So when something like this comes to your
 24 office, what happens to this document?
 25 A You would have to ask Alex or the policy staffers who

26

1 deal with it.
 2 Q Okay. So do you read these kinds of communications?
 3 A Sometimes, especially if they're from my district.
 4 If they're not from my district, usually not.
 5 Q Okay. Do you direct staff what to do with these
 6 kinds of communications?
 7 A No.
 8 Q It's totally hands-off, you just let them handle it?
 9 A Correct.
 10 Q Do you know what kind of a response they might send
 11 to something like this, if any?
 12 A If they're from out of the district, I do not.
 13 Q Okay. And then if they're from in the district, it
 14 would just be your response to them?
 15 A Usually people who email my office I call back on the
 16 telephone, but not a hundred percent of the time.
 17 Q Okay. So when you -- when somebody does write them
 18 back, would that person be you?
 19 A Normally not. Actually, never. I would never reply
 20 back directly. I would call.
 21 Q Okay. And if anybody did reply back directly, who
 22 would do that?
 23 A Usually one of the policy staffers or Alex, depending
 24 on what the topic was or if they had questions that
 25 needed to be answered, again, if they're from the

27

1 district. If they're not from the district, usually
 2 I don't know how they handle that.
 3 Q Okay. And so we would need to ask them about that?
 4 Sorry? Say that again.
 5 A Yeah, I don't handle that part of the job.
 6 Q Okay. I have kind of similar questions related to
 7 the next couple of pages of this exhibit. I'll
 8 start with the bottom, the last page, Page 3, so
 9 you can kind of see how the chain got started.
 10 And it looks like some of these communications
 11 are about -- to you and some other legislators
 12 from an individual, started by an individual named
 13 Gary Zwick. Do you know if that person is in your
 14 district, by chance?
 15 A I do not.
 16 Q Okay. And it's about the election investigation
 17 being done in Wisconsin not being an Arizona-style
 18 investigation or recount. Is that a fair
 19 characterization?
 20 A I guess so. I don't know.
 21 Q Well, how would your office handle something like
 22 this, any differently than the first one we looked
 23 at?
 24 A If someone sends an email, I believe there is an
 25 auto thing that goes out that says, "Please supply

28

1 your address and telephone number," and if they're
 2 from the district, they get added to my call list.
 3 If they're not from the district, I don't know.
 4 Q And as far as calls that you get, your office gets,
 5 is there like a log of those calls kept and what
 6 people are wanting to talk to you about?
 7 A If they're from the district, I believe so. If
 8 they're not from the district, I don't know.
 9 Q Okay. And as far as non-constituent contacts, are
 10 calls to your office logged?
 11 A I believe so, but you'd to have ask the staff that do
 12 that.
 13 Q Did you send any email, like emails regarding the
 14 election investigation, to any sort of designated
 15 folders or anything like that?
 16 A I did not.
 17 Q Okay. And if this was -- had been requested by
 18 American Oversight, these emails concerning, you
 19 know, whether an investigation should be an
 20 Arizona-style audit, do you know why this document
 21 might not have been produced to us?
 22 A I have no idea.
 23 THE VIDEOGRAPHER: I don't think that
 24 last audio came through.
 25 MR. STADLER: He said, "I have no

29

1 idea."
 2 Q Is that right, Mr. Vos?
 3 A Yes.
 4 Q When staff do -- when written responses to
 5 constituents are provided, do you know about how long
 6 it takes to respond to those?
 7 A I do not.
 8 Q And do you know if these types of communications that
 9 we were just looking at are usually retained by your
 10 office?
 11 A I do not.
 12 Q Have you told staff that they're prohibited from
 13 deleting them?
 14 A I have said we need to follow the open records law.
 15 Q As far as retention?
 16 A Correct.
 17 Q Okay. And I think that was what you were saying
 18 before, that once a request for a record has been
 19 made, you don't delete it; is that right?
 20 A Correct.
 21 Q Is it your understanding also that once a lawsuit for
 22 records has been filed, you can't delete those
 23 records either?
 24 A I would assume so but, again, I don't know that.
 25 Q Okay. Are records, you know, like emails, just

30

1 regularly deleted as a matter of course by your
 2 office just for space constraints or any other
 3 reason?
 4 A You'd have to ask the LTSB, but I believe there is a
 5 normal process they utilize. We don't have excess
 6 storage on servers. But I don't know that for a
 7 fact.
 8 Q Okay. So setting aside whatever the LTSB may
 9 instruct, do you have any other understanding
 10 independently, you individually, as to whether space
 11 constraints on shared folders, things like that,
 12 prohibit you from retaining records?
 13 A I don't have anything different from that. I don't
 14 know.
 15 Q So when a request for open records is made to your
 16 office, do you search the Rep.Vos and Robin.Vos
 17 accounts for responsive records, or is that your
 18 staff?
 19 A The staff does that.
 20 Q Okay. I'm going to turn us back to Exhibit 13, which
 21 was the discovery responses.
 22 (Exhibit 13 is shared on the video screen)
 23 Q And one of the email accounts that these answers
 24 indicate that you searched was the -- it looks like a
 25 Gmail account that is probably your personal Gmail

31

1 account; is that right?
 2 A Correct.
 3 Q Okay. And that's the bottom one on Page 5 there
 4 that's referred to?
 5 A Yep.
 6 Q Okay. And the request was who has the ability to
 7 view, send or receive messages from the account, and
 8 it says here that you are the only person with that
 9 ability in your office; is that right?
 10 A I believe that's true, yep.
 11 Q Okay. So if there's an open records request that
 12 comes in and you have a record related to government
 13 business on your personal Gmail account, you search
 14 that account for those records at that time?
 15 A Correct.
 16 Q How do you search it, like what's your search
 17 methodology?
 18 A Normally Steve or whoever is asking me to do it will
 19 tell me the search terms. I will type it in the
 20 search bar and see if any records are responsive.
 21 And I very rarely try to use my personal email, but
 22 we still search it, and rarely does anything come up.
 23 Q If Steve is telling you search terms to use, are
 24 those communicated by email or some other way?
 25 A No, it's either I'm in the office or it's over the

32

1 phone. It's usually when I'm in the office, though.
 2 Q Okay. And do you tell -- strike that. What do you
 3 tell your staff about using private accounts for
 4 government business, like Gmail accounts?
 5 A I don't think we do that.
 6 Q Okay. So staff aren't instructed that they need to
 7 avoid using private accounts for government work; is
 8 that right?
 9 A We have had that discussion in the past, to try to
 10 make sure we use our State accounts.
 11 Q Do you know when the last time was?
 12 A I do not.
 13 Q Okay. Have your open records policies changed or the
 14 methods that your office uses to respond to requests
 15 changed with the beginning of the pandemic in 2020?
 16 A No.
 17 Q Okay. If staff uses private email accounts for
 18 government business, how do you ensure that documents
 19 on those accounts are retained for purposes of
 20 responding to the open records law?
 21 A You would have to ask the staff people and Steve, who
 22 is our records collector/custodian.
 23 Q Okay. You individually haven't provided instructions
 24 to staff on that point?
 25 A Correct.

33

1 Q Do you recall whether you've ever used this Gmail
 2 account to communicate regarding the election
 3 investigation?
 4 A I don't recall.
 5 Q Okay. Are the -- if you do need to use this email
 6 account to communicate for governmental business, are
 7 there a certain category of people that use that
 8 account to communicate with you, like people from
 9 other states?
 10 A No. I very rarely use that account, and if anything,
 11 occasionally people will send me something, and then
 12 I will either call them or direct them to contact my
 13 office, to not use this email.
 14 Q Do you forward their email to your staff so that it
 15 can be retained on a government account?
 16 A Occasionally, but not usually.
 17 Q Now, the next page of these discovery requests,
 18 Page 6 there at the top, it also mentions that your
 19 phone was searched for some -- or that your phone
 20 might have been used for some responsive records. Is
 21 that your personal phone, or does the Assembly
 22 provide you with a phone?
 23 A It's my personal phone.
 24 Q Okay. And how do you search your phone for
 25 responsive records when an open records request

34

1 comes in?
 2 A Same thing, I bring up the search function in
 3 Messages and search for the parameters.
 4 Q Okay. If you haven't received parameters from Steve
 5 or anybody else, do you just kind of make up your
 6 own, or how do you search in that event?
 7 A I -- no, I don't make anything up, I mean, so if
 8 Steve instructs me to do a search, I do the search.
 9 Q So just as an example, if, you know, somebody says
 10 they want communications with you but they don't --
 11 on a certain topic, but they don't specify the sender
 12 or recipient or the topic is kind of general, how
 13 would you select search terms if you haven't been
 14 given them by Steve?
 15 A Usually we do the search through his direction, so he
 16 will say, "Look for records related to X," I'll type
 17 that parameter in, see if there are any.
 18 Q Okay. So if you're getting something like 10 or 15
 19 open records requests in your office a week, are you
 20 going through this exercise fairly frequently with
 21 Steve?
 22 A Yeah, fairly frequently.
 23 Q And what applications on your phone do you search?
 24 A Text messages and my Gmail account, that's pretty
 25 much it.

35

1 Q And you are the only one with access to your phone to
 2 be able to search that; is that right?
 3 A Correct. Now, sometimes I'll give it to the staff
 4 and they'll do the search if I'm in a meeting or
 5 whatever but, yes, in general, it's me.
 6 Q Do you recall searching for any records regarding the
 7 election investigation on your phone?
 8 A I'm sure I have. I mean, we've gotten so many
 9 requests from you guys, I mean, I'm sure we have.
 10 Q But you just don't recall either way sitting here
 11 today?
 12 A Well, I don't recall specific requests, but have I
 13 done them on the election in the past? Yes.
 14 Q Do you recall if those searches turned up any
 15 responsive records?
 16 A I don't recall.
 17 Q Do you recall what search terms you might have used?
 18 A I -- I don't. I'm sorry. We get so many requests, I
 19 don't recall specifically.
 20 Q Okay. Is there a place where your office retains the
 21 search terms that you use in response for a
 22 particular request?
 23 A It's usually related to the request that comes in,
 24 because you guys will normally put a very intricate
 25 list of terms that we're supposed to utilize.

36

1 Q Is the -- you know, if you have something that's like
 2 a general subject matter, like the election
 3 investigation for a particular set of dates, how
 4 would you search for that on your phone?
 5 A I guess it depends on what the request actually said.
 6 Q Okay. And what I guess I was asking before is, you
 7 know, to the extent Steve is telling you search terms
 8 to use, are those memorialized anywhere in your
 9 office, the search terms?
 10 A I don't know.
 11 Q Now, this document or this answer to this
 12 interrogatory, excuse me, also indicates that a
 13 member of your staff also searched their phones. And
 14 is it the same with them, that they have personal
 15 phones as opposed to phones provided by the Assembly?
 16 A You'd have to ask them, but I think that's true.
 17 Q Do you tell -- do you individually tell your staff
 18 anything about using private phones for government
 19 business?
 20 A I do not.
 21 Q Do you know if the staff are instructed generally by
 22 others in the office not to use their private phones
 23 for government business?
 24 A I don't think we instruct that. Obviously, people
 25 will call the office. If they can't get ahold of

37

1 somebody, they will try their cell phone if they have
 2 it, usually for telephone calls. I don't know other
 3 records than that.
 4 Q Okay. How do you ensure that records responsive --
 5 you know, how does your office ensure that records
 6 responsive to an open records request that might be
 7 on a staff person's phone are retained?
 8 A You'd have to ask Steve.
 9 Q Ask Steve, you said?
 10 A Correct.
 11 Q Now, Interrogatory Page 7 here indicates that a
 12 shared drive in your office and individual computer
 13 desktop drives might be searched as well as paper
 14 files. Is that consistent with your understanding?
 15 A Yes.
 16 Q Do you ever conduct any searches on the shared office
 17 drive?
 18 A Never. For myself, as an individual.
 19 Q You yourself individually, thank you.
 20 A Correct, yeah, right.
 21 Q So your staff will take care of that aspect of the
 22 search?
 23 A Yes.
 24 Q Okay. And is the shared drive essentially a server
 25 where documents and things necessary to do the work

38

1 of your office are stored?
 2 A I'd assume so.
 3 Q Do you know, is it like a Microsoft product or
 4 something like that?
 5 A I don't use it.
 6 Q Okay. Do you know if your office ever uses services
 7 like Microsoft Teams?
 8 A I do not.
 9 Q Okay. Have you ever individually used that service
 10 for any governmental business?
 11 A Yes, but not -- I shouldn't say that. I don't
 12 believe it's at our instigation. It's joining,
 13 somebody else is hosting, like this one with Zoom.
 14 Q Right, okay. So if somebody sends you an invitation,
 15 you'll accept it and participate in the call?
 16 A Right.
 17 Q Okay. Does -- you know, there's a Chat feature in
 18 those kinds of services like Microsoft Teams and
 19 Zoom. Do you know how your office retains records
 20 from those Chat features?
 21 A I have no idea.
 22 Q Do you use services like Slack in your office?
 23 A No. Well, I shouldn't -- I don't.
 24 Q Yeah, you individually.
 25 A No.

39

1 Q You're not aware of any individually --
 2 A No.
 3 Q -- being used in your office? Okay. And then you
 4 kind of beat me to the punch a minute ago. Aside
 5 from Teams, you said you might sometimes accept a
 6 Zoom invitation and speak that way?
 7 A Correct.
 8 Q Do you recall ever using the Chat feature or seeing
 9 the Chat or -- strike that. Do you recall ever
 10 seeing the Chat feature used in those calls?
 11 A I guess there's a Chat feature, yeah.
 12 Q Do you recall if you've personally used that Chat
 13 feature for calls that concerned government business?
 14 A I don't recall. I don't recall.
 15 Q Does your office use services like Dropbox where you
 16 can view and store records on a password-protected
 17 website?
 18 A I don't know.
 19 Q You don't know?
 20 A No.
 21 Q Okay. Have you ever used a password-protected
 22 website to review records related to government
 23 business?
 24 A Not that I remember.
 25 Q And I can narrow it a little bit. Related to the

40

1 election investigation?
 2 A Yep, not that I recall.
 3 Q How about services like that are hosted by an
 4 organization that has its own service like ALEC or
 5 something like that? Are you aware of any use of
 6 those password-protected websites to store records
 7 related to the election investigation?
 8 A I've never looked at any of those.
 9 Q Okay. Do you know if your staff has?
 10 A I don't.
 11 Q The last time we were in a deposition like this you
 12 had mentioned you use some messaging apps on your
 13 phone like Facebook Messenger and WhatsApp. Do you
 14 still use those?
 15 A I use Messenger occasionally. I don't use WhatsApp
 16 very often.
 17 Q To the extent you use WhatsApp, what do you use that
 18 for?
 19 A Well, I just do it when I travel overseas, so I
 20 really don't use that other than personal.
 21 Q Have you had occasion to use WhatsApp since the
 22 pandemic started?
 23 A I haven't traveled much, so no.
 24 Q Okay.
 25 A Not that I remember, I should say.

41

1 Q Okay. And then you said you use Facebook Messenger
 2 occasionally. Have you used that for any
 3 communications related to the election investigation?
 4 A Not that I recall, but I'd have to go back and look.
 5 Q Do you know if you've searched Facebook Messenger in
 6 response to any open records requests related to the
 7 election investigation?
 8 A I don't recall.
 9 Q Sorry? You cut out again there.
 10 A I'm sorry. I don't recall.
 11 Q Aside from Messenger and WhatsApp, do you use any
 12 other messaging services for governmental business?
 13 A Well, I don't use those for governmental business
 14 either, but no.
 15 Q Okay. Do you use those types of apps for anything
 16 related to the election investigation?
 17 A No.
 18 Q Okay. Do you ever -- when it comes to your private
 19 email accounts or messaging apps or phone texts, do
 20 you have settings on those items to delete after a
 21 certain period of time?
 22 A No, not that I know of, but I don't know for sure.
 23 Q Okay. So you'd have to go back and check to look and
 24 see what the settings are?
 25 A Correct.

42

1 Q And --
 2 A It's probably whatever the default is.
 3 Q I'm sorry?
 4 A I'm sorry. It's probably whatever the default is. I
 5 haven't changed -- I haven't set anything special.
 6 Q Okay. And do you ever use settings like in Facebook
 7 Messenger vanish mode where things just self-delete?
 8 A No.
 9 Q Do you delete things manually from those, from your
 10 private messaging accounts, when you delete?
 11 A I have in the past.
 12 Q Okay. And I think you might have said this before,
 13 but same for text messages, do you manually delete
 14 texts sometimes?
 15 A Yes.
 16 Q And then for your emails that are in your Gmail
 17 account, you also self-manually delete some of those
 18 sometimes?
 19 A Yes.
 20 Q Okay. Let's see, in addition to your other roles,
 21 your roles as representative for the 63rd Assembly
 22 District and the speaker of the Assembly, you're also
 23 chair of some Assembly committees; is that right?
 24 A Yes.
 25 Q And would one of those be the Assembly Committee on

43

1 Organization?
 2 A Yes.
 3 Q I'm going to show you what we have marked as
 4 Exhibit 23.
 5 (Exhibit 23 is shared on the video screen)
 6 Q This is actually composed of two documents, a mail
 7 ballot dated May 28th and one dated August 27th. Do
 8 you see that?
 9 A Yes.
 10 Q Do you recognize these documents?
 11 A Yes.
 12 Q And your stationery is headlining both of them; is
 13 that right?
 14 A Yes.
 15 Q Is it fair to say you caused these ballots to be sent
 16 to the Committee on Assembly Organization?
 17 A Yes.
 18 Q And when you send out a mail ballot like this, this
 19 is not a ballot that's voted at a meeting where
 20 you're all sitting together in a room, it's sent by
 21 mail; is that fair?
 22 A Correct.
 23 Q And is that -- how do these get sent out to the
 24 members of the committee?
 25 A I believe the clerk sends them out electronically.

44

1 Q Okay. And it says that they have to sign and provide
 2 their response. Do you get those responses?
 3 A I believe the clerk does.
 4 Q Okay. And it mentions here toward the bottom of the
 5 first page that the ballot has to be returned to the
 6 Speaker's Office, so would that suggest to you that
 7 you actually receive these?
 8 A The office does. I don't personally, but I think our
 9 office does.
 10 Q Okay. Do you know how they are communicated to your
 11 office?
 12 A I don't understand the question.
 13 Q Do they get emailed to your office or sent by page or
 14 some other method?
 15 A I don't know.
 16 Q And do they actually have to physically sign these
 17 ballots, do you know?
 18 A I don't know.
 19 Q Okay. So let's look at the first one here, the one
 20 that's dated May 28th. Did this motion pass, to your
 21 knowledge?
 22 A Yes.
 23 Q And this was the initial motion -- it says it,
 24 "Authorizes the Speaker of the Assembly to hire legal
 25 counsel and employ investigators to assist the

45

1 Assembly Committee on Campaigns and Elections in
 2 investigating the administration of elections in
 3 Wisconsin," and it then goes on to say, "Speaker Vos,
 4 on behalf of the Assembly, shall approve all
 5 financial costs and contractual arrangements for
 6 hiring legal counsel and investigators." Fair
 7 summary?
 8 A It's right there, yep.
 9 Q Yep. So the second line there says you'll approve
 10 all financial costs and contractual arrangements.
 11 How are those approvals given by you individually on
 12 behalf of the Assembly?
 13 A They are not given by me individually. They're given
 14 by members of my staff on my behalf.
 15 Q Are you consulted about the financial costs and
 16 contractual arrangements before they're approved by
 17 your staff?
 18 A Many times.
 19 Q And how do those consultations occur?
 20 A Usually by telephone or in person.
 21 Q Okay. Do you recall any written communications to or
 22 from you about financial costs and contractual
 23 arrangements?
 24 A No.
 25 Q We didn't catch that.

46

1 A I'm sorry. No.
 2 Q Do you remember what the vote was on this particular
 3 ballot, did I ask you, on May 28th?
 4 A I bet the Democrats voted no, but I don't know the
 5 exact number.
 6 Q Do you know, are these -- once the motion passes, are
 7 these voted ballots kept, you know, in any sort of
 8 Assembly record or record of your office?
 9 A I do not know.
 10 Q The number, the Subject line says this is
 11 Ballot 21-03. Do you know what that refers to?
 12 A I do not.
 13 Q Pursuant to the first line of this motion, your
 14 office did hire legal counsel and employ
 15 investigators to assist the Assembly Committee on
 16 Campaigns and Elections; is that correct?
 17 A Yes.
 18 Q Okay. In looking at Page 2 of Exhibit 23, it
 19 states -- it's a separate motion dated August 27,
 20 2021, also related to the investigation, correct?
 21 A Yes.
 22 Q Okay. Do you -- and this one, can you describe to me
 23 in your own words what this motion did?
 24 A I can read it right there.
 25 Q Do you have an independent understanding, you know,

47

1 setting aside what you see on the screen there, what
 2 this motion authorized you to do?
 3 A Yes, I understood what I voted for.
 4 Q Okay. And so that authorized you to designate the
 5 legal counsel hired pursuant to the prior ballot on
 6 May 28th as special counsel to oversee an Office of
 7 Special Counsel; is that right?
 8 A Yes.
 9 Q Okay. And was that Michael Gableman?
 10 A Yes.
 11 Q That refers to Michael Gableman?
 12 A Yes, the former justice, yep.
 13 Q And the ballot goes on to say, "The special counsel
 14 special direct elections integrity investigation,
 15 assist the Elections and Campaign Committee, and hire
 16 investigators and other staff to assist in the
 17 investigation." Is that your understanding of what
 18 they're doing?
 19 A Yes.
 20 Q All right. And how does this assistance to the
 21 Elections and Campaign Committee take shape? Like
 22 what does it mean to assist that committee? Is it
 23 just to conduct the election investigation?
 24 MR. STADLER: Counsel, I'm going to
 25 offer an objection at this point in time. I've

48

1 given you quite a bit of latitude so far, but
 2 this case is not about the Office of Special
 3 Counsel or the election investigation. It's
 4 about your public records requests. And I'm
 5 greatly concerned about you delving into this
 6 and using this deposition in a public records
 7 case as a vehicle to explore your whims about
 8 the election investigation.
 9 MS. WESTERBERG: Your objection is
 10 noted, but I can back into this a different way,
 11 if that would make you more comfortable.
 12 Q How are -- are you communicating at all individually,
 13 Mr. Vos, with the Elections and Campaign Committee
 14 about this investigation?
 15 A I have spoken to the chair.
 16 Q Okay. Other than that, are you communicating with
 17 anybody on the committee about the election
 18 investigation?
 19 A We discussed it in caucus.
 20 Q Who is the chair of that committee, by the way?
 21 A Representative Brandtjen.
 22 Q Has any of your communications with any of the
 23 members of the committee been in writing?
 24 A No.
 25 Q Do you consider records that are generated in caucus

49

1 to be responsive to public records requests, or are
 2 they not because they're political?
 3 A They are all verbal. We don't generate records in
 4 caucus.
 5 Q Is there any particular reason for that?
 6 MR. STADLER: We can't hear you.
 7 A No. The normal way is to have discussion.
 8 Q Now back to Page 1 of Exhibit 23, talking about these
 9 approvals of financial costs and contractual
 10 arrangements, you were in fact -- your office was in
 11 fact asked to approve some financial costs and
 12 contractual arrangements; is that right?
 13 A Yes.
 14 Q And when you're individually asked to approve those,
 15 how does that communication occur, you know, if your
 16 staff was to present you with a contract, for
 17 example, or an expenditure?
 18 A If I am in the office, we'll have an in-person
 19 meeting. If I am not in the office, they'll usually
 20 call me on the telephone.
 21 Q And looking back at Page 2 of Exhibit 23, this
 22 authorized the speaker of the Assembly to designate
 23 the legal counsel as special counsel. How did you do
 24 that designation? Was it in writing somewhere?
 25 A You'd have to ask Mr. Fawcett.

50

(Exhibit 21 is shared on the video screen)
 2 Q Okay. I'm going to now, Mr. Vos, show you what's
 3 been marked as Exhibit 21. Do you see that up on
 4 your screen?
 5 A I see it.
 6 Q Okay. And I'll represent this is a -- well, you
 7 probably recognize this as the initial contract
 8 between the Assembly and -- is it Consultare, LLC?
 9 A Yes.
 10 Q As in the pronunciation, I wasn't sure.
 11 A Oh, I'm sorry. I'm like, yeah, I don't know.
 12 Q Okay. Consultare, Consultare, do you know which one
 13 it is?
 14 A I don't.
 15 Q Okay, all right. We'll muddle through then. And the
 16 president of that company, regardless of how you
 17 pronounce it, is Michael Gableman?
 18 A Yes.
 19 Q Okay. So this was the Assembly's initial contract
 20 with him; is that fair?
 21 A Yes.
 22 Q All right. And looking at Page 4 of this contract,
 23 did you sign it? Is that your signature there?
 24 A That is my signature.
 25 Q Okay. Not a stamp this time, it's the actual

51

1 signature?
 2 A Nope. That's my signature, yep.
 3 Q And just for the sake of completeness, we'll move on
 4 to the next page of this document. It's the
 5 Assembly's initial contract with Michael Sandwick;
 6 is it?
 7 A Yes.
 8 Q And do you recognize that person as one of the
 9 investigators who was initially hired about the
 10 election investigation?
 11 A Yes, uh-huh.
 12 Q And again, that's your signature on the third page of
 13 that contract?
 14 A Correct.
 15 Q Okay. And then lastly of this exhibit, on the first
 16 page we see a contract with or between the Assembly
 17 and Steve Page; is that correct?
 18 A Yes.
 19 Q Okay. And again, he was another investigator hired
 20 to help conduct the election investigation; is that
 21 right?
 22 A Yes.
 23 Q Okay. Now I'm going to go back to the first page
 24 and ask you some questions about the contract with
 25 Mr. -- I'm going to say -- instead of Consultare,

52

1 I'm just going to say Mr. Gableman. Is that fair?
 2 A Okay.
 3 Q Then I don't have to worry about my pronunciation.
 4 So the second -- in the middle of the page here we
 5 see a number of bullet points, and the second one
 6 says the contractor agrees to delegate -- to,
 7 "Analyze and delegate to the investigators leads and
 8 allegations from whatever source derived, including
 9 but not limited to those that have been submitted to
 10 the Assembly Committee on Campaigns and Elections,
 11 raised in the media, provided to members of the
 12 Legislature before or during the investigation, or
 13 generated through the course of this investigation."
 14 Did I read that correctly?
 15 A Yes.
 16 Q Okay. Have you ever seen any records that were
 17 generated that fit the description of records
 18 described here in this second bullet point?
 19 MR. STADLER: I'll pose an objection.
 20 That mischaracterizes it.
 21 MS. WESTERBERG: I'm sorry, Ron. I
 22 didn't hear you.
 23 MR. STADLER: The objection is it's a
 24 mischaracterization. There's no mention of
 25 records in that bullet point.

53

1 Q I'll ask it a different -- well, first of all, can
 2 you answer the question?
 3 A Do I understand what you've read? Yes.
 4 Q Have you ever seen any records generated that fit the
 5 description of the things that are in this second
 6 bullet point, such as a lead or an allegation?
 7 A I know that very early on when Representative Tusler
 8 was chair of the committee they conducted an open
 9 hearing where people submitted lots of information.
 10 I saw some of those when they were submitted in
 11 November or December of 2020.
 12 Q In November of what? You cut out after that.
 13 A November of 2020 or December or January, somewhere in
 14 that time period. But I've not seen lots of other
 15 documents given to me.
 16 Q Okay. And as part of that hearing, how did you come
 17 to see those things that were given to the committee?
 18 A Some people submitted things to the email that I look
 19 at, and some people sent me documents way back then
 20 that I turned over to the committee at the time.
 21 Q Okay. Do you know if any of those were ever provided
 22 to American Oversight in response to their requests?
 23 A I do not.
 24 Q Did you search for those records for the purpose of
 25 responding to American Oversight's requests, you

54

1 individually?
 2 A If they would have been in my email, whatever the
 3 terms were. If they would physically have been
 4 there, they would have been in my office and my staff
 5 would have had to look.
 6 Q Do you recall searching your Gmail account for any
 7 records that would be responsive to that?
 8 MR. STADLER: I'm just going to offer
 9 an objection. When you use terms like those and
 10 that, I'm not sure the record is accurately
 11 reflecting what you are looking for.
 12 Q I can rephrase. With respect to the documents
 13 submitted to the Assembly Committee on Campaigns and
 14 Elections in the latter part of 2020, that's what my
 15 question refers to.
 16 A If they would have been in the search terms for an
 17 open records request, I would have looked for them
 18 using those parameters.
 19 Q And you at this point don't have any idea what those
 20 search terms would have been?
 21 A No.
 22 Q If you were not given -- if you were not given search
 23 terms for that particular request but you were aware
 24 of it, like -- well, let me strike that and start
 25 over. Have you submitted allegations to the -- to

55

1 Mr. Gableman to pursue, or leads as described in this
 2 bullet point here, to pursue during the
 3 investigation?
 4 A I have given him verbal parameters.
 5 Q Anything in writing?
 6 A Not that I can recall.
 7 Q Are these verbal parameters memorialized anywhere?
 8 A I don't know.
 9 Q Do you know if -- so these parameters are for how he
 10 should conduct the investigation; is that right?
 11 A Or things that he should look into. Like if there
 12 was an example where there was a news report where we
 13 saw the massive fraud that occurred in nursing homes
 14 around the state, I would say to him, "You should
 15 look at nursing homes."
 16 Q So let me make sure I understand your testimony.
 17 You've given Mr. Gableman verbal direction about how
 18 to conduct the investigation or leads to pursue, but
 19 you can't point me to anything besides this contract
 20 that's memorialized in writing that contains your
 21 directions?
 22 A Correct.
 23 MR. STADLER: I'll object to the
 24 question as compound.
 25 Q Do you know if your staff provided any further

56

1 written instruction to Mr. Gableman regarding the
 2 conduct of the investigation, how he should conduct
 3 the investigation?
 4 A I don't know.
 5 Q The third bullet point on this first page of
 6 Exhibit 21 refers to -- it says that the contractor
 7 agrees to, "Receive investigative reports from
 8 investigators and keep a weekly report of
 9 investigative findings." Have you ever seen any of
 10 those investigative reports or weekly reports of
 11 investigative findings?
 12 A I have not.
 13 Q Do you know if any of those were ever sent to your
 14 office?
 15 A I do not know.
 16 Q The second to last bullet point, it starts, it says
 17 the contractor, "Agrees to compile all investigator
 18 reports and weekly reports into a final report
 19 related to the election investigation, to be
 20 submitted to the Speaker of the Assembly." Has that
 21 report yet been submitted?
 22 A I don't know.
 23 Q Have any interim reports been submitted that you're
 24 aware of?
 25 A I believe he submitted an interim report to the

57

1 Campaigns and Elections Committee, but you'd have to
 2 ask them.
 3 Q The contract here designates Attorney Steve Fawcett
 4 as the Assembly's point of contact with the
 5 contractor. Do you know how he, when he had that
 6 position, conducted his job as the point of contact?
 7 A You'd have to ask Mr. Fawcett.
 8 Q Do you know if he received regular written reports
 9 from the contractor as part of that duty?
 10 A You'd have to ask Mr. Fawcett.
 11 Q Okay. Is the point of contact still Mr. Fawcett?
 12 A Yes.
 13 Q Now, on Exhibit 21 I'm going to scroll to Page 3, and
 14 it provides at the top there that any notices under
 15 the contract shall be addressed to the parties at the
 16 following addresses, and for the Assembly it's to
 17 Speaker Robin Vos, care of Steve Fawcett, and it
 18 gives a post office box. First of all, do you know
 19 what that post office box is?
 20 A The one for the Legislature?
 21 Q Yeah, 8953. Is that the Legislature?
 22 A Yeah, that's the public one for the Legislature.
 23 Q Okay. Do you know if your office has received any
 24 notices under that provision of the contract?
 25 A No. You'd have to ask Steve.

58

1 Q Also on Page 3, I want to look down. There's a
 2 paragraph that starts that the heading is Entire
 3 Agreement. Do you see that?
 4 A Yes.
 5 Q Okay. The last sentence of that paragraph says,
 6 "Any modification of this Agreement will be effective
 7 only if it is in writing and signed by the other
 8 party." Do you know if there has been any such
 9 modification?
 10 A I don't -- I don't know.
 11 Q I want to look now at the Sandvick contract. The
 12 middle of the page there again has some bullet points
 13 about what the contractor, in that case Mr. Sandvick,
 14 is to do. Again it mentions he has to follow leads
 15 and allegations that have been submitted from various
 16 sources. Did you ever provide any leads or
 17 allegations for Mr. Sandvick to pursue?
 18 A I don't recall.
 19 Q The third bullet point refers to collecting data and
 20 evidence. Do you know if -- strike that. Did you
 21 ever provide -- did you individually ever provide any
 22 data and evidence for Mr. Sandvick pursuant to that
 23 bullet point?
 24 A I don't recall.
 25 Q How did you communicate, if at all, with

59

1 Mr. Sandvick? You individually, I mean.
 2 A I spoke to him, I believe, prior to the contract
 3 being executed, and then after that I believe he
 4 worked with either the Campaigns and Elections
 5 Committee or Mr. Fawcett or then eventually
 6 Mr. Gableman, but I think he might have left before
 7 we hired Justice Gableman. I don't recall.
 8 Q Similarly, the fifth bullet point refers to a final
 9 report to be submitted to the Speaker of the
 10 Assembly. Do you recall getting anything like that
 11 from Mr. Sandvick?
 12 A That I don't recall, getting one.
 13 Q Page 2 of this also has similar notice language as
 14 the contract with Mr. Gableman. Do you recall
 15 ever -- if your office ever got any notices pursuant
 16 to that paragraph from Mr. Sandvick?
 17 A No, I don't recall. You'd have to ask Steve.
 18 Q Can you repeat that again?
 19 A You'd have to check with Attorney Fawcett.
 20 Q Okay. You don't personally know?
 21 A Right.
 22 Q And then same question as to the modifications that
 23 are supposed to be in writing, do you know if you
 24 received -- if there were any such modifications to
 25 this agreement?

60

01-31-2022
CIRCUIT COURT
DANE COUNTY, WI
2021CV003007

1 A I do not know.

2 Q I think you mentioned before that Mr. Sandvick left
3 the investigation. Do you know when that was?

4 A I don't remember the date. I'm sorry.

5 Q Okay. How did he inform you that he was quitting the
6 investigation?

7 A I believe he called Mr. Fawcett, but I don't know
8 that. You'd have to ask him.

9 Q Okay. And back looking at Paragraph 2 of this
10 contract, there's a line that says Termination of
11 Agreement. "Notwithstanding any other provision of
12 this Agreement, any party hereto may terminate it at
13 any time by giving written notice to the other
14 party." Do you recall if your office ever received
15 any such written notice?

16 A I don't recall.

17 Q Okay. And we're going to go through the same
18 rignarole here for Mr. Page, as you can probably
19 guess. Looking at the first page of this contract
20 that's incorporated in Exhibit 21, do you recall,
21 just to expedite things here, ever giving any
22 documents to Mr. Page that would be encompassed by
23 the bullet points on the first page of this
24 contract?

25 A No, I do not recall that.

61

1 A I did not see one, but you'd have to ask me.

2 Fawcett.

3 Q Okay. Do you recall seeing any other documents
4 regarding Mr. Page leaving the investigation from
5 whatever source? And I mean you individually, do you
6 recall?

7 A Not that I recall.

8 Q And then same with Mr. Sandvick, do you recall seeing
9 any written communication about Mr. Sandvick leaving
10 the investigation, you individually?

11 A I don't, no.

12 MS. WESTERBERG: All right. We've
13 been going for just over an hour. Does anyone
14 need a break, or are we good? I can keep going
15 if everyone else is good.

16 MR. STADLER: If we could take five, I
17 would appreciate it.

18 MS. WESTERBERG: Sure.

19 THE VIDEOGRAPHER: Off the record at
20 2:23 p.m.
21 (A recess is taken)
22 (2:23 p.m. to 2:31 p.m.)
23 THE VIDEOGRAPHER: The time is 2:31.
24 We are back on the record.
25 EXAMINATION (RESUMED)

63

1 Q Okay. Do you ever recall seeing any documents from
2 him that he might have produced under the bullet
3 points here on the first page of the contract?

4 A No, but I think he was employed after Justice
5 Gableman began his work as special counsel, so I
6 don't know if he turned them in to him.

7 Q So Mr. Page, are you -- if I understand your
8 testimony, you're saying that Mr. Page might have
9 contacted or communicated directly with Gableman
10 instead of your office?

11 A I think it's very possible, yeah, because I think
12 their timelines were overlapping.

13 Q Okay. Page 2 of this contract also has a Notices
14 provision about written notices. Do you know if your
15 office ever received any such notices from Mr. Page?

16 A You'd have to ask Steve Fawcett.

17 Q So that's a no, you don't know?

18 A I don't know.

19 Q And is it also true that Mr. Page has left the
20 investigation?

21 A I believe so. I'm pretty sure he has. I don't know
22 for certain, but I think so.

23 Q Under the Termination of Agreement provision of this
24 contract, do you recall ever seeing a written notice
25 of termination from Mr. Page?

62

1 BY MS. WESTERBERG:

2 Q Mr. Vos, I want to show you some of the open records
3 requests that American Oversight has made to your
4 office, and we will try to go through these kind of
5 quickly.

6 (Exhibit 7 is shared on the video screen)

7 Q So this is a request dated August 13, '21. Can you
8 see that? We've labeled it as Exhibit 7.

9 A I can see it.

10 Q Great. So this one is seeking -- the bulk of the
11 request is on Pages 2 and 3, but it's generally
12 seeking, you know, copies of contracts and some of
13 the financial arrangements, scope of the
14 investigation, as of that August 13th date going
15 forward. I'll represent that this request has not
16 been responded to.

17 Do you -- do you -- can you tell me what your
18 office has done to ensure any responsive records are
19 retained since this was made on August 13th of 2021?

20 A You'd have to ask Mr. Fawcett.

21 Q Okay. Have you individually instructed your staff to
22 retain records responsive to this request until it
23 can be responded to?

24 A I have not seen this request until right now, because
25 Steve handles all that.

64

1 Q Okay. Do you recall if Mr. Fawcett asked you to
 2 produce records responsive to this request?
 3 A I don't recall if it was this one specifically.
 4 Q Okay. And do you recall if he asked you to search
 5 for records responsive to this request?
 6 A I don't recall.
 7 Q Say again.
 8 A I just said I don't recall, yeah.
 9 Q Okay. And have you -- can you tell me what you have
 10 done to locate -- what you have done, if anything, to
 11 locate records on any of the devices and accounts you
 12 individually control that are responsive to this
 13 request?
 14 A He would have given me parameters, but I don't keep
 15 physical copies of anything anywhere but inside the
 16 office, so I wouldn't have had any of these just as I
 17 look at it.
 18 Q How about on your phone or Gmail account, things like
 19 that?
 20 A No, because they wouldn't have sent me those. I
 21 would have looked at them.
 22 Q I'm not sure I understand your answer there. They
 23 wouldn't have sent them to your Gmail or text
 24 messages to begin with? Like there wouldn't be any
 25 responsive records on those accounts to begin with,

65

1 A I have no idea.
 2 Q Do you know if this document was ever signed by
 3 Mr. Gableman?
 4 A I have no idea.
 5 Q Okay. Are you -- generally speaking, is this
 6 contract, this amendment, the one that's now
 7 generally governing the investigation, or is there --
 8 does it have any weight?
 9 A You'd have to ask Mr. Fawcett.
 10 Q Okay. This amendment is dated August 20, 2021. Is
 11 that about the time that the investigation expanded,
 12 to your recollection?
 13 A I don't remember the timeline.
 14 Q Do you recall the investigation expanding at some
 15 point, though?
 16 A Yes.
 17 Q Around the time of that second mail ballot we were
 18 looking at before and the one that was dated August?
 19 A Perhaps.
 20 Q Was that mail ballot the triggering event for the
 21 expansion or was there something else, do you recall?
 22 A I don't recall.
 23 Q Do you know if this amendment has been superceded by
 24 any subsequent amendments?
 25 A I don't recall. You'd have to ask Steve.

67

1 is that what you're saying, or you would have looked
 2 at them anyway?
 3 A Yeah, not that -- I mean, I don't know for certain if
 4 I've looked for them or not, but as I read what
 5 you're requesting, those are not the kind of items
 6 that would either be in my Gmail account or in a text
 7 message.
 8 Q Okay. I'm going to show you what we've marked here
 9 as Exhibit 22, and this is -- is this a document that
 10 you have -- well, it would help if I shared it with
 11 you.
 12 (Exhibit 22 is shared on the video screen)
 13 Q Is this, Exhibit 22, a document that you've seen
 14 before?
 15 A Probably.
 16 Q Is that your signature on the second page?
 17 A That's my stamp.
 18 Q Okay. And this is titled First Amendment to an
 19 agreement between the Wisconsin State Assembly and
 20 Consultare, LLC by and through its president,
 21 Michael Gableman. Have I described that correctly?
 22 A It looks like it.
 23 Q Do you know if this record was ever provided in
 24 response to any request that American Oversight has
 25 made to your office?

66

1 (Exhibit 8 is shared on the video screen)
 2 Q I'm going to show you now what we've marked as
 3 Exhibit 8, which is another request dated August 13th
 4 of 2021. And I'll scroll to the second page to get
 5 to the guts of it. I'll represent -- well, strike
 6 that. Have you -- do you recall seeing this document
 7 before?
 8 A I don't.
 9 Q I'll represent that this document, this request, also
 10 has not yet been responded to. Do you -- do you know
 11 if you have taken any actions individually to ensure
 12 that records responsive to this request are retained
 13 by your office?
 14 A I don't recall. Steve would be the one in charge of
 15 that.
 16 Q Okay. What have you done -- well, strike that.
 17 Would you have received a copy of this request in the
 18 normal course of business around the time it was
 19 sent?
 20 A Not normally. Steve handles that.
 21 Q The -- would -- if a request is sent to your Rep.Vos
 22 email account and it's forwarded to Steve, would you
 23 see it at that point?
 24 A No, not until I was asked to respond to the record.
 25 Q Okay. So even though it's coming into your email

68

1 account, you're not seeing all of those?
 2 A Correct. It goes right to Steve.
 3 Q How often do you look at your Rep.Vos email account?
 4 A Rarely.
 5 Q How about the Robin.Vos email account @legislative,
 6 blah, blah, the second, the other State account you
 7 have?
 8 A I look at that one more often.
 9 Q Okay. About how often do you look at that?
 10 A Weekly.
 11 Q How about the Rep.Vos one, how often do you look at
 12 that?
 13 A Oh, less than that.
 14 Q And then how about your Gmail account, how often do
 15 you look at that?
 16 A Regularly.
 17 Q So on a daily basis or more frequently?
 18 A Yeah, not always every day, but most days.
 19 Q And I assume you text every day?
 20 A Yes.
 21 Q So looking at this Exhibit 8, do you recall searching
 22 any of your accounts your staff don't have access to
 23 for records responsive to this request?
 24 A Again, we get so many, I can't say it was specific to
 25 this request, so I can't say that.

69

1 Q All right. And do you know what your staff might
 2 have done to respond to this request?
 3 A I don't.
 4 (Exhibit 9 is shared on the video screen)
 5 Q I'm going to show you now what we've marked as
 6 Exhibit 9, which is another request dated August 13th
 7 of 2021, and I'll scroll to the second page so you
 8 can see what we're requesting here or American
 9 Oversight is requesting. I'll represent -- well,
 10 first of all, do you recognize this request?
 11 A Again, I have not -- I did not see it.
 12 Q Okay. You have no reason to dispute that it was sent
 13 to your office, though?
 14 A No.
 15 Q Sorry?
 16 A No. I have no -- I have no idea.
 17 Q Okay. Can you tell me what you individually have
 18 done to ensure that records responsive to this
 19 request have been retained?
 20 A Again, the same as I said before.
 21 Q And just for the record, can you say what that is?
 22 A Whatever -- whatever would be the normal process that
 23 we have. Once Steve lets me know that there's an
 24 open records request, we search for whatever the
 25 terms are, and I turn over any documents to him.

70

1 Q Okay. And can you tell me what, if anything, you
 2 have done to search your own personal devices, the
 3 ones your staff doesn't have access to, for records
 4 responsive to this request?
 5 A Again, we get so many requests. I mean, this is
 6 three in one day that you're giving us. It's hard to
 7 keep track of them all, so I can't say that I did or
 8 did not, because I just don't know.
 9 Q Okay. And do you know what your staff might have
 10 done?
 11 A No.
 12 Q All right. I'm going to show you Exhibit 10.
 13 (Exhibit 10 is shared on the video screen)
 14 Q And this one is dated September 15, 2021. Do you see
 15 that?
 16 A Yep.
 17 Q And I'll give you a minute to look at the substance
 18 of it on Page 2, and let me know when you're ready,
 19 and I can scroll to 3.
 20 A Go right ahead. Okay.
 21 Q Do you recognize this request?
 22 A Again, I didn't see it until right now.
 23 Q Okay. Do you know -- sorry, strike that. You have
 24 no reason to doubt this was sent to your office?
 25 A No.

71

1 Q Sorry?
 2 A No.
 3 Q Okay. Can you tell me what, if anything, you have
 4 done to ensure that records responsive to this
 5 request are retained by your office?
 6 A Again, Steve's in charge of that.
 7 Q So you don't know?
 8 A Correct.
 9 Q Okay. And then as to records that are in your
 10 possession that your staff doesn't have access to on
 11 accounts like your Gmail and texts and private
 12 messaging apps, do you -- can you tell me what you've
 13 done to search for those records?
 14 A Again, we get so many requests, I can't say
 15 specifically related to this request that they have
 16 asked for it, but if they did, I would produce
 17 whatever I had.
 18 Q Okay. Can you say one way or the other if you have
 19 searched those devices and accounts for responsive
 20 records at this point?
 21 A Again, I can't say if I have, whether or not, because
 22 I don't know if it's relating to this specific
 23 request, because we get so many from you.
 24 Q Okay. So you might have, but you can't say sitting
 25 here today one way or the other, correct?

72

1 A Correct, yeah.

2 Q Just generally, can you tell me when the last time

3 was that you searched your private accounts for any

4 records responsive to an American Oversight request?

5 A I don't know if it was for American Oversight. They

6 don't tell me who it's for every time.

7 Q Okay. So how do you know which requests are from

8 which, American Oversight versus somebody else? You

9 say you've gotten a lot from American Oversight. How

10 do you know which ones really are attributable to

11 them?

12 A The only reason I know they're from you is because

13 you put them in the media quite a bit. Most people

14 who are looking for records don't do that.

15 Q When you see media reports of those requests, does

16 that alert you to the need to retain responsive

17 records?

18 A Yeah, I mean, no more than anything else does, but

19 sure.

20 Q All right. I'm going to show you two requests now

21 which we've marked as Exhibits 1 and 4, and

22 they're -- let's start with 1 here.

23 (Exhibit 1 is shared on the video screen)

24 Q So you mentioned you've gotten a number -- well,

25 first of all, strike that. So this request is dated

73

1 to ensure records weren't deleted after you got these

2 requests?

3 A I can't. That's in Steve's purview.

4 Q Okay. So if there was some preservation requirement

5 directed to staff in your office, that would have

6 been done by Steve and not you?

7 A Correct.

8 Q Okay. Do you know what search terms you used to

9 search for responsive records in the accounts that

10 are only in your control?

11 A I don't.

12 Q Do you recall if you did search for records that are

13 responsive to these requests in the accounts that

14 only you control?

15 A Again, we get so many requests, I have no idea if

16 they're from you or someone else.

17 Q So you can't say sitting here today what you might

18 have done to search?

19 A Correct.

20 Q All right. I'm going to show you now what we've

21 marked as Exhibit 2.

22 (Exhibit 2 is shared on the video screen)

23 Q This is another request from May 28th. Do you see

24 that?

25 A Yep.

75

1 May 28, 2021, and it seeks sort of initial contracts

2 and other documents related to the election

3 investigation as described there on Page 2. Do you

4 see that?

5 A Yes.

6 (Exhibit 4 is shared on the video screen)

7 Q And similarly, there was a request on July 15th for

8 the same documents, just for the period since the

9 first request had been made. Do you see the

10 July 15th date there on Exhibit 4?

11 A Yes.

12 Q And you see that similar description of contracts and

13 other documents on Page 2?

14 A I'll take your word for it.

15 Q Okay. Has it -- have you noticed when your office is

16 getting these requests from American Oversight that

17 they are requesting the same things, just on a

18 monthly basis?

19 A No, because I don't see the requests.

20 Q All right. So if they're just updating a prior

21 request, you know, it's all -- you wouldn't

22 necessarily know that fact?

23 A Correct.

24 Q Okay. With respect to these two requests from

25 May 28th and July 15th, can you tell me what you did

74

1 Q And this request is more or less summarized in that

2 first paragraph on the second page beginning,

3 "All electronic communications," and there's a number

4 of -- there's some content in the paragraph, but,

5 "All electronic communications...regarding the

6 Legislature's investigation of the 2020 election,"

7 do you see that?

8 A Yep.

9 Q Okay. And similarly, I'm going to show you

10 Exhibit 5.

11 (Exhibit 5 is shared on the video screen)

12 Q This one is dated July 15th and is essentially

13 seeking the same thing, all electronic communications

14 regarding the Legislature's investigation of the 2020

15 election. What -- as to these two requests, what did

16 you do to ensure records weren't deleted after you

17 got these requests?

18 A That is Steve's job, to fulfill the open records

19 requests.

20 Q Okay. Do you think that you would have -- your

21 office would have had electronic communications

22 regarding the election investigation over the periods

23 covered by these requests?

24 A I don't know.

25 Q Sorry?

76

1 A I don't know.
 2 Q Do you recall sending any electronic communications
 3 regarding the election investigation during the
 4 periods covered by these requests?
 5 A What are the periods? I don't know.
 6 Q Let's see, I can tell you. So Exhibit 5, the request
 7 was made July 15th, and it seeks records responsive
 8 through the date the search was conducted, from
 9 May 28th through the date the search was conducted.
 10 And Exhibit 2 seeks that same category of records.
 11 A Again, if there was a request --
 12 Q From March 15th, from March 15th.
 13 A Okay.
 14 Q Sorry.
 15 A If there was an open records request, whatever we had
 16 I'm sure we turned over.
 17 Q So from the period March 15, 2021 through the end
 18 date of the July, the similar July request, any
 19 electronic records you may have had at that point you
 20 believe have been provided?
 21 A I believe so. I mean, you'd have to ask Steve. He's
 22 the one who provides the records.
 23 Q If a record was sent to your office regarding the
 24 elections investigation and the request had not yet
 25 been forwarded to you or other staff and documents

77

1 Q I'm asking you for the records that you only control.
 2 So say a request comes in on June 1st, you don't get
 3 it until June 15th, and you might have something in
 4 your e-mail that's responsive to it that you got on
 5 June 5th. As far as you know, you can delete that
 6 record because you didn't get a copy of the request,
 7 fair?
 8 A I guess it's possible.
 9 Q If that scenario were arising in your office, would
 10 that be something you would want to correct so
 11 responsive records weren't being inadvertently
 12 deleted?
 13 A I don't believe responsive records are being deleted.
 14 Q But that's not the question, though. If that
 15 situation were arising, would that be something that
 16 you, as the administrator or the person responsible
 17 for your office, would want to correct?
 18 MR. STADLER: Objection, asked and
 19 answered.
 20 Q You can answer.
 21 A That's a hypothetical. I have no idea.
 22 Q I'm asking you if that situation were to arise, would
 23 you want to correct it?
 24 A I don't believe it has arisen.
 25 Q I'm going to show you Deposition Exhibit 25.

79

1 were deleted in the meantime, is that a possible
 2 scenario?
 3 MR. STADLER: Objection.
 4 A Again, I don't know.
 5 Q Do you know if there is ever a gap between the date
 6 you're made aware of a request versus the date it was
 7 received by your office?
 8 A I don't know that either.
 9 Q Say that again.
 10 A I don't know. You'd have to ask Steve.
 11 Q Okay. If you're not made aware of a request, you
 12 can't preserve -- you're not on notice to preserve
 13 records responsive to it; is that fair?
 14 A I have no idea what the process is that's utilized.
 15 Q I'm just saying for you personally, if you are not
 16 made aware of a request, you can't preserve the
 17 records responsive to it?
 18 A Well, the job of preserving the records is
 19 Mr. Fawcett's as the records custodian.
 20 Q If you're not made aware of a request, you're not on
 21 notice that you need to preserve records responsive
 22 to it that are on the personal accounts you only have
 23 access to like your Gmail, correct?
 24 A I guess you'd have to ask Mr. Fawcett how he deals
 25 with that.

78

1 (Exhibit 25 is shared on the video screen)
 2 Q Do you see that?
 3 A Yes.
 4 Q Okay. So here's an email from Steve to you and a
 5 number of other staff in your office saying here's a
 6 request and then here's how you search for any
 7 responsive records. Do you see that?
 8 A Yep. That's our normal process, yep.
 9 Q Okay. So this request came in on October -- or
 10 August 13th. Do you see that?
 11 A Yes.
 12 Q And then that distribution email didn't come in until
 13 October -- or August 26th. Do you see that?
 14 A Yes.
 15 Q So it's fair to say in that period between
 16 August 13th and August 26th staff were not made
 17 aware that there was a request that needed to be
 18 responded to with whatever documents they had in
 19 their possession as of August 13th?
 20 A Okay.
 21 Q You would agree with my characterization?
 22 A It's possible.
 23 Q Do you know if staff were advised in any other ways
 24 about the need to preserve responsive records aside
 25 from these emails?

80

1 A The only — I believe there is a form that he has
 2 people sign once they've completed the records
 3 request, but I don't know that, how that works.
 4 Q Okay. So that might be described here on Page 002?
 5 A Oh, that's probably what it is, yeah, yep.
 6 Q Do you ever sign that form yourself?
 7 A No. I think that's mainly for billing purposes,
 8 isn't it? Well, you don't know. I think that's for
 9 billing purposes.
 10 Q All right. Mr. Vos, has somebody joined you in the
 11 room there?
 12 A No, there's a person. I'm in a conference room, so
 13 somebody walked through the room and is now sitting
 14 on the deck outside. He can't hear me, but I can
 15 hear his computer, so --
 16 Q I think I'd like to be sitting on a deck outside in
 17 Florida too.
 18 A Me too, but I don't get that choice. I'm here with
 19 you.
 20 Q You could open a window.
 21 A I had that, but then you complained about the train.
 22 Q Oh, that's true. Just give me a moment. I'm having
 23 a hard time pulling up an exhibit here.
 24 A At least my mic is good enough that you can hear the
 25 guy outside through the window.

81

1 Q Yeah. All right. I'm going to show you what we've
 2 marked as Exhibit 3.
 3 (Exhibit 3 is shared on the video screen)
 4 Q Do you see that one?
 5 A I do.
 6 Q This request is dated May 28th, and it is a little
 7 different from some of the other ones because it
 8 seeks all records reflecting communications between
 9 you or anyone communicating on your behalf and any of
 10 the individuals listed here on Pages 2 through 4. I
 11 can give you a second to look at those names.
 12 A Sure, I see it, yeah.
 13 (Witness examines document)
 14 A I haven't heard most of those names, okay.
 15 Q Once -- do you recall getting this request on or
 16 around May 28th?
 17 A I don't.
 18 Q And what did you do to ensure records within your
 19 office, if anything, weren't deleted after you got
 20 this request?
 21 A That's up to Mr. Fawcett --
 22 Q Okay.
 23 A -- as the custodian of our records.
 24 Q Okay. And I'll note that this request seeks
 25 documents from November 3, 2020 through the date the

82

1 search is conducted. Do you know if you would have
 2 individually had any records responsive to this
 3 request from that November 3, 2020 to May 28th
 4 period?
 5 A Looking at just the names very quickly, I doubt it,
 6 because I don't even know hardly any of those people
 7 on there, so I doubt it.
 8 Q Okay. So do you have any recollection of
 9 communicating with, say, Item 7, President Donald J.
 10 Trump, his chief of staff or anyone communicating on
 11 behalf of the White House, on or after November 3,
 12 2020?
 13 A No.
 14 Q Sorry?
 15 A No.
 16 Q Or the Elections Commissioner Robert Spindell on
 17 Item 2, do you recall that you would have had
 18 anything responsive to that?
 19 A I -- if we have anything responsive, I would have
 20 provided it.
 21 Q If it hadn't been deleted?
 22 A I have no idea if --
 23 Q Say that again. You're cutting out again.
 24 A Yes, yes.
 25 Q But you do know Robert Spindell, correct?

83

1 A Oh, yes.
 2 Q And you do know President Donald J. Trump, correct?
 3 A Yes, I do.
 4 Q Okay. Do you know if your office, more broadly,
 5 would have had -- well, let me strike that. Do you
 6 know if you individually on the devices that only you
 7 control would have had any records responsive to this
 8 request?
 9 A I have no idea.
 10 Q Like on your Gmail or your text messages, do you know
 11 if you would have responsive records?
 12 A I mean, it's certainly possible. I mean, I know
 13 Andrew Hitt, but most of the names on here I've never
 14 even -- I don't know who Michal Farris is. I don't
 15 know Jenna Ellis. I mean, I have no idea who these
 16 people are.
 17 Q Okay. Do you know if your staff would have had any
 18 records responsive to this request?
 19 A I have no idea.
 20 Q Okay. And if there was an email sent to your Rep.Vos
 21 account from any of these people, you would have
 22 relied on your staff to have turned that over, you
 23 wouldn't have searched for it yourself?
 24 A Correct.
 25 Q So we've out of order at least gone through the

84

1 10 open records requests that are subject to this
 2 litigation which was filed on October 18th, I believe
 3 is the date, of 2021. Do you recall what you've done
 4 since October 18th to preserve any records responsive
 5 to any of these 10 requests? And by you, I mean
 6 individually.
 7 A Steve made me aware that the lawsuit was filed and
 8 said we had to make sure that no records were
 9 deleted, so I haven't.
 10 Q No records responsive to the requests?
 11 A Yeah, that's assumed, yeah, right.
 12 Q And do you know what your office more broadly has
 13 done to ensure that no records responsive to these
 14 10 requests have been deleted since August -- or
 15 October 18th of 2021?
 16 A Well, I would assume if Steve told me that, he's
 17 told everyone else in our office, but you'd have to
 18 ask him.
 19 Q Okay. You haven't seen that communicated in
 20 writing?
 21 A No.
 22 Q That's a no?
 23 A No.
 24 Q Okay. Do you recall -- I can take this down here --
 25 if you individually have deleted any records at any

85

1 time that would have been responsive to American
 2 Oversight's requests?
 3 A Oh, I have no idea.
 4 Q And can you say one way or the other that anyone in
 5 your office -- well, strike that. Do you know
 6 whether anyone in your office has deleted a record
 7 responsive to any of the 10 requests?
 8 A Again, I have no idea.
 9 Q Okay. Now, in our electronic age is it your
 10 understanding that when things are deleted they're
 11 not necessarily really deleted and that they can be
 12 recovered; is that fair?
 13 A Yeah.
 14 Q Okay. Did you individually ever search any deleted
 15 electronic records for any records that American
 16 Oversight has requested in these 10 requests?
 17 A I don't know. I mean, when I do a search on my
 18 phone, I do a search on my phone.
 19 Q Okay. So you're not sure if that would capture
 20 something you deleted?
 21 A I don't know.
 22 Q Say that again.
 23 A I don't know how that works. I'm sorry.
 24 Q Okay. So you don't know?
 25 A I don't know.

86

1 Q Okay. Do you know if anyone in your office has
 2 searched for deleted electronic records that would be
 3 responsive to American Oversight's requests?
 4 A I do not know.
 5 Q Okay. Did you ever have anyone with forensic
 6 computer skills help you find deleted records?
 7 A No.
 8 Q Do you know if anybody in your office did for any of
 9 these requests that would be -- that American
 10 Oversight has made?
 11 A You'd have to ask Steve. I have no idea.
 12 Q Okay. No forensic computer audit?
 13 A No.
 14 Q Seriously.
 15 A What do you mean?
 16 Q Sorry.
 17 A I don't understand your question.
 18 Q All right. Have you asked anyone in your office if
 19 they had -- if they deleted records that would have
 20 been responsive -- sorry, let me rephrase that. Have
 21 you asked anyone in your office if deleted records
 22 that would have been responsive to these 10 requests
 23 could be recovered?
 24 A No, I never asked that.
 25 Q Okay. Have you had discussions with your staff in

87

1 the last year about deleting records in the
 2 possession of your office?
 3 A I have no idea.
 4 MR. STADLER: I'll object. That's a
 5 vague and ambiguous question.
 6 Q Have you discussed with anybody in your office in the
 7 last year whether they have deleted any records
 8 responsive to the election investigation?
 9 A I have no idea.
 10 Q Okay. You don't recall having any of those
 11 discussions?
 12 A No.
 13 Q Okay. While we still have this Exhibit 3 up, can you
 14 tell me, looking at the page, the specified parties
 15 on Page 2 through 4, which ones you -- which items
 16 contain somebody you do know? So if you know
 17 Wisconsin Elections Commissioner Dean Knudson, you
 18 can say you know somebody in 1. Can you just kind of
 19 go through those numbers and say which ones you know?
 20 A I know 1. I know 2. I know 4. I know President
 21 Trump. That's it on that page. I know Andrew Hitt.
 22 I know who Ronna McDaniel is. I know who
 23 Rudy Giuliani is. I mean, some of these names I
 24 recognize from the news, but I don't know anybody. I
 25 know Jim Troupis. I know the name Joe Voiland, but

88

1 I've never met him.
 2 Q I didn't catch that, the name.
 3 A I know the name Joe Voiland, but I've never met him.
 4 Q Okay.
 5 A And I --
 6 Q And you're cutting out a bit again.
 7 A I'm sorry. That's it on that page. I don't know any
 8 of those people.
 9 Q On Page 4?
 10 A Page 4, yes.
 11 Q Okay. Did you or anyone in your office ever
 12 communicate with anyone not specifically named here
 13 on Item 28, for example, but with that entity, the
 14 Arizona State Senate?
 15 A I have met President Fann in the past, but I don't
 16 know her, so I did not communicate with her.
 17 Q Okay. And do you know if anybody in your office
 18 communicated with anyone on behalf of the Arizona
 19 State Senate?
 20 A I have no idea.
 21 Q For the people that you do know on this list, is it
 22 possible that you would have texted or emailed with
 23 them from November 3rd to the present date -- or to
 24 the date this request was made on May 28th?
 25 A It's possible.

1 Q So and, you know, some of these line items have a
 2 number of people in them. So in Item 7 it says
 3 President Donald J. Trump. Did you know anybody else
 4 in that paragraph?
 5 A I know the names, but I don't know them.
 6 Q Have you met -- like when you say you know them --
 7 A I know them from the news. I don't know them.
 8 Q Okay. As with this Karen Fann on Page 4, are there
 9 some people you've met but you wouldn't say you know
 10 that you didn't already identify?
 11 A No, that's the only one that I can think of.
 12 Q Do you have -- well, I can take this down -- a
 13 standard practice when someone does an open records
 14 request to your office to keep text messages that are
 15 relevant?
 16 A You'd have to ask Steve how that works.
 17 Q Okay. If you're made aware of an open records
 18 request and you have some responsive text messages,
 19 would you try to keep them?
 20 A Well, of course, yeah. But I don't usually keep text
 21 messages for long.
 22 Q How often do you delete them?
 23 A Regularly. I don't have a standard policy or
 24 anything.
 25 (Exhibit 25 is shared on the video screen)

1 Q Okay. Looking back at Exhibit 25 just for a
 2 minute, I think you is said before that your staff
 3 generally monitors the Robin.Vos email --
 4 A Correct.
 5 Q -- address, and you don't look at it, you can go a
 6 week or more without looking at it, right?
 7 A Yes.
 8 Q Okay. Is there any other way other than getting an
 9 email like this that you would be made of aware of an
 10 open records request on a regular basis?
 11 A Steve will tell me.
 12 Q Okay. Can you say that he does that all the time for
 13 every request the same day that it's made?
 14 A I can't say that.
 15 Q Have you ever told anybody not to send you any
 16 written correspondence about the election
 17 investigation?
 18 A I don't recall, but I can't -- I don't know.
 19 Q Is there an understanding within your caucus that
 20 emails or other documents shouldn't be exchanged?
 21 A In general?
 22 Q Yeah, in general.
 23 MR. STADLER: I'm just going to --
 24 MS. WESTERBERG: Ron, you're like too
 25 close to your mic or something.

1 MR. STADLER: Oh. My objection is
 2 this witness can testify about his
 3 understanding. He can't testify about everybody
 4 else's understanding.
 5 Q Okay. You can answer.
 6 A What was the question again?
 7 Q Is there an understanding that you're aware of within
 8 your caucus that emails or other documents shouldn't
 9 be exchanged?
 10 A No. People email each other all the time. I don't
 11 understand. I don't understand the question.
 12 Q So people within the caucus email each other all the
 13 time?
 14 A I mean, yeah, you can you go to any rep box and
 15 you'll see correspondences between offices all the
 16 time.
 17 Q Okay. Do you regularly correspond in writing with
 18 other Assembly leadership?
 19 A No.
 20 Q No?
 21 A Other than notices for meetings and stuff like that,
 22 yeah. I mean, there's regular correspondence, but
 23 yeah.
 24 Q Do you ever correspond on matters relating to the
 25 election investigation in writing with other members

1 of leadership in the Assembly?
 2 A You mean like by email?
 3 Q Any form of writing.
 4 A I haven't emailed anybody about that that I can
 5 remember.
 6 Q How about texts?
 7 A Oh, I'm sure. We text each other about everything,
 8 so I can't say that we haven't about that, but I
 9 can't say that we have.
 10 Q How about between you and Senate leadership, do you
 11 recall ever communicating with anybody in Senate
 12 leadership in writing about the election
 13 investigation?
 14 A It's much more often that we talk on the phone.
 15 Q Okay. So --
 16 A That's the normal way. That's the normal way for
 17 most communication in the Capitol, it's verbal.
 18 That's like normal in the world, right? People talk
 19 to each other. They don't send an email if you can
 20 talk.
 21 MS. SLOAN: That's not true if you're
 22 like a teenager. I have teenagers, so that's
 23 not true.
 24 THE WITNESS: Fair point.
 25 MS. WESTERBERG: Way to correct the

93

1 by Mr. Gableman; is that right?
 2 A Okay, yep.
 3 Q Okay. Do you recall issuing this statement? You can
 4 take a minute to look at it if you like.
 5 A I'm sure I did. I mean, if it's on my official page,
 6 I'm sure we did.
 7 Q Okay. Do you know what prompted this statement?
 8 A No.
 9 MR. STADLER: I'm just going to offer
 10 an objection again because we seem to be getting
 11 afield of the public records inquiry again.
 12 Whether, why, how, what Speaker Vos published on
 13 his Twitter page has nothing to do with this
 14 public records action, and I understand you're
 15 curious about why he does what he does, but it
 16 seems to me that you've exhausted every question
 17 you could have possibly asked about the public
 18 records action and this is going way far afield
 19 again.
 20 MS. WESTERBERG: I would respectfully
 21 disagree. I think a statement that's in writing
 22 about the election investigation is directly
 23 relevant to our open records action. And in any
 24 case, I would still like the witness to answer
 25 the question about why he issued this statement

95

1 record, Melanie.
 2 Q So you have might have corresponded in writing with
 3 somebody in Senate leadership about the election
 4 investigation, you just can't put your finger on it
 5 right now?
 6 A I think it's unlikely, but I can't say I haven't.
 7 Q Okay. I'm going to show you now what we've marked as
 8 Exhibit 37.
 9 (Exhibit 37 is shared on the video screen)
 10 Q Do you recognize this front page here?
 11 A I do.
 12 Q Okay. Can you describe what you're seeing to me?
 13 A That's our official Twitter page.
 14 Q Okay. And that's for -- by our, you're meaning the
 15 Speaker's Office?
 16 A Correct.
 17 Q And I've excerpted a few -- rather than your whole
 18 feed, I've excerpted a few Tweets here I'd like to
 19 ask you about.
 20 A Okay.
 21 Q So I'll start from the beginning here. The earliest
 22 one is July 30, 2021. Do you see that?
 23 A Yes.
 24 Q Okay. And that was a statement you said you released
 25 regarding the independent election investigation led

94

1 if he can.
 2 A I don't remember.
 3 Q Okay. Do you recall if you authored this yourself?
 4 A I don't remember. I mean, I have no access to my
 5 speaker account. I don't even know the password.
 6 It's far too negative with people on the left who do
 7 nothing but call swear words and just trash people
 8 and chastise individuals, so I actually told my staff
 9 to specifically not tell me the password because I
 10 don't want to be able to access it.
 11 Q Do you know if this statement was issued through any
 12 other channels besides Twitter?
 13 A I have no idea.
 14 Q Okay. Do you know if this statement was provided to
 15 American Oversight in response to any of its
 16 requests?
 17 A I have no idea.
 18 Q All right. I'm going to scroll up to the August 23,
 19 2003 request -- or Twitter posting. So that's a
 20 Tweet that your office made about your visit to
 21 Alabama with President Trump; is that right?
 22 A Oh, yep, it looks like it.
 23 Q Okay. And this says that you provided Mr. Trump,
 24 "Details about our robust efforts to restore full
 25 integrity & trust in elections, including our

96

1 top-to-bottom investigation by Justice Michael
 2 Gableman." Do you recall having any documents that
 3 are around the time of this Tweet regarding your
 4 robust efforts to restore full integrity and trust in
 5 elections, including the investigation?
 6 A No.
 7 Q How did your office communicate with the Trump team
 8 regarding this trip you took with President Trump?
 9 A You mean on record, the open records?
 10 Q I'm asking you if you had any, how did you
 11 communicate with the Trump team. And then we can get
 12 into whether they would have been responsive. I just
 13 want to see if you have anything yet.
 14 A No, I have no documents whatsoever.
 15 Q Okay.
 16 A It was all done by phone.
 17 Q Okay. Do you know if anybody in your office had any
 18 written communications with the Trump team regarding
 19 this visit?
 20 A I have no idea.
 21 Q Okay. Do you recall if you submitted any receipts or
 22 other reimbursement requests for this trip?
 23 A I think I was reimbursed by our campaign committee.
 24 Q Have you since this trip on August 23rd communicated
 25 with the Trump team regarding the election

97

1 investigation?
 2 A Not with the Trump team.
 3 Q Anybody related to the Trump team? I felt like there
 4 was a qualification there in your answer, so I'm just
 5 trying to understand who you may have communicated
 6 with related to the Trump team.
 7 A President Trump.
 8 Q And how do you -- do you have any of your
 9 communications with him in writing?
 10 A No.
 11 Q Is that because they were never made in writing or
 12 because they've been deleted?
 13 A No, they've never -- I've never -- I've only spoken
 14 verbally to him.
 15 Q Okay. Do you have like any calendar invites for like
 16 when you scheduled calls with him?
 17 A I don't schedule calls.
 18 Q They just happen organically?
 19 A Correct.
 20 Q Okay. Do you know if there would -- if your office
 21 does keep an official calendar for your appointments?
 22 A Yeah, my office keeps a calendar.
 23 Q Do you know if there are any entries on the calendar
 24 related to the election investigation?
 25 A I have no idea.

98

1 Q Do you ever look at the calendar yourself?
 2 A I do.
 3 Q Sorry?
 4 A I do.
 5 Q Okay. Do you -- are you able see that on your phone?
 6 A Yes.
 7 Q Do you know if your calendar has been searched in
 8 response to any American Oversight requests?
 9 A Alex or Steve from our office would do that. It's a
 10 State document.
 11 Q This Page 2 of Exhibit 37 at the top here refers to a
 12 Tweet on August 25th regarding another statement
 13 you've made regarding the election investigation
 14 along with Assembly Republicans. Do you see that
 15 Tweet?
 16 A I see that, yep.
 17 Q Okay. Do you recall issuing that statement?
 18 A I don't recall it specifically.
 19 Q Do you recall issuing any statements regarding
 20 whether a cyber forensic audit would be necessary to
 21 investigate the 2020 election?
 22 A If that statement is out there, I'm sure we put it
 23 out.
 24 Q Okay. Did you help author that statement?
 25 A Perhaps. I don't remember specifically.

99

1 Q Okay. Do you recall communicating with anybody else
 2 from the Assembly GOP about that statement?
 3 A I don't know.
 4 Q You didn't -- we didn't hear you again.
 5 A I don't know.
 6 Q Do you recall written communications with anybody
 7 else regarding that statement?
 8 A I don't know. I doubt it, but I don't know that.
 9 Q In looking at the first page of this document again,
 10 we're up to December 7, 2021, and that is a response
 11 or a statement that you've issued regarding the
 12 Wisconsin -- I'm going to say Wisconsin Institute for
 13 Law and Liberty review of the election. Do you see
 14 that?
 15 A Yep.
 16 Q Do you recall any communications that would have been
 17 responsive to American Oversight's requests that
 18 you've had with the Wisconsin Institute for Law and
 19 Liberty? Yeah, I guess that's the question.
 20 A Anything that we had would have been part of the
 21 records request we replied to from Mr. Fawcett.
 22 Q Okay. Did you ever communicate with anybody from
 23 WILL regarding the election investigation via text
 24 message or email --
 25 A No, not that I remember.

100

1 Q -- that wasn't accessible to your staff? I'm sorry?
 2 A No, not that I remember.
 3 (Exhibit 39 is shared on the video screen)
 4 Q Okay. I'm going to show you now what we've marked as
 5 Exhibit 39, and this is a letter from Michael
 6 Gableman to the Milwaukee Election Commission that
 7 attaches a subpoena it looks like you have signed on
 8 the second page, and that letter was sent
 9 September 30, 2021. Do you see that?
 10 A Yes.
 11 Q Do you recall signing a subpoena around the date of
 12 this that's mentioned here? And I think it's
 13 September 28th of 2021.
 14 A Yes.
 15 Q How are those subpoenas delivered to you to sign?
 16 A Justice Gableman brings them to me to sign.
 17 Q Okay. And just to clarify, this isn't the only one
 18 that you've signed, there have been others, correct?
 19 A Yes.
 20 Q And then do you -- how are they returned to
 21 Mr. Gableman?
 22 A I sign them while he waits for me to sign them.
 23 Q Okay. Do you keep a copy?
 24 A I do not.
 25 Q Do you know if anybody in your office does?

101

1 A You'd have to ask them.
 2 Q Do you receive courtesy copies of cover letters like
 3 these when the subpoenas are delivered?
 4 A You'd have to ask Steve. I have not seen them.
 5 Wouldn't it be easier if you guys just helped us find
 6 the fraud instead of fighting against it?
 7 Q There's no question pending.
 8 A I'm sorry.
 9 Q I'm going to show you now what we've marked as --
 10 well, strike that. While you're on that point, what
 11 documents -- what written documents have you seen
 12 that convince you that there was fraud?
 13 MR. STADLER: Objection. That's so
 14 far beyond the scope of this proceeding.
 15 MS. WESTERBERG: It's not. It's
 16 directly responsive because the question, the
 17 election -- or the open records requests are all
 18 about the election investigation, and it seems
 19 as though Speaker Vos, something has convinced
 20 him that there was election fraud, so I'm asking
 21 what it was, if it was in writing, because then
 22 that would be responsive to our requests.
 23 MR. STADLER: You didn't ask him if it
 24 was in writing. You asked him what documents
 25 he's seen.

102

1 MS. WESTERBERG: Right.
 2 MR. STADLER: And that's not part of
 3 this proceeding. Ask him what documents he has.
 4 MS. WESTERBERG: I think I would like
 5 an answer to my question and then -- because
 6 documents that might have been responsive
 7 may no longer be in his possession, but
 8 Judge Bailey-Rihn clearly said in our hearing
 9 with her that we could pursue whether records
 10 had been deleted.
 11 MR. STADLER: But your question isn't
 12 about whether he possessed a document or
 13 retained a document. You asked him what he has
 14 seen, and what somebody sees is not the subject
 15 of a public records request. What somebody
 16 possesses is the subject of that request. And I
 17 think all you're doing here, again, is trying to
 18 satisfy that curiosity about this investigation
 19 through improper means.
 20 MS. WESTERBERG: I would object to
 21 that and any characterization of anything we're
 22 doing as improper. But I think it's fair that
 23 things that the witness has seen may have been
 24 in his possession if he's seen them. So I'm
 25 asking the witness to answer the question, and

103

1 then we can narrow it after that if needed.
 2 A The things that I have seen are the news reports.
 3 One example would be the huge amount of dollars that
 4 came into Wisconsin from the Center for Technology
 5 and Life funded by the Zuckerbergs where they only
 6 went to very liberal parts of the state to turn out
 7 voters, where they actually commingled dollars from
 8 the private sector with the public sector and used
 9 those to hire people who ran the election.
 10 I've seen the testimony from the clerk in
 11 Green Bay where she was basically forced out of her
 12 job by a political operative under the direction of
 13 the mayor, who refuses to testify. I've seen the
 14 report that we know from the Racine County Sheriff
 15 where we have people who were in a nursing home who
 16 were coerced into voting. They were done in a way
 17 that certainly didn't allow for a special voting
 18 deputy, so we now know there potentially was fraud.
 19 We know that there are cases all around the state
 20 exactly like that.
 21 We have got testimony where we had people who
 22 were in front of the Campaigns and Elections
 23 Committee where they actually talked about being an
 24 election observer where people were told who to vote
 25 for. They were told to do so in Spanish, hoping that

104

1 the people who were there observing wouldn't
2 understand what they said. There are hundreds of
3 allegations, many of which I believe, not all of
4 which I do, but many of which I believe, and that's
5 why this investigation has to continue to its natural
6 conclusion to show what happened.

7 Q Do you keep copies of those news reports?

8 A I do not. You can find them on the internet, though.
9 Just go to Google.

10 Q Are you just looking at mainstream news sources or
11 other news sources? I guess I'm not understanding
12 the scope of what you're meaning when you say news
13 reports.

14 A If you go to Google, you can type it in, and you'll
15 find it quicker than I could give it to you.

16 Q Okay. So anything on the internet might fall into
17 that category?

18 A It's possible, yes.

19 Q Well, let me show you what we've had marked -- what
20 we've marked here as Exhibit 38.

21 (Exhibit 38 is shared on the video screen)

22 Q So this is one thing on the internet, wifraud.com.

23 Are you familiar with this website?

24 A I am. That's put together by Justice Gableman.

25 Q Okay. Have you -- is this one of the things that you

105

1 you're referring to when you say you believe there
2 might have been fraud in the 2020 election?

3 A That's not what I was referring to, but this is
4 another good example.

5 Q Okay. Did you have any written communications with
6 anybody about this website?

7 A No.

8 Q Okay. This website includes -- and this is a
9 printout of a website obviously, but it includes a
10 number of submitted integrity reports. Do you know
11 if you provided any of those, if your office provided
12 any of those to Mr. Gableman?

13 A I have no idea.

14 Q Okay. The website -- correct me if I'm wrong -- is
15 hosted on a private server, I'm guessing, from the
16 .com footer there. Would that be your understanding?

17 A I have no idea.

18 Q Do you know if your office has received any receipts
19 for this website?

20 A I have no idea.

21 Q No idea?

22 A No. You'd have to ask Steve.

23 Q You were very faint there.

24 A You'd have to ask Steve.

25 Q Thank you. Do you -- looking again at these fraud

106

1 reports on the third -- or excuse me, the submitted
2 election integrity reports on the third page there,
3 did you receive any of these reports at the same time
4 they were submitted on or around July 28th, do you
5 recall?

6 A I have no idea.

7 Q You don't know if your office received any of those?

8 A Correct.

9 Q And do you recall receiving any of those individually
10 on your accounts that your staff doesn't have access
11 to, like Gmail and text?

12 A No, I have none of those on my other devices.

13 Q Okay. Did any sort of approval have to be submitted
14 to use the State seal on this?

15 A I have no idea.

16 Q Do you know if Mr. Fawcett is familiar with this
17 website?

18 A You'd have to ask him.

19 Q Would it surprise you if he's not familiar with it?

20 A Not necessarily.

21 Q Not necessarily, is that what you said?

22 A Correct.

23 Q Is there anybody in your office whose responsibility
24 it would be to monitor developments like the creation
25 of this website?

107

1 A Not that I know of, no one specifically.

2 Q Okay. Are you made aware by the election
3 investigation team -- excuse me. Is your office made
4 aware from the election investigators when documents
5 like this are prepared and made public?

6 A You'd have to ask Steve for his part, but we have
7 hired Justice Gableman to lead the investigation, and
8 he is the one who is directing the work and the flow.

9 Q Is there any process by which he provides you updates
10 about events in the investigation?

11 A We have spoken multiple times on the phone, and we
12 have met in person multiple times.

13 Q No written communications for updates --

14 A Correct.

15 Q -- that you can recall? Okay.

16 A No written communications, right.

17 Q Okay, all right.

18 A Other than the report he did give that the Campaigns
19 and Elections Committee has, his preliminary report.

20 MS. WESTERBERG: Okay, all right. Why
21 don't we go off the record for a second. I'm
22 having a little trouble with one of these
23 exhibits.

24 THE VIDEOGRAPHER: The time is 3:38,
25 and we are off the record.

108

1 (Discussion off the record)
 2 THE VIDEOGRAPHER: The time is 3:43,
 3 and we are back on the record.
 4 EXAMINATION (RESUMED)
 5 BY MR. CAMPBELL:
 6 Q Mr. Vos, I'm going to show you what we've marked as
 7 Exhibit 33.
 8 (Exhibit 33 is shared on the video screen)
 9 Q Can you see that?
 10 A Yes, uh-huh.
 11 Q And this, as you can see, is the Defendant's Answer
 12 to the Complaint American Oversight filed in this
 13 case. Do you see that there on the sort of middle to
 14 top of the first page?
 15 A Yep.
 16 Q Okay. And I'm going to scroll down to the end. You
 17 know, there's a number of responses to our
 18 allegations, but at the end we have affirmative
 19 defenses, and I want to ask you about your
 20 understanding of the facts that underlie some of
 21 those defenses. So --
 22 A I am not a lawyer, so this is all -- okay. I can try
 23 to answer, but I don't --
 24 Q Okay, yeah. And to the extent that you're familiar
 25 with the open records law through your years of

109

1 public service and can respond to some of these
 2 without understanding, you know, feel free to rely
 3 on that. But, for example, the first one,
 4 "The Complaint fails to state a claim upon which
 5 relief can be granted," do you know what that is
 6 about?
 7 A I have no idea.
 8 Q Okay. The second one, it says, "Many of the records
 9 requested by Petitioner are not, quote-unquote,
 10 'Records' within the meaning of the Public Records
 11 Law." And I was just -- well, first of all, it's
 12 your understanding that certain documents that a
 13 records custodian or authority might have in their
 14 possession are not necessarily responsive because
 15 they're, say, a draft, right?
 16 A Okay.
 17 Q Well, is that your understanding, that you don't need
 18 to produce draft documents?
 19 A Right, but I'm not a public records expert. I don't
 20 want to say that, yes or no, that's the way it is.
 21 Q Yeah, just for purposes of, you know, when you have
 22 to implement the law like search for records and
 23 select which ones to provide in response to a records
 24 request, do you provide draft documents, or is it
 25 your understanding that those are exempt from

110

1 disclosure?
 2 A I don't know. I mean, I give them whatever -- I just
 3 put the search terms in there.
 4 Q Okay.
 5 A What they do with it afterwards, that's up to Steve.
 6 Q Okay. And it's your understanding that records that
 7 are personal that might be stored on a government
 8 server, you wouldn't need to disclose those, correct?
 9 A Correct.
 10 Q Yeah, that they're not records --
 11 A But I wouldn't store personal records on a government
 12 server.
 13 Q Sure.
 14 A So that would never happen.
 15 Q Or a personal record that might be on your personal
 16 email you wouldn't have to produce, correct?
 17 A Right.
 18 Q Okay. And as you use the term personal, I mean,
 19 obviously that includes interpersonal things with our
 20 family members and so forth, right? I don't need to
 21 know the substance, I just need to know what you're
 22 considering personal.
 23 A Yeah, things that are totally unrelated to my State
 24 service.
 25 Q Yeah. Would that include things that are political?

111

1 Do you consider sort of the political side unrelated
 2 to your State service?
 3 A Not usually.
 4 Q Okay. So if you were contacted by a governor, say,
 5 from out of state about the election investigation,
 6 would you consider that personal or related to your
 7 State service?
 8 A I guess if I had a record, like if somebody sent me
 9 an email, it would be an official document.
 10 Q Okay. It wouldn't be excluded from disclosure
 11 because it's personal?
 12 A I'm just trying to think. I don't have a lot of
 13 governors that are sending me or calling me, so I
 14 can't even imagine. This is like a total
 15 hypothetical but, I mean, I guess I would think if it
 16 was sent to my official account, it's official.
 17 Q And if it was sent to your personal account but it
 18 concerned the election investigation, is there any
 19 scenario in which you would consider that
 20 communication personal and not related to your State
 21 service?
 22 A I'd have to think about it. I mean, any scenario? I
 23 can't say that, I mean, but they don't have my
 24 personal email. How would they get my personal
 25 email?

112

1 Q Anybody. And I don't know how --
 2 A I don't give my personal email out. The only reason
 3 people are going to have my personal email is because
 4 you're giving it out. I don't choose to give that to
 5 people, right?
 6 Q Well, your attorney gave it to us on these requests,
 7 so we're asking about it.
 8 A Well, he didn't have a choice because you sued. I
 9 mean, let's be honest.
 10 Q As far as I know, there's no protective order or
 11 anything, so we're talking about it. But I'm just
 12 saying an email from anybody, assuming they have your
 13 personal account, or your phone to send you text
 14 messages to, is there any scenario in which you would
 15 consider a communication to one of those accounts to
 16 be personal when it also relates to the election
 17 investigation?
 18 A If it was from a family member or, you know,
 19 something where it's totally -- I can't even say. I
 20 don't want to make up an answer. I mean, I don't
 21 know.
 22 Q All right. Well, how about like the head of an
 23 interest group or something?
 24 A They wouldn't have my personal email.
 25 Q Assume for me that they do.

113

1 tell me what you don't want, which is you don't want
 2 news stories, you don't want Google alerts, you don't
 3 want all that kind of stuff, which is 99 percent of
 4 what comes up when I hit the search.
 5 Q Okay. I think I understand your testimony, but I
 6 just want to be sure. So sitting here today, you
 7 can't think of an email or a text message that was on
 8 one of your personal accounts or an account that you
 9 only have access to as opposed to your staff that
 10 relates to the election investigation that you did
 11 not provide in response to one of the requests
 12 because you considered it not a record as that term
 13 is used in the open records law?
 14 A I mean, I guess I'd have to go back and look, but
 15 again, I don't recall any. But you've asking me
 16 about everything I've communicated over the past
 17 18 months. That's a long time, or 15 months,
 18 whatever it is.
 19 Q For the requests that you haven't responded to yet
 20 but that you might have searched for records for, do
 21 you know if any of those will be withheld because
 22 they are not -- because they are personal or they're
 23 somehow exempt from the open records law?
 24 A I have no idea.
 25 Q And when you -- you know, now you're telling me some

115

1 MR. STADLER: Counsel, this is a waste
 2 of time to grill the witness about documents
 3 that hypothetically could exist. And in regard
 4 to affirmative defenses, these are
 5 legally-driven affirmative defenses that this
 6 witness can't provide you any testimony about.
 7 This is a waste of time.
 8 MS. WESTERBERG: I would disagree.
 9 I'm just wondering if there are any documents
 10 that would have been responsive to our requests
 11 that the witness would not have provided because
 12 he considered them personal. I can -- do you
 13 have any objection to that question? I think
 14 that's fair.
 15 MR. STADLER: Then ask the question.
 16 You've asked him like 17 questions that beat
 17 around it.
 18 Q Do you understand the question, Mr. Vos?
 19 A I don't know if there's anything that I would have --
 20 again, I don't -- well, let me think about it. I
 21 don't believe there's any record that I would have
 22 not given if it was responsive to the open records,
 23 because when I type it in there, I do the typed
 24 search term, and whatever comes up I turn over to
 25 Steve, unless it's what you don't want, because you

114

1 of the things that are contained in our open records
 2 requests, like, you know, that it excludes certain
 3 things. Remind me again if you've received physical
 4 copies of those requests besides the e-mails that are
 5 forwarded to your Rep.Vos email account.
 6 A I have no idea if Steve got physical copies or not.
 7 Q Did he give any to you?
 8 A Not that I know of.
 9 Q Okay. And are you only familiar with what the
 10 content of those requests are because of what you see
 11 in media reports and what Steve tells you or because
 12 you've actually read them?
 13 A Only because of the media reports and what Steve
 14 says, until I saw them today.
 15 Q Okay, all right. Item 3 on here on these affirmative
 16 defenses say, "Respondent," that's you, "Is not the
 17 authority having custody of some of the records
 18 sought by Petitioner." And is it your understanding,
 19 just as background, that only authorities need to
 20 provide records that are responsive to open records
 21 requests?
 22 A I have no idea.
 23 Q Do you know what this paragraph is referring to when
 24 it says that you're not the authority having custody
 25 of some of the records sought by the Petitioner?

116

1 A I don't know.
 2 Q Sorry?
 3 A I mean, I assume it's because I don't have physical
 4 copies of any of this stuff, it's all in my office,
 5 and that's Steve, as the custodian of the records,
 6 that's the responder to the open records requests.
 7 Q So let's assume your office as a whole is the
 8 authority. When this is saying that your office is
 9 not the authority having custody of some of the
 10 records sought by Petitioner, do you know what that's
 11 referring to?
 12 A Well, it could mean that they're in the Campaigns and
 13 Elections Committee or they could be at the Assembly
 14 Chief Clerk's Office. I don't know.
 15 Q Okay. For any of the requests that you haven't yet
 16 responded to yet that we've talked about today, do
 17 you plan to withhold some records because you're
 18 not -- well, strike that. For this Affirmative
 19 Defense No. 3, do you know, if there's a document
 20 that might be in your possession and the possession
 21 of another authority, are you not providing it
 22 because you are relying on the other authority to
 23 provide it?
 24 A Well, I can't give records I don't have.
 25 Q If you and another authority have it, would you still

117

1 provide it?
 2 A I have no idea. I mean, why -- you'll have to ask
 3 Steve how we handle that, but it would seem to me
 4 that if we have the record we usually turn it over.
 5 Q Okay. Do you know who this -- who is the authority
 6 having custody of some of the records as referenced
 7 by this paragraph?
 8 A No.
 9 Q Okay. So Item 4 here, it says one of the defenses is
 10 that, "Substantive common law principles construing
 11 the right to inspect, copy or receive copies of
 12 records dictate that many of the records sought by
 13 Petitioner are not subject to disclosure at this
 14 time." Do you know what the factual basis for that
 15 is?
 16 A I don't. We could ask Mr. Stadler. He's an open
 17 records expert. Wouldn't it be easier to ask him
 18 than me, as a common person where we rely on people
 19 who have legal degrees to do this work?
 20 You're asking me about all these affirmative
 21 defenses that have legal meanings. I have no law
 22 background. I rely on people who are trained in the
 23 law to do this. That's what we have Steve for on
 24 open records, and we have Mr. Stadler, who's an
 25 expert, helping us. So they put this together on the

118

1 affirmative defenses. Why don't you ask Mr. Stadler
 2 to explain it to you if you don't understand it?
 3 MS. WESTERBERG: I am going to object
 4 and move to strike that as nonresponsive.
 5 Q I just want to know what the factual basis is, and I
 6 think you told me earlier in that answer that you
 7 didn't know, so we can move on to No. 5. So this one
 8 says you're not -- that one of your defenses is that
 9 public policy as reflected in a provision in the open
 10 meetings law, 19.85(1)(f), "Justifies restricting
 11 public access to some of the requested records at
 12 this time because the investigation of charges
 13 against specific persons, if disclosed to the public,
 14 would be likely to have a substantial adverse effect
 15 upon the reputation of any person referred to in such
 16 investigations." Can you tell me what the factual
 17 basis for that is?
 18 A Can I just re-read it? Because you pretty much just
 19 explained it.
 20 Q Yeah, I just read what it says, but I'm saying do you
 21 know what the facts underlying that are? For
 22 example, do you know if there is a risk that there's
 23 a substantial adverse effect upon the reputation of
 24 any individual person?
 25 A Well, I have no idea other than the fact that it

119

1 looks to me like you guys will go after them with
 2 relentless lawsuits if anybody wants to participate
 3 in this process, so I think they're trying to protect
 4 people from people like you, frankly.
 5 Q Is there anything else you think might be the basis
 6 for this claim that --
 7 A I have no idea. I mean, this is just supposition. I
 8 have no idea. I am not a lawyer. I have no idea.
 9 Q All right. And you'll just have to let me finish the
 10 question so Sandy can get a clean record. This talks
 11 about charges against specific persons. Do you know
 12 the factual basis for what that is, like who would
 13 bring the charges?
 14 A I don't.
 15 Q Do you know if any of the records that the plaintiff
 16 has requested but that haven't yet been provided are
 17 going to be withheld on the basis of this Item No. 5?
 18 A I don't know.
 19 Q Now, do you recall giving an interview to Wisconsin
 20 Public Radio on or about October 19th?
 21 A I don't, but I'm sure I did.
 22 Q Do you recall talking to Kate Archer Kent about the
 23 election investigation?
 24 A Okay. I'm sure I did.
 25 Q Well, since it -- it was widely reported in the media

120

1 afterwards that you had said that you wouldn't
 2 release records related to the investigation because
 3 that would be like if the district attorney decides
 4 they're going to try to find out who killed somebody
 5 on the street corner, they do not put out for public
 6 display for everybody to read who they're talking to
 7 and who they're investigating, giving an advantage to
 8 the people who had committed the crime to avoid
 9 prosecution. Are you -- do you recall that
 10 statement?
 11 A Yeah, I said that.
 12 Q Do you know if any of the records that American
 13 Oversight has sought are being withheld on the
 14 rationale that you articulated in that interview?
 15 A I have no idea.
 16 Q Sorry, I didn't hear that.
 17 A I don't know.
 18 Q Okay. Are you withholding any records that would be
 19 responsive to any of the requests until the
 20 conclusion of the investigation?
 21 A You would have to ask Steve, and Ron, frankly.
 22 Q And then the last item, well, that I wanted to ask
 23 you about in these affirmative defenses is No. 20,
 24 or on Page 20 at the top, No. 7. It says,
 25 "Respondent Vos is not the appropriately named

121

1 respondent in this matter as to some records."
 2 Do you know what the factual basis for that is?
 3 A I don't.
 4 Q Okay. I'm hopefully going to finally pull up this
 5 last pesky exhibit here.
 6 (Exhibit 26 is shared on the video screen)
 7 Q Can you see what we've marked as Exhibit 26?
 8 A Yes.
 9 Q Okay. And this is actually a collection of a couple
 10 of emails over two pages, and I'm going to start with
 11 the one on the second page. And it looks like it's
 12 an email from Mike Gableman to Harry Wait and
 13 Robin.Vos@legis.wisconsin.gov. Do you see that?
 14 A Uh-huh.
 15 Q Is that a yes?
 16 A Yes.
 17 Q Okay. Do you recall getting this email at the time
 18 it was sent around August 17th of 2021?
 19 A Yes.
 20 Q Sorry?
 21 A Yes, I do.
 22 Q Okay. Do you recall what you did in response to that
 23 email?
 24 A I asked Alex to call -- or at the time I think it was
 25 Amanda. Oh, no, I did. I called Harry myself, and

122

1 we set up a breakfast and sat down and talked.
 2 Q Do you recall what happened to this email after this
 3 was sent to you? Like what did you do with it?
 4 A I don't.
 5 Q Do you know if you deleted it, or did you keep it?
 6 A I have no idea.
 7 Q Would you agree it would be responsive to some of
 8 American Oversight's requests for communications
 9 about the election?
 10 A Yeah, if we had it, sure.
 11 Q And scrolling back up to the first page, it contains
 12 another email, this time from Harry Wait to Robin.Vos
 13 at your State email address and copied to some
 14 others. Do you see that?
 15 A Yep.
 16 Q Do you recall getting this email at the time it was
 17 submitted to you?
 18 A I don't, but I'm sure I probably got it.
 19 Q Around July 18th?
 20 A Okay.
 21 Q That's what it says, right?
 22 A I believe, yeah.
 23 Q Yeah. Do you know why this record might not have
 24 been submitted to American Oversight in response to
 25 its requests?

123

1 A I have no idea.
 2 Q Would you agree it is responsive to requests for
 3 communications about the election investigation?
 4 A It could be, yeah.
 5 Q Do you know if there's any other emails like this
 6 that you have not provided in response to American
 7 Oversight's requests?
 8 A Not that I know of.
 9 Q Have you searched personally, since I think you said
 10 the Robin.Vos email is the one that you do check, for
 11 any records responsive to American Oversight's
 12 requests?
 13 A I don't search that one. That's a State account, so
 14 Alex and Steve and everybody else would search it at
 15 the office.
 16 Q Did you ever direct staff to be sure to retain any --
 17 either of these emails about the election
 18 investigation?
 19 A No.
 20 MS. WESTERBERG: Okay. I think we're
 21 about done here. Let me just check my notes.
 22 (Counsel reviews notes)
 23 Q You mentioned you text frequently. Do you ever text
 24 with Gableman, Mr. Gableman?
 25 A I have in the past, but very, very rarely, because

124

1 it's usually, "Call me," or something like that.
 2 Q Did you -- do you text with anybody else who's a
 3 member of the Office of Special Counsel?
 4 A No.
 5 Q Do you know if you kept those kind of, "Call me,"
 6 texts, or did you delete them?
 7 A No, I would have deleted them.
 8 Q And I think you said before you frequently delete
 9 your texts. Do you know about how often you do that?
 10 A I don't have any kind of a system, you know, just
 11 kind of whenever I have time, I guess. But I would
 12 say I try to do it most days.
 13 Q When Mr. Fawcett alerts you to the fact that there
 14 has been an open records request made to your office,
 15 you can't tell me sitting here today how much time
 16 might pass between when that request has been
 17 received by your office and when you're made aware of
 18 it, correct?
 19 A I can't say that.
 20 (Exhibit 6 is shared on the video screen)
 21 Q I want to make sure. I'm going to show you quickly
 22 what we've marked as Exhibit 6. I'm not sure if I
 23 asked you about this request specifically. This is
 24 one of the 10, dated July 15, 2021, again requesting
 25 communications between you or members in your office

125

1 anybody in writing related to the Arizona
 2 investigation of the 2020 election?
 3 A Nope.
 4 Q Okay. Do you know what you would have done to
 5 preserve records responsive to this request at the
 6 time that it was received?
 7 A Same as --
 8 Q And by you, I mean you personally.
 9 A Yeah, same as we would have done when Steve notified
 10 me of it. We would have done the search. That would
 11 be it.
 12 Q And do you know what -- besides what Steve might have
 13 done, if your office did anything else to preserve
 14 records that would be responsive to this request at
 15 the time the request was made?
 16 A I have no idea.
 17 Q Okay. I think that is it. And to the extent you've
 18 communicated with Mr. Gableman, would any of those
 19 communications have been about issues other than the
 20 election investigation?
 21 A Like what do you mean?
 22 Q Anything not about the election investigation.
 23 A Well, I would have done it on the phone, again,
 24 because we didn't communicate by email, so I guess
 25 no.

127

1 regarding the Arizona State Senate's investigation of
 2 Maricopa County's elections or a discussion of a
 3 similar investigation in Wisconsin. Do you recall
 4 getting this request?
 5 A This is the first time I've seen it.
 6 Q Okay. Do you -- I'll let you read the -- since you
 7 haven't seen it before, read the --
 8 A Yep, I see it there.
 9 Q -- okay, read the list of who the request should be
 10 interpreted to include. And I'll scroll to Page --
 11 A Yeah, I have no emails or text messages or anything
 12 like that because I just wouldn't.
 13 Q Because of what? I'm sorry.
 14 A Oh, on the first page. Okay, I'm sorry.
 15 (Witness examines document)
 16 A Well, as an example, I have no idea if other
 17 members of the Legislature have communicated with
 18 Donald Trump. I mean, there's no way I could even
 19 know those things.
 20 Q If you were copied on it you would know, but
 21 otherwise, you wouldn't?
 22 A Well, yeah. I'm just saying but then it would be in
 23 an email to my office, so we would have already
 24 provided the record.
 25 Q Do you recall having any communications at all with

126

1 MS. WESTERBERG: Okay. I think those
 2 are all the questions I have for this witness at
 3 this time. Mr. Stadler, I think then the ball
 4 is in your court.
 5 MR. STADLER: I have no questions of
 6 Mr. Vos. I would just like to put on the record
 7 just a reminder to counsel who are participating
 8 in this litigation of their obligations under
 9 Supreme Court Rule 20:3.6. That's all I have.
 10 Thank you.
 11 THE VIDEOGRAPHER: Does that conclude
 12 testimony for today then?
 13 MS. WESTERBERG: Yes, it does.
 14 THE VIDEOGRAPHER: We are going off
 15 the record. The time is 4:10 p.m., concluding
 16 the video-recorded deposition of Mr. Robin Vos
 17 taken January 12, 2022.
 18 (Adjourned at 4:10 p.m.)
 19
 20
 21
 22
 23
 24
 25

128

1 STATE OF WISCONSIN)
 2 COUNTY OF DANE)
 3 I, SANDRA L. McDONALD, Shorthand Reporter
 4 and Notary Public in and for the State of Wisconsin,
 5 do hereby certify that the foregoing is a true
 6 record of the remote video-recorded deposition of
 7 ROBIN VOS, who was first duly sworn by me; having
 8 been taken on the 12th day of January, 2022, from
 9 various remote locations, in my presence, and reduced
 10 to writing in accordance with my stenographic notes
 11 made at said time and place.
 12 I further certify that I am not a relative
 13 or employee or attorney or counsel for any of the
 14 parties, or a relative or employee of such attorney
 15 or counsel, or financially interested in said action.
 16 In witness whereof, I have hereunto set my
 17 hand and affixed my seal of office this 19th day of
 18 January, 2022.

20 Notary Public, State of Wisconsin
 21 My Commission Expires 10/18/22

50:21, 60:13, 61:9, 62:13, 35 4:19, 11:3.
 64:11, 71:18, 74:13, 75:22, 35. 11:2.
 77:10, 82:10, 83:17, 88:15, 36 4:21, 11:21.
 99:11. 36. 11:24.
 2. 74:3, 75:21, 88:20. 37 4:24, 94:9, 99:11.
 20 4:14, 19:22, 121:23, 37. 94:8.
 121:24. 38 4:26, 105:21.
 20005 2:23. 38. 105:20.
 2004 16:7. 39 4:28, 101:3, 101:5.
 2013 16:15. 3:38 108:24.
 2020 20:22, 21:10, 33:15, 3:43 109:2.
 54:13, 55:14, 76:6, 76:14,
 99:21, 106:2, 127:2.
 2020. 54:11.
 2021 21:22, 64:19, 70:7, 4 >
 85:15, 122:18. 4 3:21, 51:22, 73:21, 74:6,
 2021-2022 4:21. 74:10, 88:15, 89:9, 89:10,
 2021. 68:4, 85:3, 101:13. 90:8, 118:9.
 20:3.6. 128:9. 4. 82:10, 88:20.
 21 3:38, 51:1, 57:6, 58:13, 43 4:5.
 61:20. 4:10 128:15, 128:18.
 21-03. 47:11.
 21-CV-2521 1:13, 5:9.
 21. 51:3. < 5 >
 22 3:41, 66:9, 66:12, 5 3:22, 32:3, 76:11, 77:6,
 66:13. 120:17.
 23 3:36, 4:4, 44:5, 47:18, 5. 76:10, 119:7.
 50:8, 50:21. 51 3:39.
 23. 44:4. 53188 2:32.
 25 4:7, 80:1, 90:25, 91:1. 53703 2:15.
 25. 79:25.
 26 4:9, 4:13, 122:6, 122:7. < 6 >
 27 4:12, 26:13. 6 3:24, 34:18, 125:20.
 27. 26:12. 6. 125:22.
 28 89:13. 63rd 16:10, 16:22, 43:21.
 2:23 63:20. 64 3:26.
 2:31 63:22. 66 3:42.
 2:31. 63:23. 68 3:28.
 .
 < 3 >. < 7 >
 3 1:5, 3:20, 25:7, 28:8, 7 3:7, 3:26, 38:11, 64:6,
 58:13, 59:1, 64:11, 82:3, 83:9, 90:2.
 88:13, 116:15, 117:19. 7. 64:8, 121:24.
 3. 71:19, 82:2. 70 3:29.
 30952 1:14. 71 3:30.
 32 4:14, 20:10, 20:13. 74 3:17, 3:21.
 33 4:15, 109:8. 75 3:19.
 33. 109:7. 76 3:22.
 34 4:16, 10:17, 10:19.

< Dates >
 05/28/21 3:17, 3:19, 3:20,
 4:4.
 07/15/21 3:21, 3:22, 3:24.
 07/19/21 4:9.
 07/28/21 4:12.
 08/13/21 3:26, 3:28, 3:29.
 08/26/21 4:7.
 09/15/21 3:30.
 09/30/21 4:28.
 10/18/22 129:23.
 12/21/21 4:19.
 2020 november 21:23.
 August 13, '21 64:7.
 August 17th 122:18.
 August 20, 2021 67:10.
 August 23, 2003 96:18.
 August 23rd 97:24.
 August 25th 99:12.
 August 26th 80:13, 80:16.
 August 27, 2021 47:19.
 August 27th 44:7.
 December 7, 2021 100:10.
 January 12, 2022 1:25, 5:14,
 128:17.
 January, 2022 2:7, 129:9.
 January, 2022. 129:19.
 July 15, 2021 125:24.
 July 15th 74:7, 74:10, 74:25,
 76:12, 77:7.
 July 18th 123:19.
 July 28th 107:4.
 July 30, 2021 94:22.
 June 15th 79:3.
 June 1st 79:2.
 June 5th 79:5.
 March 15, 2021 77:17.
 March 15th 77:12.
 May 28, 2021 74:1.
 May 28th 44:7, 45:20, 47:3,
 48:6, 74:25, 75:23, 77:9,
 82:6, 82:16, 83:3, 89:24.
 November 3, 2020 82:25, 83:3,
 83:11.
 November 3rd 89:23.
 October 18th 85:2, 85:4,
 85:15.
 October 19th 120:20.
 September 15, 2021 71:14.
 September 28th 101:13.

September 30, 2021 101:9.
 (2:23 63:22.
 -vs- 1:13.
 .cam 106:16.
 .
 < 0 >.
 002 81:4.
 .
 < 1 >.
 1 3:17, 5:2, 50:8, 73:21,
 73:22, 73:23.
 1. 88:18, 88:20.
 10 3:30, 3:32, 4:17, 24:6,
 35:18, 71:13, 85:1, 85:5,
 85:14, 86:7, 86:16, 87:22,
 125:24.
 10. 71:12.
 100 13:1.
 101 4:29.
 1030 2:22.
 105 4:27.
 109 4:15.
 11 4:20, 4:22.
 12 3:32, 10:1, 12:9.
 12. 9:25.
 122 2:14, 4:10.
 125 3:24.
 12th 2:7, 129:9.
 13 3:34, 23:11, 23:15, 31:20,
 31:22.
 13. 23:16.
 13th 64:14, 64:19, 68:3,
 70:6, 80:10, 80:16,
 80:19.
 140 2:31.
 15 6:12, 19:22, 35:18,
 115:17.
 15th 2:22.
 16 6:13.
 17 114:16.
 18 115:17.
 19.85(1) (f) 119:10.
 19th 129:18.
 1:04 1:27, 2:8, 5:14.
 .
 < 2 >.

.
 < 8 >.
 8 3:28, 68:1, 68:3, 69:21.
 80 4:8.
 804 2:4.
 82 3:20.
 8953. 58:21.
 .
 < 9 >.
 9 3:29, 70:4, 70:6.
 900 2:14.
 94 4:24.
 960 7:15.
 99 115:3.
 @legislative 69:5.
 .
 < A >.
 Abbey 25:3.
 ability 32:6, 32:9.
 able 13:20, 36:2, 96:10,
 99:5.
 above-entitled 2:2.
 accept 39:15, 40:5.
 access 36:1, 69:22, 71:3,
 72:10, 78:23, 96:4, 96:10,
 107:10, 115:9, 119:11.
 accessible 101:1.
 accordance 129:11.
 account 4:24, 24:15, 31:25,
 32:1, 32:7, 32:13, 32:14,
 34:2, 34:6, 34:8, 34:10,
 34:15, 35:24, 43:17, 55:6,
 65:18, 66:6, 68:22, 69:1,
 69:3, 69:5, 69:6, 69:14,
 84:21, 96:5, 112:16,
 112:17, 113:13, 115:8,
 116:5, 124:13.
 accounts 23:9, 24:3, 24:12,
 24:13, 24:24, 31:17, 31:23,
 33:3, 33:4, 33:7, 33:10,
 33:17, 33:19, 42:19, 43:10,
 65:11, 65:25, 69:22, 72:11,
 72:19, 73:3, 75:9, 75:13,
 78:22, 107:10, 113:15,
 115:8.
 accurate 10:23.
 accurately 55:10.
 action 2:2, 95:14, 95:18,

95:23, 129:16.
 actions 68:11.
 actual 51:25.
 Actually 12:18, 27:19, 37:5,
 44:6, 45:7, 45:16, 96:8,
 104:7, 104:23, 116:12,
 122:9.
 Adam 25:5.
 added 29:2.
 addition 43:20.
 address 7:14, 26:6, 29:1,
 91:5, 123:13.
 addressed 11:8, 58:15.
 addresses 24:9, 58:16.
 adjourn 6:21.
 Adjourned 128:18.
 administration 46:2.
 administrator 79:16.
 advantage 121:7.
 adverse 119:14, 119:23.
 advised 80:23.
 Affirmative 109:18, 114:4,
 114:5, 116:15, 117:18,
 118:20, 119:1, 121:23.
 affixed 129:18.
 afield 95:11, 95:18.
 afternoon 6:6.
 afterwards 111:5, 121:1.
 age 86:9.
 ago 40:4.
 agree 17:17, 22:4, 26:21,
 80:21, 123:7, 124:2.
 Agreement 3:39, 3:41, 59:3,
 59:6, 60:25, 61:11, 61:12,
 62:23, 66:19.
 Agrees 53:6, 57:7, 57:17.
 ahead 71:20.
 ahoid 37:25.
 al 4:7, 4:12.
 Alabama 86:21.
 ALEC 41:4.
 alert 73:16.
 alerts 115:2, 125:13.
 Alex 25:8, 25:9, 25:12,
 25:16, 26:25, 27:23, 99:9,
 122:24, 124:14.
 allegation 54:6.
 allegations 20:19, 53:8,
 55:25, 59:15, 59:17, 105:3,
 109:18.

01-31-2022

CIRCUIT COURT
DANE COUNTY, WI
2021CV003007

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 3

AMERICAN OVERSIGHT,
Plaintiff,

-vs-

ROBIN VOS, in his official capacity,
Defendant.

Case No. 21-CV-2521
Case Code: 30952

VIDEOTAPED REMOTE DEPOSITION OF STEVE FAWCETT

VOLUME 1

Wednesday, January 12, 2022

9:04 a.m.

Videotaped by: TODD CAMPBELL

Reported by: SANDRA L. McDONALD

1 *****
2 INDEX
3 Examination By:
4 Attorney Colombo 5
5 Attorney Stadler --
6 *****
7 EXHIBITS
8 Exhibit Nos.: Identified:
9 1 - 05/28/21 Public Records Law Request 24
10 2 - 05/28/21 Public Records Law Request 43
11 11 - Notice of Deposition of Steve Fawcett 10
12 13 - Defendant's Answer to Plaintiff's First
13 Set of Interrogatories and Requests for
14 Production of Documents 19
15 21 - Coordinating Attorney Independent
16 Contractor Agreement with Consultare, LLC 97
17 22 - First Amendment to Agreement with
18 Consultare, LLC 110
19 25 - 08/26/21 email to Robin Vos, et al. from
20 Steve Fawcett 53
21 *****
22
23 (Original transcript filed with Attorney Westerberg)
24
25

1 REMOTE VIDEOTAPED DEPOSITION of STEVE FAWCETT, a
2 witness in the above-entitled action, taken at the
3 instance of the plaintiff, under the provisions of
4 Chapter 804 of the Wisconsin Statutes, pursuant to
5 notice, before SANDRA L. McDONALD, a Notary Public in
6 and for the State of Wisconsin, from various remote
7 locations, on the 12th day of January, 2022,
8 commencing at 9:04 a.m.

9 *****

10 A P P E A R A N C E S

11 CHRISTA O. WESTERBERG,
12 PINES BACH, LLP
13 122 West Washington Avenue, Suite 900
14 Madison, Wisconsin 53703
15 cwesterberg@pinesbach.com
16 appearing by videoconference on
17 behalf of the plaintiff;

18 SARAH COLOMBO and MELANIE SLOAN,
19 AMERICAN OVERSIGHT
20 1030 15th Street NW, B255
21 Washington, DC 20005
22 sarah.colombo@americanoversight.org
23 msloan@americanoversight.org
24 appearing by videoconference on behalf
25 of the plaintiff;

26 RONALD S. STADLER,
27 KOPKA PINKUS DOLIN
28 N19W24200 Riverwood Drive, Suite 140
29 Waukesha, Wisconsin 53188
30 rstadler@kopkalaw.com
31 appearing by videoconference on behalf
32 of the defendant.

33 Also Present: RACHEL BARON, Law Fellow with
34 American Oversight, by Zoom

1 THE VIDEOGRAPHER: Good morning.
2 We are on the record. Seated before you is
3 Mr. Steve Fawcett. This is Media No. 1 of the
4 remote video-recorded deposition taken pursuant
5 to notice at the instance of the Plaintiff in
6 the matter of American Oversight versus
7 Robin Vos in his official capacity, Defendant.
8 This matter is pending in the Circuit Court
9 of Dane County, State of Wisconsin,
10 Case No. 21-CV-2521.

11 This deposition is taking place by
12 means of remote audiovisual equipment with
13 participants in remote locations. The deponent
14 is physically located today at 2 East Washington
15 Street in Madison, Wisconsin. The date is
16 January 12, 2022, and the time is 9:04 a.m.

17 I am Todd Campbell, videographer
18 with Highlander Media Productions. The court
19 reporter is Sandy McDonald with Madison
20 Freelance Reporters. Would counsel please
21 first introduce themselves starting with the
22 Plaintiff?

23 MS. COLOMBO: Sarah Colombo for
24 American Oversight. Good morning.

25 MS. SLOAN: Melanie Sloan for

1 American Oversight.
 2 MS. WESTERBERG: Christa Westerberg
 3 for American Oversight.
 4 MR. STADLER: And Attorney Ron Stadler
 5 appears on behalf of Mr. Vos and the witness,
 6 Mr. Fawcett, this morning.
 7 MS. SLOAN: And we should also point
 8 out Rachel Baron, our legal fellow, is in
 9 attendance for American Oversight.
 10 MR. STADLER: You're muted,
 11 Mr. Videographer.
 12 THE VIDEOGRAPHER: You'd think I'd
 13 know better by now. Has everyone had the
 14 opportunity to introduce themselves?
 15 MS. COLOMBO: Yes. Thank you.
 16 THE VIDEOGRAPHER: Thank you. Would
 17 the court reporter please swear in the witness?
 18
 19 STEVE FAWCETT,
 20 having been first duly sworn on oath,
 21 was examined and testified as follows:

EXAMINATION

22
 23
 24 BY MS. COLOMBO:
 25 Q Okay. Good morning, Mr. Fawcett. Just reintroducing

5

1 myself, my name is Sarah Colombo. I'm counsel for
 2 the Plaintiff American Oversight in this case, and
 3 I'll be taking your deposition today. Can you please
 4 state your full name for the record?
 5 A Steve Fawcett.
 6 Q And what's your address?
 7 A [REDACTED]
 8 Q And you said earlier that you're sitting in Madison
 9 today; is that correct?
 10 A Correct.
 11 Q Okay. So I know that you're a lawyer and you might
 12 be more familiar with depositions than most
 13 witnesses, but I'm still going to go over a few
 14 ground rules. Does that work?
 15 A Sure.
 16 Q First, since we're on a Zoom call, can you tell me if
 17 anybody is in the room with you today?
 18 A Nope.
 19 Q I'll ask you to not communicate with anybody via cell
 20 phone or another computer screen or monitor during
 21 this deposition. Is that okay?
 22 A That's fine.
 23 Q And if anybody tries to communicate with you, just
 24 please let me know, okay?
 25 A That's fine.

6

1 Q Okay. We'll be showing you some exhibits throughout
 2 the deposition on the screen. We will be able to
 3 scroll through those exhibits for you, so just let us
 4 know if you can't see anything, okay?
 5 A Okay.
 6 Q We have a court reporter taking this down, and there
 7 are a few things that we should keep in mind so that
 8 she can get a clear transcript. So first is please
 9 say yes or no rather than nodding or saying something
 10 like uh-huh. Does that work?
 11 A Yes.
 12 Q Please allow me to finish my question before you
 13 respond so that we can get a clean record, okay?
 14 A Okay.
 15 Q And similarly, I will try to hold off on asking you
 16 another question until you're done with your answer,
 17 but if I accidentally jump in, please just let me
 18 know, and you can finish. Just a few other quick
 19 things. If you don't understand a question, please
 20 let me know, and I'll try to clarify it. If you
 21 answer my question, I'm going to assume that you
 22 understood.

23 Your lawyer might object to my questions, but
 24 unless they instruct you not to answer, you should go
 25 ahead and answer the question. And last, if you need

7

1 a break at any point, please just let me know. The
 2 only thing that we would ask is that you respond to
 3 the question that's pending before we take a break.
 4 Do you understand all of these instructions?
 5 A Yes.
 6 Q And is there anything today that you're aware of that
 7 would prevent you from testifying truthfully?
 8 A No.
 9 Q Okay. When did you first learn about this case?
 10 A I can't recall.
 11 Q Did you review the Complaint when it was filed?
 12 A At some point.
 13 Q After it was filed, immediately after?
 14 A I can't recall.
 15 Q Did you discuss the Complaint with anybody?
 16 A Yes.
 17 Q Who have you discussed it with?
 18 A Our attorney on record; my boss, Speaker Vos; my
 19 direct boss, Jenny Toftness.
 20 Q Anybody else?
 21 A I don't think so.
 22 Q Are you aware that Speaker Vos has filed an Answer in
 23 this case?
 24 A I am.
 25 Q Were you involved in preparing that Answer?

8

1 A I was.

2 Q What did you do to prepare?

3 MR. STADLER: Well, I think at this

4 time I'm just going to offer an objection. You

5 know, Mr. Fawcett is counsel for Speaker Vos,

6 and so we have to walk a fine line between what

7 he has done as a witness and anything he has

8 done as an attorney, and so I would object to

9 the extent that what you're asking for calls for

10 the disclosure of any attorney-client privileged

11 communications or any work product.

12 MS. COLOMBO: Yes, that's fine. We're

13 not asking about communications that Mr. Fawcett

14 may have had with any clients. We're simply

15 asking about what involvement he had in the

16 Answer, so if it was gathering facts or that

17 sort of thing.

18 MR. STADLER: And again, I think that

19 to some extent that implicates work product, so

20 I'll make the objection, and I'll ask the

21 witness to pay attention as he responds to not

22 cross that line into disclosing either work

23 product or privileged communications. Thank

24 you.

25 MS. COLOMBO: Christa, can we pull up

9

1 Exhibit 11?

2 (Exhibit 11 is shared on the video screen)

3 Q Okay. Mr. Fawcett, do you -- are we technically

4 working here? Can you see this exhibit?

5 A Yes.

6 Q Okay. Have you seen this notice before?

7 A Yes.

8 Q Do you understand that you're here today testifying

9 pursuant to this notice?

10 A Yes.

11 MS. COLOMBO: Okay. Christa, can we

12 go to the second page?

13 Q Did you -- on the second and third page here we have

14 list of documents that we asked you to bring to this

15 deposition. Your counsel provided a couple documents

16 immediately before the deposition. I just wanted to

17 ask a few questions around what you searched for.

18 Did you search for the documents in response to this

19 document request?

20 A Yes.

21 Q What did you search for?

22 A I guess I'm going to ask you to clarify here as to

23 what you mean as to --

24 Q Well, looking -- yeah, looking at, for example,

25 Item No. 2 which asks about sheets that were referred

10

1 to in particular documents, did you search for those

2 sheets?

3 A Yes, I started to, and I asked counsel to convey to

4 you that I'd need a little more information. We

5 don't -- we don't list our sheets per year as sort of

6 internal numbers.

7 Q What -- what additional information did you need?

8 A The date and the time of the request.

9 Q But you do maintain -- you do maintain the sheets

10 that you use that are referred to in this document

11 request?

12 A In general, we do.

13 Q And you retain those sheets?

14 A Those specific ones?

15 Q In general.

16 A Are you asking me if we retain sheets in general or

17 if I retain those specific ones?

18 Q This request is referring to sheets that you use to

19 catalog responses to open records requests. Do you

20 know what this is referring to?

21 A Yes.

22 Q So with respect to those sheets, those sheets, are

23 those maintained by your office?

24 A In general.

25 Q Okay. But you're not sure if these particular sheets

11

1 that are referenced here have been maintained?

2 A You'd have to provide me a little bit more

3 information, and then I could go back and check and

4 pull those specific sheets.

5 Q Okay.

6 A Or I could do it, but just not in the time frame

7 given to me.

8 Q Okay. Going to Request No. 3, did you search for

9 records that were deposited into any folders

10 maintained by your office but not provided to

11 American Oversight?

12 MR. STADLER: Counsel, I'll note for

13 you that we've provided a written response to

14 these document requests and we objected to

15 No. 3 as being vague and ambiguous because we

16 don't know what it means.

17 Q Okay. I think we can move on from there. And we did

18 receive a contract with your counsel who's appearing

19 today. Did you search for any other outside counsel

20 contracts that are responsive to Item No. 4 on this

21 list?

22 MS. COLOMBO: And, Christa, if you

23 could go just go to the next page as well.

24 MR. STADLER: And again I would note

25 for the record, counsel, that we objected to

12

1 that request, and subject to and without waiving
2 that objection we produced the retainer
3 agreement with Kopka Pinkus Dolin.
4 Q Do you have a retainer -- does Speaker Vos' office
5 have a retainer agreement with Briesen & Roper?
6 A Yes.
7 Q But you haven't produced that retainer agreement
8 today?
9 A Well, we don't -- we don't have those in our office.
10 Q Can you clarify what you mean by that?
11 A Those are generally kept in the Chief Clerk's Office.
12 Q So Briesen & Roper is retained by the Assembly?
13 A That's correct.
14 MR. STADLER: I believe von Briesen is
15 the firm name.
16 MS. COLOMBO: Briesen, yes.
17 MR. STADLER: It's von Briesen.
18 MS. COLOMBO: Oh, von Briesen. Excuse
19 me. Yes, thank you.
20 MR. STADLER: Sure. It's an odd start
21 to a name with a small letter.
22 MS. COLOMBO: Yes. Yes, I see that.
23 Thank you.
24 Q Okay. I'm going to -- we're going to move on from
25 this. I'm going to ask you a few questions about how

13

1 you prepared for this deposition, but don't tell me
2 about the substance of any discussions that you've
3 had with your counsel, okay?
4 A Okay.
5 Q Did you meet with an attorney to prepare for this
6 deposition?
7 A Yes.
8 Q Which attorney?
9 A Ron Stadler.
10 Q Was anybody else present?
11 A Yes.
12 Q Who was that?
13 A Speaker Vos and Jenny Toftness.
14 Q They were present during your preparation for this
15 deposition?
16 A Not in my preparation for this one.
17 Q What were you referring to when you said that they
18 were present?
19 A I would say just in -- on the topic of depositions
20 overall.
21 Q So you discussed your testimony that you were going
22 to give today with Speaker Vos and Jenny Toftness?
23 A No.
24 Q What did you discuss with them?
25 MR. STADLER: Well, again I would

14

1 offer an objection that it's privileged.
2 MS. COLOMBO: His discussions with his
3 boss are privileged; is that what you're saying,
4 Ron?
5 MR. STADLER: Correct.
6 MS. COLOMBO: I'm asking about his
7 conversations with Speaker Vos.
8 MR. STADLER: Correct.
9 MS. COLOMBO: Okay, but about his
10 testimony.
11 MR. STADLER: It would be
12 privileged.
13 MS. COLOMBO: About the testimony that
14 Mr. Vos --
15 A I didn't discuss my testimony with Speaker Vos.
16 Q Okay. Did you review any documents to prepare for
17 this deposition today?
18 A I did.
19 Q What type of documents did you review?
20 A The interrogatories that we turned over to you, the
21 DOJ guideline on open government and open records.
22 Q Anything else?
23 A No, that's it.
24 Q Did you -- so you said that you spoke with
25 Jenny Toftness. Who is Jenny Toftness?

15

1 A My boss, the chief of staff.
2 Q And Speaker Vos' -- she's your direct supervisor?
3 A That's correct.
4 Q Okay. Did you speak with any consultants or
5 contractors regarding your testimony?
6 A No.
7 Q Have you ever given testimony before?
8 A No.
9 Q Okay. I'm just going to ask a few questions around
10 your background. What is the highest level of
11 education that you've attained?
12 A J.D.
13 Q Where did you go to law school?
14 A Indiana University.
15 Q And when did you graduate?
16 A 2006.
17 Q Are you -- what -- sorry, strike that. What's your
18 current employment?
19 A State of Wisconsin.
20 Q And what's your title?
21 A General counsel in the State Assembly.
22 Q In Speaker Vos' office?
23 A That's correct.
24 Q How long have you been in that position?
25 A About two years.

16

1 Q Did you hold any positions in Speaker Vos' office
 2 before that?
 3 A Yes.
 4 Q What were those positions?
 5 A Legal and policy advisor.
 6 Q Okay. And how long have you been with Speaker Vos'
 7 office in total?
 8 A About five years.
 9 Q Okay. Can you just briefly describe your job
 10 responsibilities in your current role in Speaker Vos'
 11 office?
 12 A With regards to open records?
 13 Q In general, just briefly.
 14 A Well, I act as general counsel to our outside counsel
 15 with regard to litigation and other matters. I, of
 16 course, handle open records for the office and also
 17 act as an open records liaison for the rest of the
 18 Assembly, and I handle some policy and some other
 19 various administrative tasks.
 20 Q Okay. And can you describe -- you talked about a
 21 couple different open records-related
 22 responsibilities, so can you describe first what you
 23 meant by being a liaison to the Assembly?
 24 A If other staffers or members of the Assembly have
 25 questions regarding open records, they can sort of

17

1 reach out to me and seek sort of some advice as to
 2 how to handle particular open records requests or
 3 just in general.
 4 Q Okay. And what are your responsibilities in
 5 Speaker Vos' office?
 6 A In regards to open records?
 7 Q Yes, in regards to open records.
 8 A Well, I mean, I just handle the administration of
 9 them. So, I mean, I can elaborate on that if you
 10 want or I can just leave it at that.
 11 Q Yes, please do.
 12 A So I make sure the open records basically gets
 13 communicated to the Chief Clerk's Office, which is
 14 what all offices are generally asked to do. And I
 15 make sure that record then gets communicated to the
 16 rest of the staff members so they can conduct their
 17 search, and I make sure that they get their records
 18 turned in or that they have turned in their records,
 19 and I sort of answer any questions they may have if
 20 those come up. And finally, you know, I turn those
 21 over to the Chief Clerk's Office so they can turn
 22 turn those over to the requester.
 23 Q Okay. Do you in -- and you're familiar with the open
 24 records law generally?
 25 A In general.

18

1 MS. COLOMBO: Okay. Let's do
 2 Exhibit 13.
 3 (Exhibit 13 is shared on the video screen)
 4 Q Have you seen this document before?
 5 A I have.
 6 Q And this is Speaker Vos' interrogatory responses --
 7 A Correct.
 8 Q -- in this case?
 9 A Correct.
 10 Q Okay. Let's just stay on the last page for a second.
 11 So this is a Verification of those responses, and I
 12 see that your name is in the signature line. Is that
 13 your signature?
 14 A Yes.
 15 Q And it's not dated, but the notarization says
 16 January 4th. Did you sign this on January 4th?
 17 A I believe so.
 18 Q Okay. And is it correct that you're verifying that
 19 to the best of your knowledge the December 1st
 20 interrogatory responses are true and correct?
 21 A That's correct.
 22 Q Okay. And did you review those responses before they
 23 were submitted on December 1st?
 24 A Can you repeat that, please?
 25 Q What I'm getting at is the Verification is signed on

19

1 January 4th, so I'm confirming that you reviewed the
 2 responses before they were submitted on December 1st,
 3 which is the date of the interrogatory responses.
 4 A That's correct.
 5 Q Okay. Let's look at Interrogatory Response No. 3.
 6 THE REPORTER: Excuse me. Before we
 7 do that, can I just go off the record for one
 8 second?
 9 MS. COLOMBO: Sure.
 10 THE REPORTER: I'll be right back.
 11 Sorry about this.
 12 THE VIDEOGRAPHER: We are off the
 13 record. The time is 9:24.
 14 (Discussion off the record)
 15 THE VIDEOGRAPHER: We are back on the
 16 record. The time is 9:27.
 17 EXAMINATION (RESUMED)
 18 BY MS. COLOMBO:
 19 Q Okay. We were looking at Interrogatory No. 3 and the
 20 response to Interrogatory No. 3, so if you could just
 21 read your response or Speaker Vos' response.
 22 A "Steve Fawcett."
 23 Q And this is referring to individuals with duties with
 24 respect to coordinating, managing or otherwise
 25 administering Speaker Vos' responses to open records

20

1 requests; is that correct?
 2 A That's correct.
 3 Q And you're identified as the individual with those
 4 duties?
 5 A Correct.
 6 Q Yes. So can you describe -- you described it a
 7 little bit, but can you just describe what you do to
 8 coordinate the responses to this in particular?
 9 A I don't know what you mean by coordinate.
 10 Q Well, you're listed here as the person who
 11 coordinates the responses, so whatever that means to
 12 you.
 13 MR. STADLER: Well, I'll object as a
 14 mischaracterization. He's listed as somebody
 15 who coordinates, manages or otherwise
 16 administers the responses.
 17 Q Okay. So what do you do to administer the responses?
 18 A Send them to the Chief Clerk's Office.
 19 Q What do you do -- you described that you have duties
 20 with respect to the collection of records within the
 21 office. Can you talk a little bit about that?
 22 A I make sure people have conducted their search.
 23 Q Do you provide any instructions as to how to search
 24 for records?
 25 A It depends.

21

1 Q It depends on what? Can you elaborate, please?
 2 A The nature of the search. Or the nature of the
 3 request, I should say.
 4 Q Can you give an example of where you would provide
 5 instructions?
 6 A Where I would or where I would not?
 7 Q Where you would provide instructions.
 8 A A lot of times you have some unsophisticated
 9 requesters that ask for vague things or things that
 10 aren't open records or search parameters that aren't
 11 allowed, so in those cases I will instruct them to
 12 sort of stay within the confines of the open records
 13 law.
 14 Q And when you said them, that's referring to staff in
 15 Speaker Vos' office?
 16 A That's correct.
 17 Q Do you ever provide instructions regarding searching
 18 for open records to Speaker Vos?
 19 A Yes.
 20 Q And same thing, clarifying what to search, that sort
 21 of thing?
 22 A Yes.
 23 Q Do you -- but again, it depends on the nature of the
 24 request?
 25 A Yes.

22

1 Q Roughly how much of your time is spent working on
 2 open records requests-related duties?
 3 A It varies.
 4 Q Just ballpark it.
 5 A It varies from day to day, week to week, month to
 6 month, so --
 7 Q Is it -- is it sometimes the bulk of your time?
 8 A I don't know what you mean by that.
 9 Q Would you -- are there weeks where you spend the
 10 majority of your time while working on open records
 11 requests?
 12 A Occasionally.
 13 Q Okay. Have your duties with respect to open records
 14 requests changed since you joined -- or since you
 15 took on the general counsel role in Speaker Vos'
 16 office?
 17 A No.
 18 Q Is anybody -- does anybody else have duties with
 19 respect to coordinating open records requests in
 20 Speaker Vos' office?
 21 A You'll have to define coordinating.
 22 Q Similar to your duties, I would say. Does anybody
 23 else have duties that overlap with yours?
 24 A Well, I mean, I have a duty to search like everybody
 25 else. Outside of that, generally no.

23

1 Q Okay. Do you ever work with contractors or vendors
 2 when responding to open records requests?
 3 A In what regard?
 4 Q For example, for purposes of tech or IT issues?
 5 A No.
 6 Q Do you work with outside counsel ever when responding
 7 to open records requests?
 8 A Occasionally.
 9 Q Okay. You're aware that American Oversight, the
 10 plaintiff in this case, has submitted open records
 11 requests to Speaker Vos' office; is that correct?
 12 A That's correct.
 13 Q And that 10 of those requests are at issue in this
 14 case; are you aware of that?
 15 A You'd have to put the exhibit in front of me. I
 16 don't know the exact number.
 17 Q Okay. Well, we'll do just that. So we'll start with
 18 the logical place, which is Exhibit 1.
 19 (Exhibit 1 is shared on the video screen)
 20 Q Okay. This is Exhibit 1. Are you familiar with this
 21 request? We can scroll through it.
 22 A It looks familiar.
 23 Q Okay. And if I told you that this was Exhibit 1 to
 24 the Complaint in this litigation, would that -- would
 25 that sound correct to you?

24

1 A I guess so.
 2 Q Okay. What did you do -- can we go back to the first
 3 page? You'll see that this request is dated May 28,
 4 2021. Do you see that?
 5 A Yes.
 6 Q Okay. What did you do with this request when you
 7 received it?
 8 A This specific request?
 9 Q Yes.
 10 A I don't remember.
 11 Q Well, by looking at this request, what would you have
 12 done? What would you have, if you don't remember
 13 specifically, looking at the documents that are
 14 requested?
 15 A What do you mean?
 16 Q For example, did you notify staff of this request?
 17 A I don't remember specifically.
 18 Q Would you have documents that reflect you notifying
 19 staff?
 20 A Possibly.
 21 Q What sort of documents?
 22 A There would be an email.
 23 Q And can you describe that email?
 24 A The specific email?
 25 Q Yes, with respect to this request.

25

1 A I don't remember that specific email.
 2 Q Well, do you have an email that you typically send
 3 regarding open records requests?
 4 A I do.
 5 Q And would you have sent that with respect to this
 6 request?
 7 A Most likely.
 8 Q But you don't recall?
 9 A No.
 10 Q Would your office have retained that email?
 11 A I don't know.
 12 Q Meaning you don't know if you've deleted it?
 13 A Correct.
 14 Q Who would you have notified of this request?
 15 A This specific one?
 16 Q Yes.
 17 A I don't remember.
 18 Q Can we go to the second page? So when you receive a
 19 request like this, who would you typically notify?
 20 A The staff members and Speaker Vos.
 21 Q And you said you would notify them by email?
 22 A That's correct.
 23 Q Who decides who might have records responsive to a
 24 request like this?
 25 A No one.

26

1 Q Sorry, you said no one?
 2 A Yeah. With few exceptions, it's everybody searches
 3 for a request that comes in.
 4 Q And how do you -- do you confirm that everybody has
 5 conducted a search?
 6 A Define confirm.
 7 Q Do you ask?
 8 A No.
 9 Q Do you have a system for confirming that everybody
 10 has conducted a search?
 11 A Yes.
 12 Q What's that system?
 13 A A signed sheet.
 14 Q Saying whether they've searched for records?
 15 A Well, I mean, their signature signifies that they
 16 have.
 17 Q And everybody signs the sheet before you complete
 18 your response to a request?
 19 A No.
 20 Q In what cases would you respond to requests without
 21 everybody doing that?
 22 A In some narrow tailored circumstances where they ask
 23 for something specific that only one person might
 24 have or have access to, I would not make everybody
 25 search for them.

27

1 Q So in those situations you would make a judgment that
 2 only a certain person or people in the office would
 3 have responsive records --
 4 A That's correct.
 5 Q -- is that right? Do you ever -- do you ever recall
 6 consulting with Speaker Vos about this request?
 7 A I don't recall.
 8 Q Looking at the content of the request, is this the
 9 type of request that you would have consulted with
 10 Speaker Vos about?
 11 (Witness examines document)
 12 A No.
 13 Q Why not?
 14 A There's nothing there to consult him about.
 15 Q What do you mean by that?
 16 A What do you mean by that?
 17 Q Well, in -- what about this request makes you say
 18 that there's nothing to consult with Speaker Vos?
 19 Are you saying that he doesn't have -- he would not
 20 have records related to this request?
 21 A So I guess we'll go back to consult. If you want to
 22 define that a little further, I guess I can
 23 reconsider my answer, but he will search for the
 24 request like everyone else for the accounts that he
 25 has sole access to.

28

1 Q Other than searching, would you have discussed this
 2 request with Speaker Vos?
 3 A In general, this type of request?
 4 Q Yes.
 5 A No.
 6 Q Did you provide any instructions regarding how to
 7 search for records?
 8 A I don't remember.
 9 Q Would you -- would you have typically provided search
 10 terms in response to a request like this?
 11 A For a request like this?
 12 Q Yeah.
 13 (Witness examines document)
 14 A No.
 15 Q Would you have provided guidance regarding the time
 16 frame of documents that might be responsive?
 17 A Other than what you've put in this request as far as
 18 time frame goes?
 19 Q Yes.
 20 A Yes.
 21 Q What instructions would you have given?
 22 A To complete the search through the date of the open
 23 records request.
 24 Q Through the date of the open records request?
 25 A That's correct.

29

1 Q So that's May 28th in this case?
 2 A It looks like it.
 3 Q Would you have instructed for staff to search for
 4 records after that date?
 5 A No.
 6 Q Why not?
 7 A It's not in compliance with open records law.
 8 Q Can you elaborate on that?
 9 A You want me to give you legal advice on open records
 10 law in Wisconsin?
 11 Q Well, the request, if you go to the -- it requests
 12 records through the date of the search, so I'm just
 13 confirming when you would have instructed staff to
 14 stop, on what date you would have instructed staff to
 15 stop searching for records.
 16 MR. STADLER: I'll object to the form
 17 of the question as vague and ambiguous and
 18 compound.
 19 Q Yeah, I can rephrase that. So my question is, I'm
 20 just confirming that after May 28th -- sorry, strike
 21 that. The instructions that you gave to staff for
 22 purposes of searching for records in response to this
 23 request said to search for records through May 28th;
 24 is that correct?
 25 MR. STADLER: Objection, calls for

30

1 speculation.
 2 Q You can answer.
 3 A You have to repeat the question.
 4 Q The instructions that you gave to staff regarding
 5 this request would have -- looking at the face of
 6 this request, is it your understanding that you
 7 would have told staff to search for records through
 8 May 28th?
 9 A This particular request?
 10 Q Yes.
 11 A I don't remember.
 12 Q But you just -- you just said that you would have
 13 instructed staff in general to search for records
 14 through the date the request is received. Did I --
 15 is that correct?
 16 A I believe so.
 17 Q Okay. But you just don't recall with respect to this
 18 particular request what you asked for?
 19 A That's correct.
 20 Q Would you have searched shared drives in response to
 21 this request?
 22 A I didn't quite understand the question. Can you
 23 repeat it, please?
 24 Q Does Speaker Vos' -- I'll go go back. Does
 25 Speaker Vos' office utilize any shared drives,

31

1 shared file drives?
 2 A There was a noise outside. I apologize. Could
 3 you -- what type of drives are you asking if we have?
 4 Q Any shared folders or shared drives where you
 5 maintain records in Speaker Vos' office.
 6 A Shared, yes.
 7 Q And would you have searched those drives in response
 8 to this request?
 9 A Yes.
 10 Q Who does that search?
 11 A It depends.
 12 Q In this case looking at this request, who would have
 13 done the search?
 14 A I don't recall.
 15 Q Are there particular -- would you ever do the search?
 16 A I conduct a search, yes.
 17 Q Of the shared drives, I'm asking about in particular.
 18 A Of the specific folder assigned to me, I conduct --
 19 on the shared drive, I conduct searches, yes.
 20 Q Okay. Do your instructions to staff include an
 21 instruction to search the shared drives that they
 22 use?
 23 A I don't recall.
 24 Q Do you typically instruct staff to search shared
 25 drives?

32

1 A In what regard?
 2 Q In regard to open records requests, do you typically
 3 ask staff to search for files that might be stored on
 4 shared drives?
 5 A Do I typically personally ask them to do that, is
 6 that the question?
 7 Q Yes, and then when you inform them of the request,
 8 which you explained earlier you typically do.
 9 A I can't recall.
 10 Q You can't recall whether you would have asked staff
 11 to search shared drives?
 12 A That's correct.
 13 Q Would you have any record of which files or drives
 14 were searched in response to this request?
 15 A No.
 16 Q You don't maintain those records?
 17 A I don't know how to obtain a record, such a record.
 18 Q You don't catalog -- do you catalog in any way what
 19 searches are done in response to an open records
 20 request?
 21 A You'll have to define catalog.
 22 Q Do you in any way memorialize the searches that are
 23 done in response to an open records request?
 24 A None that I can think of outside of the sheet asking
 25 for people to confirm that they've searched.

33

1 Q Do you store in Speaker Vos' office paper records in
 2 any particular way?
 3 A No.
 4 Q Is there any way to systematically identify
 5 responsive records?
 6 A No. You know, I can only speak for myself. I mean,
 7 I can't answer that on behalf of an entire office.
 8 Q So the way that records might be identified would be
 9 based on an individual's own knowledge of how they
 10 store their own records --
 11 A That's correct.
 12 Q -- am I correct? Do you have any understanding of
 13 how staff in Speaker Vos' office store records?
 14 A Yes.
 15 Q What's that understanding?
 16 A They put them in files, in desk drawers, other
 17 cabinets.
 18 Q Do you know where staff in Speaker Vos' office might
 19 store -- actually, strike that. Do you have an
 20 understanding of how Speaker Vos stores records?
 21 A No.
 22 Q When -- does Speaker Vos ever ask staff to do
 23 searches in response to open records requests on his
 24 behalf?
 25 A I'm going to ask you to rephrase that question.

35

1 Q So do you have any way of knowing what those searches
 2 entailed?
 3 A Whose searches?
 4 Q Staff in Speaker Vos' office.
 5 A Yes.
 6 Q How do you know?
 7 A I could ask them.
 8 Q Do you typically ask them?
 9 A Not typically.
 10 Q Did you ask them in response to this request?
 11 A I don't remember.
 12 Q Do you have any way of knowing what Speaker Vos has
 13 done to search in response to open records requests?
 14 A Yes.
 15 Q You can ask him?
 16 A That's correct.
 17 Q Is there any other way?
 18 A Not that I can think of.
 19 Q Did you ask him about this request?
 20 A I can't remember.
 21 Q Did you search for paper records in response to this
 22 request? By you -- let me strike that. Would
 23 Speaker Vos -- did Speaker Vos' office search for
 24 records in response to this request?
 25 A I can't remember.

34

1 Q Let's take an example. Looking at Speaker Vos'
 2 email, does Speaker Vos use email?
 3 A Yes.
 4 Q Does he ever in response to open records requests
 5 have staff search his email as opposed to doing it
 6 himself?
 7 A Yes. It's -- his email accounts are accessible to
 8 some staff, who conduct the searches.
 9 Q Okay. Is that the typical process for responding to
 10 open records requests?
 11 A Yes.
 12 Q And who are those staff who might do those searches?
 13 A It's generally our front office admin assistant.
 14 Q And what instructions have they been given about how
 15 to search for records in response to open records
 16 requests?
 17 A I mean, I guess you'd have to -- you're asking me
 18 what instructions I give them?
 19 Q Yes.
 20 A It varies on the request.
 21 Q Have you trained them on how to search Speaker Vos'
 22 email accounts in response to open records requests?
 23 A Not -- not with specificity to Speaker Vos.
 24 Q Have you provided general training around responding
 25 to open records requests?

36

1 A Yes.

2 Q What does that training look like?

3 A It's more or less a brief presentation along with

4 LTSB to our staffers on sort of the general -- really

5 the DOJ guide to open records and our Assembly Policy

6 Manual and just generally how to conduct open records

7 in an office.

8 Q You said something I didn't catch. LTSB, is that

9 correct?

10 A That's correct.

11 Q What does that refer to?

12 A That's our Legislative Service Bureau.

13 Q Got it, okay. Do you -- in that training do you

14 provide instructions on how to locate responsive

15 records?

16 A I wouldn't say instructions.

17 Q Guidance, do you provide guidance?

18 A Yes, some general guidance.

19 Q What's that guidance?

20 A It's been a few years. I can't remember with any

21 specificity what guidance I would have given them.

22 Q You said it's been a few years since you provided

23 that training?

24 A Yes. That would be pre the COVID-19 pandemic and

25 people out of the building when we had our last one.

37

1 Q Has the office hired new staff since that time?

2 A Yes.

3 Q And has that staff received the training on open

4 records?

5 A You'd have to ask them.

6 Q Is there anybody else in the office other than you

7 who would provide that training?

8 A The general Assembly staff-wide training?

9 Q The training that you described regarding the open

10 records requests.

11 A The chief clerk usually spoke about his role in the

12 process as well.

13 Q To your knowledge, have new staff received training

14 regarding open records responses?

15 A I don't know.

16 Q How long has Vos' administrative assistant or what

17 you referred to as the front office, how long have

18 those people been with Speaker Vos' office, the

19 people who currently hold those roles?

20 A You'd have to ask them.

21 Q Do you know if they received the training regarding

22 open records requests?

23 A I do not.

24 Q Does staff have access to Speaker Vos' personal

25 accounts?

38

1 A I do not.

2 Q Do you know if any staff have access to Speaker Vos'

3 personal accounts?

4 A I don't know.

5 Q When you receive an open records request do you

6 instruct staff and Speaker Vos to search personal

7 records that are used for government business,

8 personal accounts, I should say?

9 A Are you asking in general?

10 Q In general, yes.

11 A I can't remember.

12 Q You can't remember if you've ever provided

13 instructions to search personal accounts?

14 A Are you asking me if I've ever done it or if I do it

15 in general?

16 Q If you've ever done it.

17 A Yes, I have.

18 Q In what context?

19 A In the context that there might be or I guess that

20 there's a reasonable likelihood that there would be a

21 record that's relevant to open records.

22 Q Have you asked staff to search personal accounts in

23 response to American Oversight's requests?

24 A I can't remember.

25 Q Have you asked Speaker Vos to search personal

39

1 accounts?

2 A I can't remember.

3 Q And that's you can't remember in response to whether

4 you've asked Speaker Vos to search personal accounts

5 in response to American Oversight's requests?

6 A That's correct.

7 Q Would you have any -- no, strike that. Have you ever

8 received an email from Speaker Vos from one of his

9 personal accounts?

10 A Yes.

11 Q And that related to work; is that correct?

12 A Yes.

13 Q What do you do to determine whether there's a

14 reasonable likelihood that a document responsive to

15 an open records request would exist in Speaker Vos'

16 personal accounts?

17 A Well, a good sort of clue would be if throughout the

18 searches in other documents other people are sort of

19 coming to me showing me that somebody has sent one

20 from a personal account, in which case, you know, the

21 general practice would be to instruct that person to

22 go back and make a search of all their personal

23 accounts.

24 Q And would you have asked Speaker Vos to search

25 personal accounts -- sorry, strike that. How would

40

1 you have asked Speaker Vos to search personal
 2 accounts in those situations?
 3 A I would have an admin assistant do it.
 4 Q You'd have the administrative assistant search which
 5 accounts?
 6 A I don't know. You're talking about a hypothetical, I
 7 mean.
 8 Q In situations where you've asked — you've determined
 9 that Speaker Vos may have responsive records in a
 10 personal account, what do you do?
 11 A I tell our admin assistant to make sure that he sets
 12 a time to complete, you know, his search by getting
 13 Speaker Vos in and conducting the relevant search
 14 that needs to be done with Speaker Vos that can't be
 15 done by staff.
 16 Q And what accounts, in your understanding, would that
 17 include?
 18 A Well, any account where there might reasonably be a
 19 record.
 20 Q Have you ever asked Speaker Vos to search his text
 21 messages?
 22 A Yes.
 23 Q Have you asked Speaker Vos to search text messages in
 24 response to any of American Oversight's requests?
 25 A I can't remember.

41

1 Q Would you have any record of asking Speaker Vos to
 2 search his personal accounts?
 3 A No.
 4 Q You don't -- do you ask by email?
 5 A No.
 6 Q You ask in person?
 7 A In general.
 8 Q When you don't ask in person, how do you ask?
 9 A Are you asking hypothetically or —
 10 Q In the situations -- you said in the situations where
 11 you've asked Speaker Vos to search personal accounts.
 12 A Again, I'd have our administrative assistant do it.
 13 Q You would communicate with the administrative
 14 assistant?
 15 A That's right.
 16 Q Okay. Do you communicate with the administrative
 17 assistant via email?
 18 A Sometimes.
 19 Q Okay. Have you ever received any text messages from
 20 Speaker Vos?
 21 A Yes.
 22 Q Have you ever received any text messages from
 23 Speaker Vos regarding the Assembly's election
 24 investigation?
 25 A I can't recall specifically, but I'm sure I have.

42

1 Q And when I talk about the Assembly's election
 2 investigation, are we on the same page that we're
 3 talking about the investigations into the 2020
 4 election, including the investigation currently being
 5 conducted by the Assembly Office of Special Counsel?
 6 A Yes.
 7 Q Okay. And this would also include any investigations
 8 that were announced by Speaker Vos in May of this
 9 year?
 10 A Yes.
 11 Q Okay. Do you review records before they've released
 12 to requesters?
 13 A Occasionally.
 14 Q What do you do in that review?
 15 A It depends.
 16 Q Let's look at Exhibit 2. While we're pulling that
 17 up, let me just ask and go back to one thing we were
 18 talking about. We were talking about text messages
 19 with Speaker Vos. Have you searched for texts with
 20 Speaker Vos in response to any of American
 21 Oversight's requests? I'm asking about your own text
 22 messages.
 23 A Specifically, I can't recall.
 24 (Exhibit 2 is shared on the video screen)
 25 Q Okay. Let's go to Page 2 of this request. Let me

43

1 know if you'd like to review the whole thing, but I'm
 2 going to ask a few questions about this page.
 3 A Sure.
 4 (Witness examines document)
 5 Q Have you had a chance to review?
 6 A Yes.
 7 Q Okay. Are you familiar with this request?
 8 A In what regard?
 9 Q Have you seen it before?
 10 A I'm sure that I have.
 11 Q And you're aware generally that American Oversight
 12 has submitted requests -- looking at the first
 13 paragraph, the first indented paragraph, that
 14 American Oversight has submitted requests for
 15 communications regarding the Legislature's
 16 investigation of the 2020 election?
 17 A That's correct.
 18 Q And that American Oversight has submitted several
 19 requests asking for those communications? Are you
 20 aware?
 21 A That's correct.
 22 Q Okay. What did you do to search for communications
 23 regarding the Legislature's investigation of the 2020
 24 election in response to this request?
 25 A I don't remember.

44

1 Q Well, looking at -- looking at the language of the
2 request, would you have provided search terms to
3 staff?
4 A It's hard to say.
5 Q Who would have communications responsive to this
6 request?
7 A I don't know.
8 Q Was that, "I don't know"?
9 A That's correct.
10 Q Would Speaker Vos have communications responsive to
11 this request?
12 A I don't know. That's why we make everybody do a
13 search.
14 Q In your -- in your judgment, would Speaker Vos likely
15 have had records responsive to this request, looking
16 at the text of the request?
17 MR. STADLER: Objection, it calls for
18 speculation.
19 Q The question is whether you -- looking at the text of
20 this request, whether it is your understanding that
21 Speaker Vos has communications regarding the
22 election, has made communications regarding the
23 election investigation?
24 A I have no idea.
25 MR. STADLER: Same.

45

1 A Over what time frame?
2 Q Over a month.
3 A Maybe a couple times, give or take.
4 Q Okay. But it's a regular form of communication that
5 you use with Speaker Vos; is that correct?
6 A You declined to define regular, so if regular to you
7 is a couple times a month, then you can refer to it
8 as regular. That's not how I would define regular,
9 but to each their own.
10 Q What I'm asking is do you text with Speaker -- do you
11 consider texts to be a mode of communicating with
12 Speaker Vos that you use?
13 A Regularly?
14 Q Sure.
15 A Well, again, do you want to define regularly?
16 Q I think the question is whether you -- if you need to
17 communicate with Speaker Vos, wouldn't text be one of
18 of the options you would consider?
19 A Yes.
20 Q Okay. Do you use other forms of messaging other than
21 email or text?
22 A With Speaker Vos?
23 Q Yes.
24 A No.
25 Q You don't use any other messaging applications like,

47

1 Q Have you ever communicated with him regarding the
2 election investigation?
3 A Yes.
4 Q By email?
5 A It's hard to say, possibly.
6 Q Do you regularly communicate with Speaker Vos by
7 email?
8 A Define regularly.
9 Q Do you communicate with Speaker Vos by email daily?
10 A It depends.
11 Q Weekly?
12 A Yes.
13 Q How often do you text with Speaker Vos?
14 A That's hard to say.
15 Q Daily, do you text daily?
16 A No.
17 Q Would you say that you text weekly?
18 A No.
19 Q Do you recall -- do you text with Speaker Vos -- or
20 how often -- strike that. How often, roughly, would
21 you say that you text with Speaker Vos?
22 A Again, it's hard to say.
23 Q Can you estimate?
24 A What do you want, like an average?
25 Q Sure, an average.

46

1 for example, Signal or Confide?
2 A No.
3 Q Okay. Do you use those applications to communicate
4 with anybody else from Speaker Vos' office?
5 A No.
6 Q Do you use those applications to communicate about
7 work?
8 A Didn't I just answer no to the last two questions?
9 Q Yes, you said you don't use any other messaging
10 applications to communicate with either Speaker Vos
11 or any other staff. Is that wrong?
12 A That's correct. And then you asked me if I use them
13 to communicate about work.
14 Q For example, with a vendor or a contractor or staff
15 in an office other than Speaker Vos' office.
16 A No. Again, I answered no, that I don't have those
17 and don't use those to communicate.
18 MS. COLOMBO: Okay. We've been going
19 for about an hour. Should we take a quick
20 break?
21 THE WITNESS: I'm fine.
22 MS. COLOMBO: Okay. Just like a
23 couple minutes.
24 MR. STADLER: Let's do five minutes.
25 We'll come back on at 10:20.

48

1 MS. COLOMBO: Okay.
 2 THE VIDEOGRAPHER: We are off the
 3 record at 10:14.
 4 (A recess is taken)
 5 (10:14 a.m. to 10:24 a.m.)
 6 THE VIDEOGRAPHER: We are back on the
 7 record. The time is 10:24 a.m.
 8 EXAMINATION (RESUMED)
 9 BY MS. COLOMBO:
 10 Q Okay. We're going to shift gears a little bit, and I
 11 wanted to ask does Speaker Vos' office have a policy
 12 or procedure to preserve records responsive to open
 13 records requests?
 14 MR. STADLER: I'll object to the form
 15 of the question as vague and ambiguous.
 16 Q You can answer.
 17 A I guess define policy or procedure.
 18 Q Do you have any formal processes for preserving
 19 records responsive to open records requests?
 20 A No, nothing formal.
 21 Q Do you have an informal process within Speaker Vos'
 22 office for preserving records responsive to open
 23 records requests?
 24 A Well, I mean, in general everybody has a duty to
 25 comply with the law, so if it extends past that, it's

49

1 Q Can people manually delete records?
 2 A We can.
 3 Q Is there any -- do you take any steps to prevent
 4 manual deletion of records?
 5 A Do I personally?
 6 Q Yes.
 7 A I mean, on behalf of myself, I just don't generally
 8 delete records that are within a date range of any
 9 open search.
 10 Q You don't delete any records or records that are
 11 described in a request?
 12 A Any.
 13 Q Are you -- do you currently delete records?
 14 A If we're in a date range where there's no open
 15 records request covering it, yes.
 16 Q After American Oversight submitted the requests that
 17 we looked at earlier that are dated May 28th, did you
 18 delete any records regarding the election
 19 investigation being conducted by the Assembly?
 20 A I don't remember.
 21 Q You don't remember if you've deleted any records
 22 regarding the election investigation? Sorry, I
 23 didn't hear your answer.
 24 A I specifically cannot recall deleting any records as
 25 you described.

51

1 simply just not to, you know, discard any records
 2 that might be subject to a search.
 3 Q What steps does Speaker Vos' office take to ensure
 4 that records responsive to open records requests are
 5 not discarded?
 6 A I mean, there's generally not other than, again, the
 7 training that people go through.
 8 Q Does that training include instruction regarding when
 9 to preserve records?
 10 A I can't remember specifically.
 11 Q What's your understanding of when records should be
 12 preserved in Speaker Vos' office?
 13 A Again, any records that are potentially open to a
 14 search are records that should be preserved.
 15 Q So we looked earlier at a couple of American
 16 Oversight's requests. What steps did Speaker Vos'
 17 office take to preserve records responsive to these
 18 requests?
 19 A I can't remember.
 20 Q Would you have taken any steps typically to preserve
 21 records in response to an open records request?
 22 A I mean, what kind of steps are you looking for?
 23 Q Does Speaker Vos' office have an automatic deletion
 24 system for any records?
 25 A Not that I know of.

50

1 Q Do you use personal email for work?
 2 A No.
 3 Q Do you ever search your personal email in response to
 4 open records requests?
 5 A Not unless I would have a reason to.
 6 Q But you don't use personal email for work?
 7 A That's correct.
 8 Q When would you have a reason to then?
 9 A Well, I wouldn't generally.
 10 Q The staff in Speaker Vos' office, when do they --
 11 sorry, strike that. When -- the requests that
 12 American Oversight submitted on May 28th, when did --
 13 when would staff typically become aware that a
 14 request has been submitted? Do you circulate that
 15 immediately?
 16 Q Are you asking me specifically with relation to
 17 May 28th requests or in general?
 18 Q With respect to the May 28th requests.
 19 A I don't remember.
 20 Q Do you typically inform staff immediately upon
 21 receipt of an open records request?
 22 A Define immediately.
 23 Q On the same day.
 24 A I would say not generally.
 25 Q In general, between receipt of a request and

52

1 informing staff, how much time goes by?
 2 A Well, it really depends on, you know, the amount of
 3 requests we have and the amount we've received on a
 4 particular day, but we generally try to get them
 5 turned around in a couple days to a week.
 6 MS. COLOMBO: Okay. Can we look at,
 7 Christa -- I'm just going to look for an exhibit
 8 number. Can we look at Exhibit 25?
 9 (Exhibit 25 is shared on the video screen)
 10 Q Okay. We can stop on the first -- this is a series
 11 of emails, but I'm looking at the first three pages
 12 of this exhibit. Okay. We can start on this third
 13 page here. So does this email look familiar to you?
 14 A Sure, yes.
 15 Q And you can see that the email from AO Records is
 16 dated August 13th?
 17 A Yes.
 18 Q And then there's an email that forwards to you also
 19 dated August 13th?
 20 A Yes.
 21 Q Okay. Let's go up to the beginning. Okay. And then
 22 this is an email that you wrote on August 26th or
 23 sent on August 26th?
 24 A It appears so.
 25 Q Okay. And is this an example of the emails that you

53

1 were describing earlier regarding informing staff
 2 regarding open records requests?
 3 A Yes.
 4 Q Would you have informed staff about the open records
 5 requests referred to in this email prior to sending
 6 this email?
 7 A I don't recall.
 8 Q Do you have any reason to believe that you would have
 9 informed staff of this open records request prior to
 10 sending this email?
 11 A I don't know.
 12 Q So you have no basis to think that you would have
 13 informed staff about this open records request prior
 14 to sending this email; is that right?
 15 A I don't know, no.
 16 Q Looking through this email, does this email say
 17 anything about preserving documents? We can go to
 18 the next page as well.
 19 A No.
 20 Q Would you have given any oral instructions regarding
 21 preserving documents described in this request?
 22 A I don't recall.
 23 Q Do you have any reason to believe that you would have
 24 given those instructions?
 25 A In general?

54

1 Q In response to this particular request.
 2 A Well, I don't recall.
 3 Q Why did you send this request to this group of
 4 people?
 5 A Because these were the people working in our office
 6 at the time.
 7 Q This is the complete staff at the time; is that
 8 right?
 9 A To the best of my knowledge, yeah.
 10 Q Okay. Just very briefly, I'm just going to ask you
 11 about who each of these people are. So Vos, Robin, I
 12 assume that's Speaker Vos?
 13 A Correct.
 14 Q And Jenny Toftness, that's Speaker Vos' chief of
 15 staff?
 16 A Correct.
 17 Q Okay. Who is Abbey Fabick? And I apologize if I
 18 mispronounce any of these names.
 19 A She's a policy advisor.
 20 Q What's her -- is she a policy advisor to Speaker Vos?
 21 A That's correct.
 22 Q Who is Moriah Thiry?
 23 A She's a policy advisor.
 24 Q She has the same job as Abbey Fabick?
 25 A That's correct.

55

1 Q And how about Adam King?
 2 A He was a social media director.
 3 Q Okay. Does that entail he runs -- well, what does
 4 that entail, just very generally?
 5 A I don't know.
 6 Q Okay. Who is Amanda Ledtke?
 7 A She was an administrative assistant.
 8 Q You said was. Is she no longer with Speaker Vos'
 9 office?
 10 A That's correct.
 11 Q Okay. When did she leave?
 12 A I don't remember.
 13 Q Roughly, do you recall?
 14 A The summer, the fall.
 15 Q Okay. Who's Kelly Smith?
 16 A She's our videographer.
 17 Q Sydney Robson, who's that?
 18 A She was an intern.
 19 Q How about Jake Wolf?
 20 A He's a policy advisor.
 21 Q Just two more. Angela Joyce?
 22 A She's our comms director.
 23 Q And Tyler Clark?
 24 A He's our policy -- he's a policy advisor.
 25 Q Okay. Would any of these people -- you talked

56

1 earlier about front office staff that have access to
 2 Speaker Vos' emails. Would any of these people have
 3 access to Speaker Vos' emails?
 4 A The only one I can say for sure would have been the
 5 administrative assistant.
 6 Q That's Amanda Ledtke?
 7 A That's correct.
 8 Q Okay. This request -- you can see I'm just reading
 9 from the red language on the screen -- it asks for,
 10 "All records reflecting communications," and then I'm
 11 going to skip a bunch, and then it says, "Sent or
 12 received by Representative Robin Vos or anybody
 13 communicating on his behalf," and then skipping down
 14 further, "Regarding any investigations of the 2020
 15 election." What -- would you have records responsive
 16 to this request?
 17 A I can't remember.
 18 Q Do you communicate about the 2020 election? I think
 19 you said yes earlier, but I might be misremembering.
 20 A Yes, I've communicated with Speaker Vos about the
 21 election investigation.
 22 Q Okay. Did you instruct Ms. Ledtke to search
 23 Speaker Vos' communications in response to this
 24 request?
 25 A I can't remember what I instructed her.

57

1 Q Was anything done to preserve Ms. Ledtke's emails
 2 after she left Speaker Vos' office?
 3 A I don't know.
 4 Q Are there any -- who would be responsible for
 5 ensuring that her emails are preserved?
 6 A I don't know.
 7 Q Would you agree that if she had emails reflecting
 8 communications regarding any investigation of the
 9 2020 election that haven't been produced in response
 10 to open records requests that those emails should be
 11 preserved?
 12 A Yes.
 13 Q But you don't know whether those emails have been
 14 preserved?
 15 A Well, I have no knowledge that she didn't produce
 16 any.
 17 Q Are you aware that Speaker Vos' office hasn't
 18 produced any records in response to this request?
 19 A I don't recall.
 20 Q Are you aware that Speaker Vos' office hasn't denied
 21 this request?
 22 A I don't recall.
 23 Q What steps -- this email was circulated on
 24 August 26th. What steps has Speaker Vos' office
 25 taken since that date to respond to the request

58

1 that's reflected in this email?
 2 A We would have taken the same steps we take for every
 3 other open records request.
 4 Q Do you know why the documents haven't been produced
 5 in response to this request?
 6 A Well, in this one, again, I do not recall. In
 7 general, if documents are not produced, it's because
 8 a search did not turn up any.
 9 Q Would it typically take four months from sending this
 10 sort of email to respond to an open records request?
 11 A Not typically.
 12 Q Are you aware of any steps that are being taken to
 13 fulfill this request?
 14 A Was this -- was this not fulfilled?
 15 Q Yeah, if I told you that this was not fulfilled,
 16 which is one of the allegations in the Complaint in
 17 this case --
 18 A We didn't --
 19 Q -- are you aware of why that is?
 20 A No, I don't remember specifically, no.
 21 Q And are you aware of what steps are being taken to
 22 fulfill this request, if any?
 23 A Again, that's something that I would work with our
 24 counsel. Once litigation starts, that's something
 25 that has to go through our outside counsel.

59

1 Q Between -- between the date that you sent this email
 2 and the commencement of litigation are you aware of
 3 any steps that were taken to fulfill this request?
 4 A Well, I --
 5 Q So since September -- sorry.
 6 A Is there a specific step you're thinking of?
 7 Q Well, you described earlier the documents, that
 8 documents would be searched for and then that
 9 documents would be collected and provided to the
 10 assembly clerk. Are you aware of whether any of
 11 those steps have been taken?
 12 A That's our routine for every open records request.
 13 Q So you don't know why this request hasn't been
 14 fulfilled; is that right?
 15 A Apparently it's a source of litigation.
 16 Q The litigation in this case was filed on
 17 October 18th. Do you know why -- were there any
 18 steps taken in the month of September in response to
 19 this request?
 20 A I don't know. I don't recall specifically.
 21 Q This request asks for communications, if you look at
 22 the first paragraph again, including communications
 23 from Joe Handrick. Joe Handrick, why is Joe Handrick
 24 not included in the distribution list here?
 25 A He no longer works for us.

60

01-31-2022
CIRCUIT COURT
DANE COUNTY, WI
2021CV003007

1 Q When did he leave the office?
 2 A I don't remember.
 3 Q Do you know if any steps were taken to preserve
 4 Joe Handrick's documents after he left the office?
 5 A He -- he left some of his files in one of the shared
 6 drives for people to use in the future.
 7 Q Did those files include emails?
 8 A I can't remember. I don't remember off the top of my
 9 head.
 10 Q Do you know if they included text messages?
 11 A I don't remember.
 12 Q So other than the litigation, is there any reason
 13 that you're aware of why this request hasn't been
 14 fulfilled?
 15 A No.
 16 Q Do you consider litigation to be a valid reason not
 17 to respond to a request?
 18 A Well, it will be responded to through the course of
 19 the litigation, so --
 20 Q Is that a -- is that a yes or a no?
 21 A Is what?
 22 Q Whether you consider litigation to be a valid reason
 23 not to respond to a request?
 24 MR. STADLER: Objection, asked and
 25 answered.

61

1 reflecting communications, telephone calls,
 2 calendar invitations --
 3 (Reporter disconnected from Zoom)
 4 (Following section inserted by the Reporter from the
 5 video record - Page 63, Line 6 through Page 64, Line 5)
 6 A That's pretty straightforward, but all records
 7 reflecting communications, telephone call logs,
 8 calendar invitations, calendar entries, meeting
 9 notices, meeting agendas, informational material,
 10 draft legislation, talking points, any handwritten or
 11 electronic notes, oral communications, summaries of
 12 any oral communications, sent or received by
 13 Representative Robin Vos or anyone communicating on
 14 his behalf, including but not limited to all the
 15 people listed below, such as Mike Sandrick,
 16 Mike Page (sic.), Michael Gableman, volunteers,
 17 advocacy groups and so on and so forth.
 18 Q So if there are communications encompassed by this
 19 request in personal accounts, those would be
 20 responsive to this request; is that true?
 21 A You'll have to repeat the question, please.
 22 MS. COLOMBO: Could the court reporter
 23 read back the question, please? Can we go off
 24 the record for a second?
 25 THE VIDEOGRAPHER: Sure. The time is

63

1 MS. COLOMBO: I don't believe that was
 2 answered. I was asking whether litigation is a
 3 valid reason to respond to -- not to respond to
 4 a request. I'm just looking for a yes or no.
 5 A Yes.
 6 Q Were any vendors asked to -- I'm sorry, strike that.
 7 Looking at this request, have you taken steps to
 8 preserve records on your personal devices or
 9 accounts?
 10 A Yes. I would not delete any records related to an
 11 open records request.
 12 Q And what would you understand this request to
 13 encompass?
 14 A All the criteria listed in red.
 15 Q Can you put that in your own words?
 16 MR. STADLER: I'm just going to offer
 17 an objection to the question. Are you asking
 18 him to reiterate what's in red?
 19 MS. COLOMBO: I'm asking what he
 20 understands this request to be asking for. He's
 21 saying that he wouldn't delete records
 22 responsive to this request. I'm asking to
 23 understand what his understanding is as to what
 24 those records are.
 25 A That's pretty straightforward, but all records

62

1 10:52. We are off the record.
 2 (Discussion off the record)
 3 (Reporter reconnected to Zoom)
 4 (Reporter reads back)
 5 THE VIDEOGRAPHER: We are back on the
 6 record at 11 a.m.
 7 EXAMINATION (RESUMED)
 8 BY MS. COLOMBO:
 9 Q Okay. Let's pull back up Exhibit 25. And if we
 10 could go to, I believe it's the fourth page of this,
 11 okay. Mr. Fawcett, is this an email that you sent on
 12 August 26th?
 13 A It appears to be.
 14 Q Just one moment. I'm not seeing Mr. Fawcett on my
 15 screen, so just give me a moment so I can adjust my
 16 Zoom here. Okay, there we go. And if we could go
 17 down to the next page, that one.
 18 So looking at the bottom of this page, do you
 19 see an email that was forwarded to you on
 20 August 13th?
 21 A Yes.
 22 Q Okay. And then this is another example of an email
 23 that you would send to staff regarding an open
 24 records request?
 25 A This is correct.

64

1 Q And based on the email that we looked at below, is it
 2 your understanding that that request was submitted on
 3 August 13th?
 4 A That's my understanding.
 5 Q And if you could just skim the content of the request
 6 and let me know when you're done.
 7 A Okay.
 8 (Witness examines document)
 9 A Okay.
 10 Q Have you -- we can go to the second page. Did
 11 anybody come to you with questions regarding this
 12 request?
 13 A I don't recall.
 14 Q Do people frequently come to you with questions
 15 regarding these emails that you circulate?
 16 A Define frequently.
 17 Q Once a week.
 18 A You asked how many per email. Now you want me to
 19 give you a number for a hypothetical week?
 20 Q Do you -- do you -- do you consider it part of your
 21 regular job duties to field questions regarding how
 22 to respond to an open records request?
 23 A Yes.
 24 Q How often do you field those questions?
 25 A It depends.

65

1 A I can't recall.
 2 Q Do you know why documents haven't been fulfilled or
 3 haven't been provided in response to this request?
 4 A No, same as last time you asked that, I can't recall.
 5 Q But you agree that four months is an atypical amount
 6 of time to respond to a request for Speaker Vos'
 7 office; is that right?
 8 A No, that's not what I said.
 9 Q Can you clarify what you said?
 10 A As to which part?
 11 Q Is this a typical time frame -- sorry, strike that.
 12 Does it typically take Speaker Vos four months to
 13 respond to an open records request?
 14 A No, not generally.
 15 Q Is there any reason why this request has taken longer
 16 than normal?
 17 A I would have to look into this request specifically
 18 more, but if it's subject to litigation like the
 19 previous request, that would be a possibility.
 20 Q Are you aware of any steps that Speaker Vos' office
 21 took to respond to this request between August 26th
 22 and the date litigation was filed?
 23 A Not specifically, no.
 24 Q Did you take any steps during that time to respond to
 25 this request?

67

1 Q Do you recall ever fielding any questions
 2 regarding how to respond to a request submitted by
 3 American Oversight?
 4 A Not specifically.
 5 Q Let's go back to the first page. Would it typically
 6 take you 13 days between receipt of a request --
 7 strike that. Would it typically take you 13 days
 8 after receipt of a request to circulate the request
 9 to staff?
 10 A Didn't I already provide you with my typical time
 11 frame?
 12 Q No, I'm asking you whether it would typically --
 13 whether this is a typical time frame. Is 13 days a
 14 typical time frame?
 15 A Well, I previously said a couple days to a week, so
 16 13 days would be atypical.
 17 Q What steps is Speaker Vos' office taking to respond
 18 to this request?
 19 A Again, I can't recall the specifics of this request.
 20 Q Are you aware that Speaker Vos hasn't fulfilled this
 21 request?
 22 A Not specifically, no.
 23 Q Is there any reason why -- strike that. Is there any
 24 reason why you took an atypical amount of time to
 25 circulate this request?

66

1 A Well, I sent this email out.
 2 Q After this email I'm asking about.
 3 A I can't remember any specifics.
 4 Q Have you provided any instructions to Speaker Vos or
 5 any staff in Speaker Vos' office to retain the
 6 documents that are described in this request?
 7 A In what?
 8 MS. COLOMBO: Sandy, could you read
 9 back that question, please?
 10 (Reporter reads back last question)
 11 A I can't recall.
 12 Q Do you have any reason to believe that you've
 13 provided those instructions, any such instructions?
 14 A Yes.
 15 Q And what's that reason?
 16 A Well, generally, people are instructed to not dispose
 17 of records that are subject to open records search.
 18 Additionally, this being subject to litigation, I
 19 would have, in general, told people not -- or to
 20 preserve records related to litigation.
 21 Q Do you have a formal litigation hold process?
 22 A I don't. I use a process sent by outside counsel.
 23 Q Does that involve any automatic processes?
 24 A You would have to ask outside counsel.
 25 Q I'm asking about whether there's any technological

68

1 implementation of a litigation hold.
 2 A In this one in particular?
 3 Q With respect to American Oversight's litigation, yes.
 4 A I can't recall.
 5 Q Who is responsible for implementing litigation holds?
 6 A The office as a whole.
 7 Q Do you have a copy of litigation hold correspondence
 8 that's been sent to the staff?
 9 A I don't know.
 10 Q Do you ever recall receiving or sending any such
 11 correspondence regarding a litigation hold?
 12 A I don't remember.
 13 Q Do you recall reviewing a litigation hold in respect
 14 to this case?
 15 A No, I don't remember.
 16 Q Do you know anything about what the contents of that
 17 hold may have said?
 18 A I do not remember.
 19 Q Who's responsible for ensuring that a litigation hold
 20 is enforced within Speaker Vos' office?
 21 A Define enforced.
 22 Q Who's responsible for making sure that staff and
 23 Speaker Vos follow the litigation hold?
 24 A Each person is responsible for their own records that
 25 they have access to.

69

1 Q Is it possible that there is no written litigation
 2 hold related to this case?
 3 A I don't know.
 4 Q But you're not aware of one; is that right?
 5 A Again, we have a general practice or general routine.
 6 Q But you're not aware of one in this specific case?
 7 A I specifically can't remember the specifics of one.
 8 Q Let's scroll down to the next set of emails in this
 9 document. Okay. So this is -- on this page here you
 10 see this is another email from August 13th that was
 11 forwarded to you?
 12 A That's correct.
 13 Q Okay. And going up to the first page, you sent an
 14 email, again, on August 26th regarding this request?
 15 A It appears so.
 16 Q Did you take any steps before sending this email in
 17 response to the request that's referenced?
 18 A I can't recall.
 19 Q Would you in the ordinary course take any steps
 20 before sending this email?
 21 A What kind of steps?
 22 Q Anything in response to this request.
 23 A Well, I would review it, I would sort of generate
 24 this email, and then I would send it.
 25 Q But in the ordinary course you wouldn't typically

70

1 have communicated about this request before sending
 2 this email?
 3 A You know, I'm unsure of what you're asking.
 4 Q I'm asking whether there was anything that we haven't
 5 discussed that you do when you receive an open
 6 records request before sending this email.
 7 A So again, are you asking in general is there anything
 8 we haven't discussed or are you asking specifically
 9 about this email?
 10 A I'm asking in general whether -- you said that you
 11 typically send these emails. Here's an example of
 12 this email with respect to one of American
 13 Oversight's requests. I'm asking whether there is
 14 anything that you -- since you don't recall what you
 15 did, whether there's anything that you ordinarily
 16 would do in response to this request.
 17 A Prior to sending this?
 18 Q Before sending, correct, before sending this email.
 19 A To the best of my knowledge, I've described
 20 everything.
 21 Q Would -- looking at the language of this request,
 22 would you have expected there to be responsive
 23 records?
 24 A It's hard to say.
 25 Q Would you have expected to yourself -- sorry, strike

71

1 that. Would you have expected to yourself have held
 2 responsive records in relation to this request?
 3 A Are you asking if I conducted a search?
 4 Q I'm asking when you received this request and you
 5 reviewed it, did you expect that you yourself would
 6 have responsive records?
 7 A Again, you're asking about a thought process that
 8 doesn't really happen, so I'm not exactly sure what
 9 you're asking.
 10 Q I'm asking whether upon reviewing this request you
 11 considered yourself to be a custodian of responsive
 12 records.
 13 A I consider everyone a potential custodian, so I sent
 14 the email to everyone, including myself.
 15 Q Looking at the language of this request or going back
 16 to the one that we looked at before regarding
 17 communications, which we can pull up -- I think it's
 18 the first one. So why, looking at this request which
 19 asks for communications regarding -- including your
 20 own communications regarding the investigation of the
 21 2020 election, why is it hard to say whether you
 22 would have expected to have records responsive?
 23 A I'm going to go back to my other answer. It's not --
 24 you're asking me about a thought I had when I
 25 received an email from you, so you've got it in your

72

1 head that some sort of thought process happens and
 2 you want me to relay that thought process to you.
 3 I'm telling you that thought process is not triggered
 4 in my head like it is in your head, so your question
 5 really doesn't make sense in the context of how we
 6 fulfill open records. You're asking about my
 7 expectations --
 8 Q Okay.
 9 A -- upon you on your open records request.
 10 Q So sitting here today, would you expect that there
 11 were ever responsive records to this request, the one
 12 we're looking at here?
 13 A Again, I don't know. We don't know until the search
 14 is conducted, which is why we conduct the searches.
 15 Q So you don't know whether there would be any
 16 communications regarding any investigation of the
 17 2020 election in Speaker Vos' office?
 18 A Relevant to this search, yeah, I don't know until it
 19 comes in when we do the search.
 20 Q Did you personally have any communications regarding
 21 the 2020 election investigation?
 22 A With anyone?
 23 MS. SLOAN: Sarah, we can't hear
 24 you.
 25 MR. STADLER: We can't hear you.

73

1 MS. SLOAN: Sarah, we can't hear
 2 you.
 3 MS. COLOMBO: Off the record for a
 4 moment.
 5 THE REPORTER: Todd, I believe she
 6 wants to go off the record for a moment.
 7 THE VIDEOGRAPHER: Does everyone want
 8 to go off?
 9 MR. STADLER: That's fine.
 10 THE VIDEOGRAPHER: The time is 11:18,
 11 and we are off the record.
 12 (Discussion off the record)
 13 THE VIDEOGRAPHER: The time is 11:19.
 14 We are back on the record.
 15 MS. COLOMBO: And we're still looking
 16 at Exhibit 25. Could the court reporter read
 17 back the last exchange just so I can make sure I
 18 got it?
 19 (Reporter reads back)
 20 Q Yes, with anybody is the question.
 21 A I'm sure that I did.
 22 Q And do you agree that those would be responsive to
 23 the language of this request?
 24 MR. STADLER: I'm going to offer an
 25 objection. You asked him about communications.

74

1 There was nothing about written.
 2 Q Okay. Well, first off -- well, okay. Any written
 3 communications, have you had any written
 4 communications about the election investigation?
 5 A I don't recall specifically, but it seems likely.
 6 Q And would you agree that those are responsive to this
 7 request?
 8 MR. STADLER: I'll offer an objection
 9 to the extent it calls for a legal conclusion.
 10 MS. COLOMBO: That -- well, I'm not
 11 asking for a legal conclusion. The witness
 12 testified that each individual records custodian
 13 or holder of records makes a determination about
 14 whether records are responsive, so I'm asking
 15 what his determination was.
 16 MR. STADLER: Then I'll offer an
 17 objection that it calls for speculation because
 18 as it stands, it's an incomplete hypothetical.
 19 MS. COLOMBO: Well, speculation is not
 20 legal advice, so the witness -- I'd ask the
 21 witness to answer the question, which, Sandy, if
 22 you could read back the question, please.
 23 (Reporter reads back)
 24 MR. STADLER: And I'll offer the
 25 objection that it's compound and calls for

75

1 speculation.
 2 Q You can answer the question.
 3 A It depends.
 4 Q It depends on what?
 5 A Whether the records fall within the confines of a
 6 particular request.
 7 Q Right, but you just said that you think it is likely
 8 that you had communications regarding the election
 9 investigation and that those communications were in
 10 writing. Assuming that that is the case, would you
 11 consider those records to be responsive to this
 12 request?
 13 MR. STADLER: Objection. It's
 14 compound, and it calls for speculation.
 15 A And I answered that, but I'll answer it again. It
 16 depends.
 17 Q Have you conducted a search of your own records in
 18 response to this request?
 19 A I can't recall.
 20 Q Has anybody in Speaker Vos' office, to your
 21 knowledge, deleted any electronic records related to
 22 the election investigation since it was announced on
 23 May 28th?
 24 A I couldn't say.
 25 Q You don't know whether anybody has deleted election

76

1 investigation-related records; is that correct?
 2 A You're asking for the office?
 3 Q Within the office, yes.
 4 A Yeah, I -- I don't know. You would have to ask them.
 5 Q So going back to this request again, is it possible
 6 that some communications regarding an
 7 investigation -- the Assembly's investigation into
 8 the 2020 election have been deleted?
 9 MR. STADLER: Objection, calls for
 10 speculation, lack of personal knowledge.
 11 Q Is it possible that such records have been deleted?
 12 A It's possible.
 13 Q Would you have any way of knowing whether any records
 14 have been deleted?
 15 A Yeah, I mean, yes.
 16 Q And how would you know?
 17 A Well, occasionally, a record shows up on one end of a
 18 search and not on the other end of a search, so
 19 that's why we make everybody in the office generally
 20 search for most general records requests.
 21 Q Do you have any other way of knowing whether records
 22 have been deleted?
 23 A I can't think of any.
 24 Q Do you have any way of knowing when a record might
 25 have been deleted?

77

1 A No.
 2 Q Have you ever instructed anyone not to send written
 3 communications regarding the election investigation?
 4 A Not the investigation, per se.
 5 Q Have you ever instructed not to send written
 6 communications regarding any of American Oversight's
 7 requests?
 8 A No.
 9 Q Do you have an understanding -- strike that. Has
 10 there been any discussion in Speaker Vos' office
 11 regarding creating or exchanging records related to
 12 the investigation?
 13 MR. STADLER: Object to the form of
 14 the question as vague and ambiguous.
 15 Q Yeah, I'll rephrase that. Has there been any
 16 discussion within Speaker Vos' office regarding
 17 limiting written communications about the election
 18 investigation?
 19 A Not that I can recall specifically.
 20 Q In cases -- well, what have you told staff not to
 21 send written communications about?
 22 MR. STADLER: I'm going to offer an
 23 objection at this time to the extent it calls
 24 for any attorney-client privileged
 25 communication.

78

1 MS. COLOMBO: I'm asking just
 2 generally what sort of things.
 3 MR. STADLER: And generally, I'm going
 4 to object that it calls for attorney-client
 5 privileged communication.
 6 Q Have you ever instructed staff not to send written
 7 communications?
 8 MR. STADLER: Same objection.
 9 Q Is there an understanding in Speaker Vos' office not
 10 to send written communications about certain topics?
 11 MR. STADLER: Objection. This witness
 12 can't testify as to everyone else's
 13 understanding.
 14 MS. COLOMBO: I'm asking whether the
 15 witness believes that there's any understanding
 16 to that effect.
 17 A I believe -- I personally believe that, you know, we
 18 work in politics, which is a people business, so it's
 19 good form in all conduct and processes in the
 20 building to pick up the phone or go see somebody and
 21 sort of hash out your issues with them in person.
 22 Again, whether that's -- that can be really related
 23 to anybody, but that's my personal belief.
 24 Q Are you aware of anyone in Speaker Vos' office who
 25 might have a different belief and limit their written

79

1 communications regarding certain topics?
 2 A I'm not sure I understand the question.
 3 Q Does Speaker Vos, for example, have a practice of
 4 limiting his written communications regarding certain
 5 topics?
 6 A I don't know.
 7 Q He's never conveyed anything to you regarding
 8 limiting his written communications; is that right?
 9 A Not that I recall.
 10 Q Okay. Are staff provided any instructions regarding
 11 the use of applications that have a self-deleting
 12 feature for purposes of government business?
 13 A I don't know.
 14 Q Have you provided any such instructions?
 15 A No.
 16 Q Have you received any such instructions?
 17 A Not that I recall.
 18 Q Are staff provided any instructions regarding the use
 19 of encrypted or private messaging apps for use in
 20 government or for purposes of government business?
 21 A I don't know.
 22 Q Have you been provided any such instructions?
 23 A Not that I recall.
 24 Q And have you given any such instructions?
 25 A Not that I recall.

80

1 Q To your knowledge, is there any limit on the use of
2 those applications? I'm talking about encrypted
3 messaging applications or private messaging
4 applications.
5 A What kind of limit?
6 Q Are you free to use those applications for government
7 work?
8 A I don't know.
9 Q Are you aware of any staff in Speaker Vos' office who
10 uses those applications?
11 A No, I'm not aware.
12 Q Are you aware of whether Speaker Vos uses those
13 applications?
14 A No, I'm not.
15 Q Do you ever delete emails immediately upon receipt?
16 A Yes.
17 Q Does Speaker Vos' office have any policy regarding
18 the deletion of emails upon receipt?
19 A Other than the open records policy, no, or not that I
20 am aware of.
21 Q Is staff ever instructed to delete records?
22 A I don't know.
23 Q Are records that you delete retrievable in any way to
24 your knowledge?
25 A Again, I don't know.

81

1 Q How frequently do you delete records upon -- emails
2 upon receipt?
3 A It just depends.
4 Q Can you ballpark how frequently that might be?
5 A It really depends.
6 Q It depends on what?
7 A You know, open records we have going on versus not
8 being under open records. At a time when we're not
9 under open records we probably delete quite
10 frequently.
11 Q Are you currently in an open records scenario that
12 you've described?
13 A Yes, there are open open records.
14 Q So is it your understanding that you currently -- are
15 you currently not deleting records upon receipt?
16 A Yes, as a general practice, I try to put everything
17 into a Junk folder to delete later.
18 Q Do you recall deleting any records over the course of
19 the fall?
20 A Not specifically.
21 Q Do you believe you were limited from doing so?
22 A No.
23 Q Do you know if staff has deleted records --
24 A I don't know.
25 Q -- over the last several months? Are they limited

82

1 from doing so?
2 A No.
3 MS. COLOMBO: Can we go back to
4 Exhibit 25?
5 (Exhibit 25 is shared on the video screen)
6 MS. COLOMBO: I muted myself.
7 Christa, if we could go down, I think there's
8 one more email at the bottom.
9 Q Okay. Is this -- looking at the bottom emails, it
10 looks like this was forwarded to you on
11 September 15th; is that correct? Do you see that?
12 A That's correct.
13 Q And the request appears to have been submitted that
14 same day; is that right? Is that your understanding?
15 A That's correct.
16 Q Going to the top page, which this is labeled 488,
17 would you just take a moment to review the red
18 writing?
19 A Okay.
20 (Witness examines document)
21 Q Have you had a chance to review?
22 A I'm reading.
23 (Witness examines document)
24 A Okay.
25 Q Are you familiar with the request that's described in

83

1 this email?
2 A I'm reading it before me.
3 Q And you circulated it on September 28th?
4 A It appears so.
5 Q What have you done to respond to this request?
6 A I don't recall.
7 Q Do you know if Speaker Vos has fulfilled this
8 request?
9 A I don't recall.
10 Q Did you -- other than emailing this to staff, have
11 you taken any steps yourself in relation to this
12 request?
13 A I don't recall.
14 Q Would you have any record of you having taken any
15 steps? Do you keep -- sorry. Would you have had any
16 record of you taking any steps in response to this
17 request?
18 A What type of record?
19 Q Notes, for example.
20 A It's unlikely but possible.
21 Q Are you aware of any -- anything that any of the
22 recipients of this email are doing to respond to this
23 request?
24 A I don't know.
25 Q Do you know if Speaker Vos has searched for

84

1 responsive records in his own files?
 2 A I do not know.
 3 Q Do you know if Speaker Vos has searched for
 4 communications in his own records and files?
 5 A Do you not consider communications records?
 6 Q I'm asking you specifically about communications.
 7 A Well, I answered generally, which encompasses a
 8 specific --
 9 Q Okay. So you're saying you don't know if Speaker Vos
 10 has searched communications?
 11 A That's correct.
 12 Q I see Amanda Ledtke is still on this email, so is it
 13 fair to assume that she was still with Speaker Vos'
 14 office as of September 28th?
 15 A That's a fair assumption.
 16 Q Who took over her duties after she left?
 17 A Well, nobody right away.
 18 Q Who would be responsible for searching Speaker Vos'
 19 emails in response to open records requests since
 20 Amanda is no longer with the office?
 21 A Well, we have a staffer by the name of Alex.
 22 Q Alex, do you know his last name or her last name?
 23 A It's escaping my mind currently.
 24 Q And is Alex an administrative assistant or has a
 25 different role?

85

1 A He is.
 2 Q Okay. Sitting here today, do you know whether there
 3 are records responsive to this request?
 4 A I would have no way of knowing other than reviewing
 5 what other people have turned in or conducting my own
 6 search.
 7 Q Have you conducted your own search?
 8 A I don't know.
 9 Q If you had conducted your search, where would those
 10 records be?
 11 A In a file system we use to send the records to the
 12 Chief Clerk's Office.
 13 Q Let's go to Page 2. Or sorry, I should be clear.
 14 I'm talking about the PDF pages of Exhibit 25, but
 15 Page 2 of this particular email is Bates-stamped
 16 ending in 489.
 17 What are the -- so there's two processes talked
 18 about here. There's a process that's described in
 19 red, and then you have a paragraph right before you
 20 say thanks. I wanted to ask you about both.
 21 So for electronic records, when you conduct a
 22 search what do you do with those records? Sorry, let
 23 me rephrase that. When you locate responsive records
 24 that you believe are responsive to a request that are
 25 electronic, what do you do with them?

86

1 A Put them in a folder on a shared drive to be sent to
 2 the Chief Clerk's Office.
 3 Q And is that folder subject to deletion at any point?
 4 A Yeah, after the request has been fulfilled, it can be
 5 deleted.
 6 Q Do you have access to that folder?
 7 A I do.
 8 Q And the sheet that's described in the paragraph right
 9 before you say thank you when you say, "I will leave
 10 a sheet with everyone's name on it on the conference
 11 table in the policy office," and then you say,
 12 "Sign the sheet," it says, "When you have completed
 13 your search please leave any documents you have, if
 14 any, under the sheet and sign the sheet next to your
 15 name and include the time spent searching," what
 16 documents are you referring to there?
 17 A Well, like hard copies.
 18 Q And what are hard copies -- how are hard copies
 19 retained after they're put under the sheet?
 20 A I'll have someone scan them in and then drag them
 21 into the folder.
 22 Q Did you do that in response to this request?
 23 A I do not know.
 24 Q Do you know whether anybody completed this search?
 25 A I do not know.

87

1 Q Do you know whether anybody started a search?
 2 A I do not know.
 3 Q Is there any understanding in the office about a
 4 deadline when you send these types of emails?
 5 A The deadline that's communicated to people is the
 6 deadline that is put out in the DOJ hand guide.
 7 Q Does that have a concrete deadline?
 8 A No, it does not.
 9 Q So when you send this email you don't -- sorry,
 10 strike that. Well, when you send this email there's
 11 no understanding as to when the recipients need to
 12 take action in response to the email; is that
 13 correct?
 14 A I mean, I send them the time frame, as you can see.
 15 Q The time frame for fulfilling the request --
 16 A Correct.
 17 Q -- or the time frame that the records sought is for?
 18 A Well, you'll have to scroll back up and view each
 19 individual email to see if there's a time frame that
 20 comes with the record.
 21 Q Let's go to 488. Do you -- what I'm asking is do you
 22 send -- is there any understanding as to when the
 23 recipients of this email should take action in
 24 response to the email?
 25 A Yes, same as every government employee statewide,

88

1 which is the time frame reflected in the DOJ
 2 hand guide or handbook.
 3 Q Is there any uniform understanding within
 4 Speaker Vos' office as to what that means in terms
 5 of number of days?
 6 A Well, I can't speak for everybody else.
 7 Q What -- what number of days do you consider -- sorry,
 8 strike that. What number of days do you take to
 9 complete the actions in this email?
 10 A It depends.
 11 Q How long typically would you let this email sit
 12 before taking action in response to it?
 13 MR. STADLER: I'm just going to offer
 14 an objection that you're asking questions about
 15 typical but then giving him a particular email,
 16 so I think this seems to be an impossible
 17 hypothetical.
 18 Q So I'm asking -- I'm trying to get at -- let me
 19 rephrase my question. With respect to this email,
 20 you sent it, but you testified earlier that you also
 21 conduct your own search for records. So with respect
 22 to your own search for records, when would you have
 23 conducted that search?
 24 A For this email?
 25 Q Yes.

1 A I don't recall.
 2 Q Do you know if you conducted a search?
 3 A I don't recall.
 4 Q Looking at the email, do you think it is necessary to
 5 have -- that you conduct a search?
 6 A It's necessary for everyone that I sent the email to
 7 to conduct a search.
 8 Q You said earlier that you don't know whether you have
 9 responsive records. Why? Why don't you know?
 10 A Why don't I know what?
 11 Q Why don't you know whether you have responsive
 12 records, looking at the text of this request?
 13 A Because you have to search to see if you have
 14 responsive records.
 15 Q So have you -- you haven't searched then in response
 16 to this request?
 17 A No, I have not. Well, actually, I don't know. I
 18 mean, I don't know. Same answer as the last time you
 19 asked me, I do not know.
 20 Q Given that this is dated -- that the request is dated
 21 September 15th, would you say you have an obligation
 22 to search by now?
 23 A Well, again, this one is part of litigation, so that
 24 sort of -- that alters how we would go about things.
 25 Q So if there is litigation and you haven't conducted a

1 search prior to the litigation, you don't then
 2 conduct a search after litigation has been filed; is
 3 that right? Sorry, what did you say, if you could
 4 clarify, please?
 5 A This is in litigation, which would alter how we would
 6 conduct ourselves.
 7 Q Did you conduct a search -- sorry, strike that. Do
 8 you recall conducting a search between September 15th
 9 and when litigation was filed in this case?
 10 A I do not recall.
 11 Q Do you have any reason to believe that you conducted
 12 that search?
 13 A I don't know.
 14 Q Okay. I think we're done with this exhibit. I just
 15 want to go back to one thing. Do you -- is it your
 16 understanding that there would be communications
 17 regarding the election investigation -- or sorry,
 18 strike that. Have you communicated regarding the
 19 election investigation in the last several months in
 20 writing?
 21 A I don't recall.
 22 Q Do you agree that it would be likely that you have
 23 communicated regarding the election investigation in
 24 writing in the past several months?
 25 A No.

1 Q You think it's unlikely that you've communicated
 2 regarding the election investigation; is that what
 3 you're saying?
 4 A Yeah, I don't know how to quantify likely versus
 5 unlikely, but I would say that's closer to the truth.
 6 Q So there's less than a 50 percent chance that you've
 7 communicated regarding the election investigation in
 8 the last several months?
 9 A Yeah, I don't know how you'd place odds on a
 10 hypothetical email, but it's not something that I
 11 handle a lot of.
 12 Q So you can't recall ever sending any individual email
 13 regarding the election investigation?
 14 A Again, I'm sure -- I'm sure that I have, but I don't
 15 recall specific ones off the top of my head.
 16 Q Do you recall ever sending a text regarding the
 17 election investigation?
 18 A It's quite likely, but I don't recall a specific one.
 19 MS. COLOMBO: One second. Since we
 20 have about -- I think we've been going, with the
 21 tech issues, for about another hour, so why
 22 don't we take one more break if that works for
 23 everybody.
 24 THE VIDEOGRAPHER: We are off the
 25 record at 11:54.

1 (A recess is taken)
 2 (11:54 a.m. to 12:04 p.m.)
 3 THE VIDEOGRAPHER: We are back on the
 4 record. The time is 12:04 p.m.
 5 EXAMINATION (RESUMED)
 6 BY MS. COLOMBO:
 7 Q So I want to -- can you tell me who Jenny -- what
 8 Jenny Toftness' role is?
 9 A She is our chief of staff.
 10 Q Does she have a role in the Assembly outside of
 11 Speaker Vos' office?
 12 A Well, in what context?
 13 Q Is she -- is she staff in Speaker Vos' office?
 14 A Yes.
 15 Q And does she have any role other than as staff in
 16 Speaker Vos' office with the Assembly?
 17 A Again, in what context?
 18 Q In any context does she have a role outside of
 19 Speaker Vos' office?
 20 A Not that I'm aware of.
 21 Q Is she a lawyer?
 22 A She is not.
 23 Q Okay. We talked a little bit earlier about what
 24 you do after there's been a search for records.
 25 Before a -- before a request comes in -- excuse me.

93

1 Before records are provided to a requester, do you
 2 ever remove any records from the records that have
 3 been located by you or staff or Speaker Vos?
 4 A In what context?
 5 Q You said earlier that members of the office do their
 6 own search for records and then put those records, if
 7 they're electronic, into a folder. Do you review
 8 that folder before it's provided to the Assembly
 9 clerk?
 10 A Not generally.
 11 Q Does anybody review the records in that folder before
 12 they're provided to the Assembly clerk?
 13 A It's open to everyone.
 14 Q Do you ever remove any records from that folder
 15 before providing it to the Assembly clerk?
 16 A It depends.
 17 Q It depends on what?
 18 A On if the record is supposed to be sent to the
 19 Assembly chief clerk or not.
 20 Q What -- can you -- what do you mean by that, if it's
 21 supposed to be sent?
 22 A So if it's not a record that's responsive to the
 23 request, then we don't send it.
 24 Q So you review the full collection of records that
 25 have been located by staff for responsiveness; is

94

1 that correct?
 2 A No, for the third time, I do not.
 3 Q You just said that you might take something out that
 4 isn't responsive.
 5 A That's correct.
 6 Q So how do you determine what to take out?
 7 A They will highlight a record and ask me.
 8 Q So you look at individual records in that folder but
 9 not necessarily the full set?
 10 A Sometimes.
 11 Q Other than when staff or Speaker Vos highlights a
 12 record for you, do you look at the records before
 13 they're provided to the Assembly clerk?
 14 A Not generally.
 15 Q Other than responsiveness, is there any reason why
 16 you would remove records from the folder?
 17 A Yes.
 18 Q Can you tell me what those reasons are?
 19 A Some records are subject to privilege.
 20 Q And how do you identify which records those might be?
 21 I'm not -- sorry. I'm not asking about how you make
 22 a privilege determination. I'm asking about how you
 23 identify a record that might be subject to privilege
 24 if you don't look at the whole set.
 25 A For the second time, the person that has the record

95

1 brings it to me or to my attention.
 2 Q So you don't -- so similar for privilege, you don't
 3 do a review of the whole set of records, just ones
 4 that have been flagged for you; is that right?
 5 A I don't understand what you're asking.
 6 Q I'm asking whether you look at each record before
 7 they're supplied to the Assembly clerk and whether
 8 you review each record for privilege or if you review
 9 only those records that are flagged for you by the
 10 individual searchers.
 11 A The latter.
 12 Q Okay. Do you review the records that are provided to
 13 the Assembly clerk for completeness?
 14 A I don't understand your question.
 15 Q Do you compare the records that are in the folder to
 16 be provided to the Assembly clerk to the request?
 17 A Remember the part where I said I don't look at each
 18 record in the folder?
 19 Q So the answer is no?
 20 A That's correct.
 21 Q Does anybody else review the full set for
 22 completeness?
 23 A I have no idea.
 24 Q So how do you assure yourself that the request has
 25 been responded to?

96

1 A Because each person has done their own full search.
 2 Q Is there any mechanism you can think of for
 3 overseeing the quality of those searches?
 4 A Again, I'm not understanding your question.
 5 Q Do you do anything to determine whether the searches
 6 that have been conducted are responsive to the
 7 request?
 8 A Do anything like what?
 9 Q Such as review the records to determine if anything
 10 is missing.
 11 A In the entire folder?
 12 Q Correct.
 13 A No, I do not do that.
 14 Q Do you ask anybody about what their search was?
 15 A Not generally.
 16 Q Okay. Is it anybody else's responsibility to look at
 17 the -- sorry, strike that. Is there anybody else
 18 responsible for administering the open records
 19 process after records are put into the folder? In
 20 Speaker Vos' office, I should say.
 21 A In what regard?
 22 Q So you said you don't review the full set of records.
 23 Does anybody else do that?
 24 A Yes, everybody reviews their own full set of records.
 25 Q But not the full set in the folder?

97

1 A I don't.
 2 Q Let's look at Exhibit 21.
 3 (Exhibit 21 is shared on the video screen)
 4 Q We can flip through, but are you familiar with this
 5 document?
 6 A I've seen this document before.
 7 Q And on Page -- oh, are we still -- there's a couple
 8 documents in here, my apologies. Let's look at the
 9 first one real quick. And the Bates numbers are a
 10 little bit obscured by an exhibit number. Oh,
 11 there's a page number at the bottom of these
 12 contracts that will help us, okay.
 13 So we're looking at Page 1 of a contract between
 14 the Wisconsin Assembly and Consultare, LLC by its
 15 president Michael Gableman. Is that what you're
 16 looking at, Mr. Fawcett?
 17 A Exhibit 21 is what I'm looking at.
 18 Q Okay. And let's go to the next page, and then the
 19 next one. Okay. And do you see the Notices
 20 provision?
 21 A Yes.
 22 Q And it says that your -- that notices are to be given
 23 to Speaker Vos c/o Steve Fawcett?
 24 A That's correct.
 25 Q Have you ever received any notices under this

98

1 contract?
 2 A I don't recall.
 3 Q You don't recall -- have you ever received any
 4 notices under any other contract related to the
 5 Assembly investigation?
 6 A Have I personally received it? I do not believe so,
 7 but I don't recall specifically.
 8 Q Have you searched for any notices pursuant to this
 9 contract when responding to open records requests
 10 submitted by American Oversight?
 11 A Yeah, if that's what you asked for in a search,
 12 that's, in general, what we would have searched for.
 13 Q How did you search for those notices?
 14 A So in this particular -- contracts are housed at the
 15 Assembly Chief Clerk's Office, so probably -- I don't
 16 recall, but in general, contracts, everybody knows to
 17 get them from the Assembly Clerk's Office, and so I
 18 would just ask them.
 19 Q But the notice provision requires the counter-party
 20 to the contract to provide notice directly to you; is
 21 that right?
 22 A That's right.
 23 Q What is the P.O. Box No. 8953?
 24 A I don't know.
 25 Q Do you know who monitors that P.O. box?

99

1 A I do not know specifically. I believe it's the page
 2 staff.
 3 Q So that's an Assembly P.O. box?
 4 A I can't say specifically. I've never sent anything
 5 to the Assembly, and we get our mail from the page
 6 staff.
 7 Q Were you involved in negotiating this contract?
 8 A You'll have to scroll down. Most likely, yes.
 9 Q Do you recall any negotiations around this contract?
 10 A Not specifically.
 11 Q Did you communicate with Michael Gableman regarding
 12 this contract?
 13 A I cannot remember.
 14 Q Have you had any contact with Michael Gableman?
 15 A Yes.
 16 Q What? What is that contact?
 17 A I can't recall specifically. I know we've talked.
 18 Q Have you emailed with him?
 19 A Most likely, yes.
 20 Q Did you search for those emails in response to any of
 21 American Oversight's open records requests?
 22 A If they were -- again, yes, if they were -- if
 23 that was part of a search sent to us, I would have,
 24 yes.
 25 Q Have you emailed with any of the other investigators

100

1 working on the Assembly's election investigation?
 2 A I believe so.
 3 Q Which investigators?
 4 A I can't recall specifically. One of them sent me
 5 their resignation via email.
 6 Q Have you communicated with any members of the staff
 7 of the Assembly Office of Special Counsel?
 8 A Yes.
 9 Q Which staff?
 10 THE VIDEOGRAPHER: I hate to
 11 interrupt. Someone is brushing against their
 12 microphone and it's canceling out the --
 13 MS. COLOMBO: That actually might be
 14 me. I apologize, unless it's somebody else.
 15 THE VIDEOGRAPHER: Okay. Pardon the
 16 interruption.
 17 MS. COLOMBO: Can you read back the
 18 question, please?
 19 (Reporter reads back)
 20 A I don't know their full names, but he has a younger
 21 gentleman that works for him as sort of an assistant.
 22 I've spoken with him before. He has a lady by the
 23 name of Carol that works for him. I've spoken to her
 24 before.
 25 Q Have you communicated with them in writing?

101

1 A To which one?
 2 Q With the younger gentleman who -- would that possibly
 3 be somebody by the name of Zach?
 4 A It could be. I don't remember. I may have with him.
 5 I'm unsure. I don't -- I don't recall any specific
 6 email correspondence with him, but --
 7 Q Do you recall what you might have communicated with
 8 him about?
 9 A No.
 10 Q And how about with Carol, have you communicated with
 11 Carol in writing?
 12 A I don't believe I ever communicated with her in
 13 writing.
 14 Q And when we talk about writing, you're referring to
 15 emails?
 16 A Any form.
 17 Q And texts as well?
 18 A Correct.
 19 Q Okay. Can we look at the bullet -- the last bullet
 20 on this first page of Exhibit 21, Page 1 of the
 21 contract with Consultare, LLC? Can you just take a
 22 minute to read that bullet? You can read it to
 23 yourself.
 24 (Witness examines document)
 25 A Okay.

102

1 Q And I'm looking at the line that says, "At present,
 2 the Speaker hereby designates Attorney Steve Fawcett
 3 as the Assembly's point of contact with the
 4 Contractor." Do you see that?
 5 A Yep.
 6 Q And this agreement is dated June 25th and becomes
 7 effective on July 1st; is that correct? I'm looking
 8 at the top.
 9 A That's correct.
 10 Q Have you been the designated contact for
 11 Michael Gableman since July 1st?
 12 A No.
 13 Q At what point did you become something other than
 14 the designated contact?
 15 A I don't recall.
 16 Q Is there a new designated contact?
 17 A As far as this contract goes, I mean, I think this
 18 has been amended, so, you know, if you're asking
 19 in actuality, I don't -- I don't know that there's
 20 a specific point of contact for -- is this
 21 Mr. Gableman's contract, yes -- for Mr. Gableman.
 22 Q Do you -- how often have you communicated with
 23 Mr. Gableman?
 24 A You'll have to define often.
 25 Q However you define it. Do you consider -- do you

103

1 consider your communications with Mr. Gableman to
 2 have at any point have been frequent?
 3 A No.
 4 Q How many communications, roughly, do you think you've
 5 made -- you've had with Mr. Gableman in writing?
 6 A It's hard to say.
 7 Q Why is it hard to say?
 8 A Again, because I haven't really communicated with him
 9 much at all as of lately, so --
 10 Q So when you -- when you were the designated contact,
 11 what is the point of being the designated contact,
 12 what does that mean?
 13 A So what that means -- again, this was amended shortly
 14 thereafter, but what that means to me is he's on his
 15 own to investigate and, if, you know, he needs
 16 something, if a check didn't clear or whatever, call
 17 me.
 18 Q Would he -- would Mr. Gableman under this contract
 19 have had to communicate with you regarding expenses
 20 incurred by Mr. Gableman?
 21 A I don't remember with regards to this contract.
 22 Q Do you ever recall communicating with him about any
 23 planned travel?
 24 A Yeah, I believe so.
 25 Q Sorry. Did you say -- can you repeat that?

104

1 A I believe so.
 2 Q You do recall communicating with him about planned
 3 travel. Did you communicate with him in writing
 4 about travel?
 5 A Not to my knowledge.
 6 Q Can you rule out that you communicated with him in
 7 writing about travel?
 8 A I don't really understand the question.
 9 Q Yeah, I'll rephrase it. Can you rule out whether --
 10 can you say for sure that you haven't communicated
 11 with Gableman regarding any planned travel?
 12 A To my knowledge, I believe within a reasonable degree
 13 of certainty that I did not communicate with him in
 14 writing about travel, but this was six months ago. I
 15 could be wrong.
 16 Q Have you communicated in writing with Mr. Gableman
 17 around leasing of office space?
 18 A I don't believe so.
 19 Q If Mr. Gableman -- no, strike that. Did you -- did
 20 Speaker Vos' office have any involvement in a website
 21 called wifraud.com?
 22 A Not to my knowledge.
 23 Q Do you have any knowledge of the creation of that
 24 website?
 25 A I do not.

105

1 Q Other than being a point of contact under this
 2 contract, do you have any role in the Assembly's
 3 investigation of the 2020 election?
 4 A I'm going to let my attorney jump in here. I believe
 5 this is supposed to be about our search habits and
 6 records and those are the confines put down by the
 7 judge; is that correct?
 8 Q This question is about records that may exist
 9 regarding the request at issue in this case, so --
 10 A You didn't ask me about any records.
 11 Q I'm asking about whether records exist.
 12 A With regards to?
 13 Q Yeah, I mean, this is -- you -- you have to answer
 14 the question.
 15 MR. STADLER: What was the question
 16 again? Could you read it back for him?
 17 (Reporter reads back last question)
 18 MR. STADLER: And I do agree with the
 19 witness. This is really far afield of the
 20 purpose of this deposition. I understand that
 21 relevance isn't necessarily an objection, but I
 22 think we're getting to the point where it's not
 23 only irrelevant but it's unlikely to lead to the
 24 discovery of relevant evidence.
 25 MS. COLOMBO: Your objection is noted,

106

1 but I'd ask the witness to answer the
 2 question.
 3 A Well, my role in the investigation is my role in the
 4 office as previously described to you.
 5 Q So responding to open records requests. What else?
 6 A Do you want to have the court reporter read it back
 7 to you?
 8 Q I'm asking specifically about what you're doing in
 9 relation to the election investigation. You gave
 10 some general, a general review of your job duties,
 11 and I'm asking --
 12 A I'm not doing anything specifically with regard to
 13 it. I mean, I serve as a general purpose inside this
 14 office, which is separate from the investigation,
 15 so to the extent --
 16 Q So you do have a role --
 17 A -- that those duties overlap with my general duties,
 18 then I fulfill them.
 19 Q You have to let me ask my question. So you do have a
 20 role in the election investigation other than serving
 21 as a point of contact --
 22 A Correct.
 23 Q -- under this contract?
 24 A I'm also general counsel in the Speaker's Office in
 25 the Wisconsin State Assembly.

107

1 MR. STADLER: Again, Sarah, you're
 2 shuffling papers on top of your microphone.
 3 MS. COLOMBO: Sorry.
 4 MS. WESTERBERG: Thank you.
 5 MS. COLOMBO: Thank you, Ron. Yeah,
 6 it's the hazards of working on a laptop.
 7 Q So the -- how much time in your -- over the course
 8 of, say, July to September did you spend working on
 9 the election investigation, just roughly,
 10 percentagewise?
 11 MR. STADLER: Again I'm going to offer
 12 an objection. I've given you pretty free rein
 13 here today to ask a lot of different questions,
 14 but it seems like what you're doing now is
 15 turning 90 degrees and going into your curiosity
 16 about the election investigation and not about
 17 any open records requests.
 18 MS. COLOMBO: That's not -- sorry.
 19 That's not -- that's not what I'm doing here.
 20 I'm getting at whether there are records that
 21 exist that are responsive to our requests, but I
 22 think we can move on to the other contract that
 23 I want look at, which I believe is Exhibit 22.
 24 THE WITNESS: Okay. Well, at this
 25 point I'm going to request that we take a

108

1 break.
 2 MS. COLOMBO: Yeah, we can take a
 3 break.
 4 THE WITNESS: Let's take 15 or
 5 20 minutes so I can grab a bite to eat and
 6 something to drink and come back.
 7 MS. COLOMBO: Well, we actually are
 8 only going for another half-hour here before we
 9 have another deposition going, so --
 10 THE WITNESS: Oh, okay. We'll call it
 11 15 minutes.
 12 MS. COLOMBO: Okay.
 13 THE VIDEOGRAPHER: Counsel, are we
 14 going off the record?
 15 MS. COLOMBO: Yeah, we can go off the
 16 record.
 17 THE VIDEOGRAPHER: Okay. We have
 18 agreement from all counsel?
 19 MR. STADLER: Yep.
 20 THE VIDEOGRAPHER: Hearing no
 21 objection, the time is 12:33, and we're off the
 22 record.
 23 (A recess is taken)
 24 (12:33 p.m. to 12:51 p.m.)
 25 THE VIDEOGRAPHER: The time is 12:51,

1 and we are back on the record.
 2 MS. COLOMBO: Can we call up
 3 Exhibit 22?
 4 MS. WESTERBERG: Yes.
 5 (Exhibit 22 is shared on the video screen)
 6 EXAMINATION (RESUMED)
 7 BY MS. COLOMBO:
 8 Q Okay. Mr. Fawcett, are you able to see Exhibit 22?
 9 A I can.
 10 Q Okay. And are you familiar with this document?
 11 A I've seen it before.
 12 Q Is this the amendment that you referred to earlier
 13 when we were talking about the contract with
 14 Consultare, LLC by and through Mr. Gableman?
 15 A I believe so.
 16 Q Okay. Can we go to the second page? So this is
 17 Page 2 of this amendment, and you see that it's
 18 signed. That's Robin Vos' signature; is that right?
 19 A Yes.
 20 Q But it's not signed by anybody for Consultare, LLC or
 21 Michael Gableman; is that right?
 22 A Looks correct to me.
 23 Q Do you -- are you aware of a version of this contract
 24 that is signed by Mr. Gableman?
 25 A Not to my knowledge.

1 Q Is this the -- is this the most recent version of
 2 this contract that you're aware of?
 3 A I don't know.
 4 Q Did you have any involvement in generating this
 5 contract?
 6 A I would have been consulted most likely.
 7 Q Consulted for purposes of negotiating this amendment?
 8 A Correct.
 9 Q Were any of those negotiations done in writing?
 10 A That I do not recall.
 11 Q Would -- do you recall -- sorry, strike that. Did
 12 you discuss this amendment with Mr. Gableman?
 13 A I don't remember.
 14 Q Do you typically -- are you typically involved in
 15 contracts like this?
 16 A No. I don't believe we've ever had an Office of
 17 Special Counsel since I've been here.
 18 Q Okay. So this is a fairly unique arrangement in your
 19 experience?
 20 A With regards to the Office of Special Counsel, yes.
 21 Q Have you searched for documents in relation to
 22 American Oversight's requests -- excuse me, sorry.
 23 Strike that. Have you searched for documents related
 24 to this amendment in response to American Oversight's
 25 open records requests?

1 A Are you referring to a specific request?
 2 Q In relation to any of American Oversight's records
 3 requests.
 4 A I don't recall you guys asking for this, off the top
 5 of my head.
 6 Q You don't recall us asking for contracts related to
 7 the election investigation?
 8 A You may have. You sent a lot of open records
 9 requests.
 10 Q So did you search for this amendment in relation to
 11 American Oversight's requests?
 12 MR. STADLER: Objection, asked and
 13 answered.
 14 MS. COLOMBO: I don't think that the
 15 record is clear on whether he searched for this
 16 document.
 17 A I don't recall.
 18 Q And similarly, did you search for communications
 19 related to this amendment in response to American
 20 Oversight's requests?
 21 A I don't recall an open records request asking for
 22 that.
 23 Q So this amendment is about the election
 24 investigation; is that correct?
 25 A In a general sense.

1 Q So would you agree that any communications regarding
2 this amendment were also about the election
3 investigation?

4 MR. STADLER: Objection, it's vague,
5 ambiguous, compound.

6 A It's possible.

7 Q Did you search for those communications?

8 A Again, I don't know what requests you're referring
9 to.

10 Q So do you recall ever searching for communications
11 regarding this amendment in response to an open
12 records request?

13 A I don't recall the specifics of any search of that
14 nature.

15 Q Would you have -- no, strike that. Do you recall
16 searching for communications about any other
17 agreements related to the election investigation?

18 A Again, I make searches based on open records
19 requests. I don't know what open records requests
20 you're referring to.

21 Q I'm referring to the requests that we looked at
22 earlier, for example, the one that seeks
23 communications related to the election
24 investigation.

25 A Can you display it?

113

1 objections on the record.

2 MS. WESTERBERG: The notice stated
3 that the deposition may be continued until
4 it's completed, so that was already accounted
5 for. And I mean no offense to you, Mr. Fawcett,
6 but I think it is probably -- since we have
7 Speaker Vos scheduled at 1 and it might be
8 harder to reschedule him, we'd rather continue
9 yours another day.

10 MR. STADLER: I think we can have a
11 discussion after this is done as to what you
12 have left to ask Mr. Fawcett about, but again,
13 we can do that and make productive use of the
14 time to get Mr. Vos in and done.

15 MS. COLOMBO: Okay. Yeah, we can talk
16 about that off the record.

17 THE VIDEOGRAPHER: Are we going off
18 the record, concluding testimony for today then?

19 MS. WESTERBERG: Yeah, we're
20 continuing the deposition and wanting to leave
21 it open until such time in the future as
22 provided in the notice.

23 MR. STADLER: So we'll address that
24 in the future then, so we can conclude this
25 deposition for the day, and I would expect

115

1 MS. COLOMBO: I think that's -- I
2 think we could look at Exhibit 2, for example.
3 (Exhibit 2 is shared on the video screen)

4 Q On the second page where it asks for -- I'm reading
5 the indented paragraph at the top of the second page
6 that says, "All electronic communications," and then
7 there's a parenthetical regarding particular types of
8 electronic communications, and then it goes on to
9 say, "Sent or received by Representative Robin Vos or
10 anyone communicating on his behalf." You're listed
11 there, and then the topic is, quote, "Regarding the
12 Legislature's investigation of the 2020 election."

13 Would you agree that the amendment that we just
14 looked at on Exhibit 22 is regarding the
15 Legislature's investigation of the 2020 election?

16 A In a general sense, yes.

17 MS. COLOMBO: Okay. I think we're
18 pretty much running up against the clock here
19 because we have another deposition scheduled, so
20 that's all for today, but --

21 THE WITNESS: Well, for the record,
22 I'm willing to keep going. I'm here. You asked
23 me to come here at this time, so I'm willing to
24 keep going. If you don't want to keep going,
25 then I'm sure my attorney will put his

114

1 Mr. Vos will be signing on momentarily.

2 MS. WESTERBERG: Nice to meet you,
3 Mr. Fawcett.

4 THE WITNESS: My pleasure. Thank you.

5 MS. WESTERBERG: Thank you.

6 MS. COLOMBO: Thank you, nice to meet
7 you.

8 THE VIDEOGRAPHER: We are back on
9 the record. The time is 1:01 p.m. This
10 concludes the video testimony for today of
11 Mr. Steven Fawcett. We are off the record at
12 1:01 p.m.

13 (Adjourned at 1:01 p.m.)

116

1 STATE OF WISCONSIN)
 2 COUNTY OF DANE)
 3 I, SANDRA L. McDONALD, Shorthand Reporter
 4 and Notary Public in and for the State of Wisconsin,
 5 do hereby certify that the foregoing is a true
 6 record of the remote video-recorded deposition of
 7 STEVE FAWCETT, who was first duly sworn by me; having
 8 been taken on the 12th day of January, 2022, from
 9 various remote locations, in my presence, and reduced
 10 to writing in accordance with my stenographic notes
 11 made at said time and place.

12 I further certify that I am not a relative
 13 or employee or attorney or counsel for any of the
 14 parties, or a relative or employee of such attorney
 15 or counsel, or financially interested in said action.

16 In witness whereof, I have hereunto set my
 17 hand and affixed my seal of office this 19th day of
 18 January, 2022.

19
 20 Notary Public, State of Wisconsin
 21 My Commission Expires 10/18/22

489. 86:16.
 .
 < 5 >.
 5 3:7.
 5) 63:5.
 50 92:6.
 53 3:33.
 53188 2:32.
 53703 2:15.
 .
 < 6 >.
 6 63:5.
 63 63:5.
 64 63:5.
 .
 < 7 >.
 750 6:7.
 .
 < 8 >.
 804 2:4.
 8953 99:23.
 .
 < 9 >.
 90 108:15.
 900 2:14.
 97 3:27.
 9:04 1:29, 2:8, 4:16.
 9:24. 20:13.
 9:27. 20:16.
 .
 < A >.
 a.m 49:7.
 a.m. 1:29, 2:8, 4:16, 49:5,
 64:6, 93:2.
 Abbey 55:17, 55:24.
 able 7:2, 110:8.
 above-entitled 2:2.
 access 27:24, 28:25, 38:24,
 39:2, 57:1, 57:3, 69:25,
 87:6.
 accessible 36:7.
 accidentally 7:17.
 accordance 117:11.
 account 40:20, 41:10,
 41:18.
 accounted 115:4.
 accounts 28:24, 36:7, 36:22,
 38:25, 39:3, 39:8, 39:13,
 39:22, 40:1, 40:4, 40:9,
 40:16, 40:23, 40:25, 41:2,
 41:5, 41:16, 42:2, 42:11,
 62:9, 63:19.
 act 17:14, 17:17.
 action 2:2, 88:12, 88:23,
 89:12, 117:16.
 actions 89:9.
 actuality 103:19.
 actually 35:19, 90:17,
 101:13, 109:7.
 Adam 56:1.
 additional 11:7.
 Additionally 68:18.
 address 6:6, 115:23.
 Adjourned 116:13.
 adjust 64:15.
 admin 36:13, 41:3, 41:11.
 administer 21:17.
 administering 20:25, 97:18.
 administrators 21:16.
 administration 18:8.
 administrative 17:19, 38:16,
 41:4, 42:12, 42:13, 42:16,
 56:7, 57:5, 85:24.
 advice 18:1, 30:9, 75:20.
 advisor 17:5, 55:19, 55:20,
 55:23, 56:20, 56:24.
 advocacy 63:17.
 affixed 117:18.
 afield 106:19.
 agendas 63:9.
 ago 105:14.
 agree 58:7, 67:5, 74:22,
 75:6, 91:22, 106:18, 113:1,
 114:13.
 Agreement 3:27, 3:29, 13:3,
 13:5, 13:7, 103:6,
 109:18.
 agreements 113:17.
 ahead 7:25.
 al 3:32.
 Alex 85:21, 85:22, 85:24.
 allegations 59:16.
 allow 7:12.
 allowed 22:11.

< Dates >
 05/28/21 3:17, 3:19.
 08/26/21 3:32.
 10/18/22 117:23.
 August 26th 53:22, 53:23,
 58:24, 64:12, 67:21,
 70:14.
 December 1st 19:19, 19:23,
 20:2.
 January 12, 2022 1:27,
 4:16.
 January 4th 19:16, 20:1.
 January, 2022 2:7, 117:9.
 January, 2022. 117:19.
 July 1st 103:7, 103:11.
 June 25th 103:6.
 May 28, 2021 25:3.
 May 28th 30:1, 30:20, 30:23,
 31:8, 51:17, 52:12, 52:17,
 52:18, 76:23.
 October 18th 60:17.
 September 15th 83:11, 90:21,
 91:8.
 September 28th 84:3, 85:14.
 (10:14 49:5.
 (11:54 93:2.
 (12:33 109:24.
 -vs- 1:13.
 .O. 99:23, 99:25, 100:3.
 .
 < 1 >.
 1 1:25, 3:17, 4:3, 24:19,
 24:23, 98:13, 102:20,
 115:7.
 1. 24:18, 24:20.
 10 3:20, 24:13.
 1030 2:22.
 10:14 49:3.
 10:20 48:25.
 10:24 49:5, 49:7.
 10:52. 64:1.
 11 3:20, 10:1, 10:2, 64:6.
 110 3:30.
 11:18 74:10.
 11:19. 74:13.
 11:54 92:25.
 122 2:14.
 12:04 93:2, 93:4.
 12:33 109:21.

12:51 109:24, 109:25.
 12th 2:7, 117:9.
 13 3:22, 19:2, 19:3, 66:6,
 66:7, 66:13, 66:16.
 13th 53:16, 53:19, 64:20,
 65:3, 70:10.
 140 2:31.
 15 109:4, 109:11.
 15th 2:22.
 19 3:24.
 19th 117:18.
 1:01 116:9, 116:12, 116:13.
 .
 < 2 >.
 2 3:19, 4:14, 10:25, 43:24,
 43:25, 86:15, 110:17,
 114:2, 114:3.
 2. 43:16, 86:13.
 20 109:5.
 20005 2:23.
 2006. 16:16.
 2020 43:3, 44:16, 44:23,
 57:14, 57:18, 58:9, 72:21,
 73:17, 73:21, 77:8, 106:3,
 114:12, 114:15.
 21 3:26, 98:3, 98:17,
 102:20.
 21-CV-2521 1:13, 4:10.
 21. 98:2.
 22 3:29, 108:23, 110:3,
 110:5, 110:8, 114:14.
 24 3:17.
 25 3:32, 53:8, 53:9, 83:4,
 83:5, 86:14.
 25. 64:9, 74:16.
 .
 < 3 >.
 3 1:5, 12:8, 12:15, 20:19,
 20:20.
 3. 20:5.
 30952 1:14.
 .
 < 4 >.
 4 12:20.
 43 3:19.
 488 83:16.
 488. 88:21.

already 66:10, 115:4.
 alter 91:5.
 alters 90:24.
 Amanda 56:6, 57:6, 85:12,
 85:20.
 ambiguous 12:15, 30:17,
 49:15, 78:14, 113:5.
 amended 103:18, 104:13.
 Amendment 3:29, 110:12,
 110:17, 111:7, 111:12,
 111:24, 112:10, 112:19,
 112:23, 113:2, 113:11,
 114:13.
 American 1:9, 2:21, 2:38,
 4:6, 4:24, 5:1, 5:3, 5:9,
 6:2, 12:11, 24:9, 39:23,
 40:5, 41:24, 43:20, 44:11,
 44:14, 44:18, 50:15, 51:16,
 52:12, 66:3, 69:3, 71:12,
 78:6, 99:10, 100:21,
 111:22, 111:24, 112:2,
 112:11, 112:19.
 amount 53:2, 53:3, 66:24,
 67:5.
 Angela 56:21.
 announced 43:8, 76:22.
 Answer 3:22, 7:16, 7:21,
 7:24, 7:25, 8:22, 8:25,
 9:16, 18:19, 28:23, 31:2,
 35:7, 48:8, 49:16, 51:23,
 72:23, 75:21, 76:2, 76:15,
 90:18, 96:19, 106:13,
 107:1.
 answered 48:16, 61:25, 62:2,
 76:15, 85:7, 112:13.
 Anybody 6:17, 6:19, 6:23,
 8:15, 8:20, 14:10, 23:18,
 23:22, 38:6, 48:4, 57:12,
 65:11, 74:20, 76:20, 76:25,
 79:23, 87:24, 88:1, 94:11,
 96:21, 97:14, 97:16, 97:17,
 97:23, 110:20.
 AO 53:15.
 apologies 98:8.
 apologize 32:2, 55:17,
 101:14.
 Apparently 60:15.
 appearing 2:17, 2:26, 2:34,
 12:18.
 appears 5:5, 53:24, 64:13,
 70:15, 83:13, 84:4.
 applications 47:25, 48:3,
 48:6, 48:10, 80:11, 81:2,
 81:3, 81:4, 81:6, 81:10,
 81:13.
 apps 80:19.
 around 10:17, 16:9, 36:24,
 53:5, 100:9, 105:17.
 arrangement 111:18.
 asks 10:25, 57:9, 60:21,
 72:19, 114:4.
 Assembly 13:12, 16:21, 17:18,
 17:23, 17:24, 37:5, 38:8,
 42:23, 43:1, 43:5, 51:19,
 60:10, 77:7, 93:10, 93:16,
 94:8, 94:12, 94:15, 94:19,
 95:13, 96:7, 96:13, 96:16,
 98:14, 99:5, 99:15, 99:17,
 100:3, 100:5, 101:1, 101:7,
 103:3, 106:2, 107:25.
 assigned 32:18.
 assistant 36:13, 38:16, 41:3,
 41:4, 41:11, 42:12, 42:14,
 42:17, 56:7, 57:5, 85:24,
 101:21.
 assume 7:21, 55:12, 85:13.
 Assuming 76:10.
 assumption 85:15.
 assure 96:24.
 attained 16:11.
 attendance 5:9.
 attention 9:21, 96:1.
 Attorney 3:7, 3:9, 3:26,
 3:44, 5:4, 8:18, 9:8, 14:5,
 14:8, 103:2, 106:4, 114:25,
 117:14, 117:15.
 attorney-client 9:10, 78:24,
 79:4.
 atypical 66:16, 66:24,
 67:5.
 audiovisual 4:12.
 August 53:16, 53:19, 64:20,
 65:3, 70:10.
 automatic 50:23, 68:23.
 Avenue 2:14.
 average 46:24, 46:25.
 aware 8:6, 8:22, 24:9, 24:14,
 44:11, 44:20, 52:13, 58:17,
 58:20, 59:12, 59:19, 59:21,
 60:2, 60:10, 61:13, 66:20,

COORDINATING ATTORNEY INDEPENDENT CONTRACTOR AGREEMENT

This Independent Contractor Agreement (Agreement) is entered into this 25th day of June 2021 by and between The Wisconsin Assembly (Assembly) and Consultare LLC, by and through its President, Michael J. Gableman, an independent contractor (Contractor), in consideration of the mutual promises made herein, as follows:

Term of Agreement

This Agreement will become effective on July 1, 2021, and will continue in effect until October 31, 2021, unless altered or extended by mutual agreement of Assembly and the Contractor.

Services to be Rendered by Contractor

Contractor agrees to:

- Coordinate the day to day investigatory work relating to potential irregularities and/or illegalities connected to the 2020 November election in Wisconsin.
- Analyze and delegate to the investigators leads/allegations from whatever source derived, including- but not limited to- those that have been submitted to the Assembly Committee on Campaigns and Elections, raised in the media, provided to members of the Legislature before or during the investigation, or generated through the course of this investigation;
- Receive investigative reports from investigators and keep a weekly report of investigative findings.
- Routinely consult with investigators to help direct them in the nature and manner of their investigatory work.
- Compile all investigator reports and weekly attorney reports into a final report related to the election investigation, to be submitted to the Speaker of the Assembly, and;
- Keep all information/findings related to the services rendered under this agreement confidential, except when working with Integrity Investigators and such designee(s) of the Assembly whom the Speaker shall from time to time identify in writing to the Consultant for such purposes. At present, the Speaker hereby designates Attorney Steve Fawcett as the Assembly's point of contact with the Contractor. The identity of the Assembly point of contact with whom the Contractor may share such information may be modified from time to time in writing by the Speaker. The requirement for confidentiality set forth in this paragraph extends to any and all employees or agents of the Contractor.

Method of Performing Services

Contractor will determine the method, details, and means of performing the above-described services.

Compensation

In consideration for the services to be performed by Contractor, the Assembly agrees to pay Contractor the sum of Eleven Thousand dollars (\$11,000), on a monthly basis, the first such payment due on July 15, 2021, and payment continuing on and through the 15th day of each subsequent month subject to this Agreement (August, September, and October 2021) until the "Term of Agreement" recited herein has ended.

Equipment, Supplies and Related Expenses

Contractor will supply all equipment and supplies required to perform the services under this Agreement. Contractor will also be responsible for all related expenses, including but not limited to mileage or hotel stays, required to perform the services under this Agreement.

Workers Compensation

Contractor agrees to hold harmless and indemnify the Assembly for any and all claims arising out of any injury, disability, or death of the Contractor and Contractor's employees or agents. The Contractor also agrees to provide workers' compensation insurance for Contractor's employees and agents where necessary.

Insurance

Contractor agrees to hold the Assembly free and harmless from any and all claims arising from any negligent act or omission by the Contractor or Contractor's employees or agents during the performance of any duties under this Agreement. The Contractor should consider maintaining a policy of insurance to cover any negligent acts committed by the Contractor or Contractor's employees or agents during the performance of any duties under this Agreement.

Obligations of the Assembly

The Assembly agrees to meet the terms of all reasonable requests of Contractor necessary to the performance of Contractor's duties under this Agreement.

Assignment

Neither this Agreement nor any duties or obligations under this Agreement may be assigned by the Assembly or Contractor without the prior written consent of the Assembly and Contractor.

Termination of Agreement

Neither party may terminate this Agreement at any time prior to the "Term of Agreement" recited herein absent good cause, except at the sixty (60) day mark either party may terminate the last two months of the contract, by written notice, should either party desire to terminate the contract. If no such termination occurs by the sixty (60) day mark, the contract shall be fulfilled in full by both parties unless terminated for good cause.

Notices

Any notices to be given hereunder by either party to the other may be made either by personal delivery or by mail. Mailed notices shall be addressed to the parties at the following addresses:

Contractor:

Consultare LLC
c/o Michael J. Gableman, President
P.O. Box 510145
New Berlin, WI 53151

Assembly:

Speaker Robin Vos
c/o Steve Fawcett
PO BOX 8953
Madison WI 53708

Dispute Resolution

In the event the parties disagree to the terms or execution of the contract, the parties agree to notify the other party as soon as possible to said conflict and work in good faith to find a resolution. In the event that no resolution can be found, the parties agree that any conflict arising out of this contractual agreement is within the sole jurisdiction of the Circuit or Court for Waukesha County, which is the jurisdiction for the home County of residence of the Contractor.

Entire Agreement

This Agreement supersedes any and all other agreements, either oral or in writing, between the parties hereto with respect to the performance of services by Contractor and the Assembly, and contains all the covenants and agreements between the parties with respect to the rendering of such services in any manner whatsoever. Each party to this Agreement acknowledges that no representations, inducements, promises, or agreements, orally or otherwise, have been made by any party, or anyone acting on behalf of any party, which are not embodied herein, and that no other agreement, statement, or promise not contained in this Agreement shall be valid or binding. Any modification of this Agreement will be effective only if it is in writing and signed by the other party.

Partial Invalidity

If any provision of this Agreement is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remaining provisions shall nevertheless continue in full force without being impaired or invalidated in any way.

Governing Law

This Agreement shall be governed by and construed in accordance with the laws of the State of Wisconsin.

Assembly, by: *[Signature]* Date: 6-24-2021

Contractor, by: *[Signature]* Date: June 26, 2021

INTEGRITY INVESTIGATOR INDEPENDENT CONTRACTOR AGREEMENT

June 1, 2021

This Independent Contractor Agreement (Agreement) is entered into this 1st day of June, 2021 by and between The Wisconsin Assembly (Assembly) and Michael Sandvick, an independent contractor (Contractor), in consideration of the mutual promises made herein, as follows:

Term of Agreement

This Agreement will become effective on June 1, 2021, and will continue in effect until September 1, 2021, unless altered or extended by the Assembly with written notice to the Contractor.

Services to be Rendered by Contractor

Contractor agrees to:

- Carry out the day to day investigatory work relating to potential irregularities and/or illegalities connected to the 2020 November election in Wisconsin.
- Follow leads/allegations that have been submitted to the Assembly Committee on Campaigns and Elections, raised in the media, provided to members of the Legislature before or during the investigation, or generated through the course of this investigation.
- Collect data and evidence, interview witnesses, document findings, and share information with the other Integrity Investigators as needed.
- Conduct all work in cooperation, consultation, and coordination with the other Integrity Investigators.
- Collaborate with other Integrity Investigators in preparing/completing a final report related to the above related services/findings, to be submitted to the Speaker of the Assembly.
- Keep all information/findings related to the services rendered under this agreement confidential, except when working with other Integrity Investigators, the Assembly, or counsel for the Assembly (this requirement extends to any/all employees or agents of the Contractor).

Method of Performing Services

Contractor will determine the method, details, and means of performing the above-described services, including the determination of the need for and hiring assistants at the Contractor's own expense. The Assembly may not control, direct, or otherwise supervise Contractor's assistants or employees in the performance of those services.

Compensation

In consideration for the services to be performed by Contractor, the Assembly agrees to pay Contractor the sum of Three Thousand Two Hundred dollars (\$3,200), on a monthly basis, until the "Term of Agreement" listed above has ended.

Equipment, Supplies and Related Expenses

Contractor will supply all equipment and supplies required to perform the services under this Agreement. Contractor will also be responsible for all related expenses, including but not limited to mileage or hotel stays, required to perform the services under this Agreement.

Workers Compensation

Contractor agrees to hold harmless and indemnify the Assembly for any and all claims arising out of any injury, disability, or death of the Contractor and Contractor's employees or agents. The Contractor also agrees to provide workers' compensation insurance for Contractor's employees and agents where necessary.

Insurance

Contractor agrees to hold the Assembly free and harmless from any and all claims arising from any negligent act or omission by the Contractor or Contractor's employees or agents during the performance of any duties under this Agreement. The Contractor should consider maintaining a policy of insurance to cover any negligent acts committed by the Contractor or Contractor's employees or agents during the performance of any duties under this Agreement.

Obligations of the Assembly

The Assembly agrees to meet the terms of all reasonable requests of Contractor necessary to the performance of Contractor's duties under this Agreement.

Assignment

Neither this Agreement nor any duties or obligations under this Agreement may be assigned by the Assembly or Contractor without the prior written consent of the Assembly and Contractor.

Termination of Agreement

Notwithstanding any other provision of this Agreement, either party hereto may terminate this Agreement at any time by giving written notice to the other party.

Notices

Any notices to be given hereunder by either party to the other may be made either by personal delivery or by mail. Mailed notices shall be addressed to the parties at the following addresses:

Contractor:

Michael Sandvick
4894 South Wingspan Lane
Greenfield WI 53228

Assembly:

Speaker Robin Vos
c/o Steve Fawcett
PO BOX 8953
Madison WI 53708

Dispute Resolution – In the event the parties disagree to the terms or execution of the contract, the parties agree to notify the other party as soon as possible to said conflict and work in good faith to find a resolution. In the event that no resolution can be found, the parties agree that any conflict arising out of this contractual agreement is within the sole jurisdiction of the circuit or superior court of the home county of residence of the contractor.

Entire Agreement

This Agreement supersedes any and all other agreements, either oral or in writing, between the parties hereto with respect to the performance of services by Contractor and the Assembly, and contains all the covenants and agreements between the parties with respect to the rendering of such services in any manner whatsoever. Each party to this Agreement acknowledges that no representations, inducements, promises, or agreements, orally or otherwise, have been made by any party, or anyone acting on behalf of any party, which are not embodied herein, and that no other agreement, statement, or promise not contained in this Agreement shall be valid or binding. Any modification of this Agreement will be effective only if it is in writing and signed by the other party.

Partial Invalidity

If any provision of this Agreement is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remaining provisions shall nevertheless continue in full force without being impaired or invalidated in any way.

Governing Law

This Agreement shall be governed by and construed in accordance with the laws of the State of Wisconsin.

Assembly, by:  Date: 6-16-21

Contractor, by:  Date: 6-14-2021

INTEGRITY INVESTIGATOR INDEPENDENT CONTRACTOR AGREEMENT

June 1, 2021

This Independent Contractor Agreement (Agreement) is entered into this 1st day of June, 2021 by and between The Wisconsin Assembly (Assembly) and Steve Page, an independent contractor (Contractor), in consideration of the mutual promises made herein, as follows:

Term of Agreement

This Agreement will become effective on June 1, 2021, and will continue in effect until September 1, 2021, unless altered or extended by the Assembly with written notice to the Contractor.

Services to be Rendered by Contractor

Contractor agrees to:

- Carry out the day to day investigatory work relating to potential irregularities and/or illegalities connected to the 2020 November election in Wisconsin.
- Follow leads/allegations that have been submitted to the Assembly Committee on Campaigns and Elections, raised in the media, provided to members of the Legislature before or during the investigation, or generated through the course of this investigation.
- Collect data and evidence, interview witnesses, document findings, and share information with the other Integrity Investigators as needed.
- Conduct all work in cooperation, consultation, and coordination with the other Integrity Investigators.
- Collaborate with other Integrity Investigators in preparing/completing a final report related to the above related services/findings, to be submitted to the Speaker of the Assembly.
- Keep all information/findings related to the services rendered under this agreement confidential, except when working with other Integrity Investigators, the Assembly, or counsel for the Assembly (this requirement extends to any/all employees or agents of the Contractor).

Method of Performing Services

Contractor will determine the method, details, and means of performing the above-described services, including the determination of the need for and hiring assistants at the Contractor's own expense. The Assembly may not control, direct, or otherwise supervise Contractor's assistants or employees in the performance of those services.

Compensation

In consideration for the services to be performed by Contractor, the Assembly agrees to pay Contractor the sum of Three Thousand Two Hundred dollars (\$3,200), on a monthly basis, until the "Term of Agreement" listed above has ended.

Equipment, Supplies and Related Expenses

Contractor will supply all equipment and supplies required to perform the services under this Agreement. Contractor will also be responsible for all related expenses, including but not limited to mileage or hotel stays, required to perform the services under this Agreement.

Workers Compensation

Contractor agrees to hold harmless and indemnify the Assembly for any and all claims arising out of any injury, disability, or death of the Contractor and Contractor's employees or agents. The Contractor also agrees to provide workers' compensation insurance for Contractor's employees and agents where necessary.

Insurance

Contractor agrees to hold the Assembly free and harmless from any and all claims arising from any negligent act or omission by the Contractor or Contractor's employees or agents during the performance of any duties under this Agreement. The Contractor should consider maintaining a policy of insurance to cover any negligent acts committed by the Contractor or Contractor's employees or agents during the performance of any duties under this Agreement.

Obligations of the Assembly

The Assembly agrees to meet the terms of all reasonable requests of Contractor necessary to the performance of Contractor's duties under this Agreement.

Assignment

Neither this Agreement nor any duties or obligations under this Agreement may be assigned by the Assembly or Contractor without the prior written consent of the Assembly and Contractor.

Termination of Agreement

Notwithstanding any other provision of this Agreement, either party hereto may terminate this Agreement at any time by giving written notice to the other party.

Notices

Any notices to be given hereunder by either party to the other may be made either by personal delivery or by mail. Mailed notices shall be addressed to the parties at the following addresses:

Contractor:

Steve Page
5472 Woodcrest Highlands
Eau Claire WI 54701

Assembly:

Speaker Robin Vos
c/o Steve Fawcett
PO BOX 8953
Madison WI 53708

Dispute Resolution – In the event the parties disagree to the terms or execution of the contract, the parties agree to notify the other party as soon as possible to said conflict and work in good faith to find a resolution. In the event that no resolution can be found, the parties agree that any conflict arising out of this contractual agreement is within the sole jurisdiction of the circuit or superior court of the home county of residence of the contractor.

Entire Agreement

This Agreement supersedes any and all other agreements, either oral or in writing, between the parties hereto with respect to the performance of services by Contractor and the Assembly, and contains all the covenants and agreements between the parties with respect to the rendering of such services in any manner whatsoever. Each party to this Agreement acknowledges that no representations, inducements, promises, or agreements, orally or otherwise, have been made by any party, or anyone acting on behalf of any party, which are not embodied herein, and that no other agreement, statement, or promise not contained in this Agreement shall be valid or binding. Any modification of this Agreement will be effective only if it is in writing and signed by the other party.

Partial Invalidity

If any provision of this Agreement is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remaining provisions shall nevertheless continue in full force without being impaired or invalidated in any way.

Governing Law

This Agreement shall be governed by and construed in accordance with the laws of the State of Wisconsin.

Assembly, by:  Date: 6-23-2021

Contractor, by:  Date: 6/21/21

FIRST AMENDMENT TO AGREEMENT

THIS FIRST AMENDMENT TO AGREEMENT (this "First Amendment") is made and entered into as of August 20, 2021, by and among **THE WISCONSIN STATE ASSEMBLY** (the "Assembly"), and **CONSULTARE LLC**, a Wisconsin limited liability company, by and through its President, Michael J. Gableman ("Gableman", and together with the Assembly, the "Parties" and each a "Party").

RECITALS

A. The Parties entered into that certain Independent Contractor Agreement effective July 1, 2021 (the "IC Agreement").

B. The Parties desire to amend the IC Agreement to (1) approve and provide additional resources, including the budget attached hereto as Exhibit A, in order for Gableman to perform the Services required under the IC Agreement and (2) to confirm that Gableman shall act as the Custodian of Records with regard to the investigation that is subject of the IC Agreement.

C. Capitalized terms used and not defined herein shall have the meaning given the same in the IC Agreement.

AMENDMENT

NOW, THEREFORE, in consideration of the foregoing recitals, the mutual covenants and agreements contained herein, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the IC Agreement is amended and/or supplemented as follows:

1. **Incorporation of Recitals.** The recitals set forth in the section entitled "Recitals" above are hereby incorporated into this First Amendment as if set forth in full herein.

2. **Budget.** The Assembly hereby approves and incorporates the Budget attached hereto as Exhibit A, which funds shall be made available by the Assembly to Gableman for reimbursement of costs and expenses for the purposes identified in the Budget.

3. **Office of The Special Counsel.** There shall be, and is hereby established, The Office of The Special Counsel (the "Office") for the investigation that is the subject of the IC Agreement and Michael J. Gableman, as Special Counsel, shall control such Office, which Office shall be the Custodian of Records with regard to the records related to the investigation that is the subject of the IC Agreement.

4. **Miscellaneous.** In the event of any conflict between the terms and provisions of this First Amendment and the IC Agreement, the terms and provisions of this First Amendment shall control. If any provision of this First Amendment or the application thereof shall, for any reason and to any extent, be invalid or unenforceable, neither the remainder of this First Amendment nor the application of the provision to other persons, entities or circumstances shall be affected thereby, but instead shall be enforced to the maximum extent permitted by law. This First Amendment may be executed in multiple counterpart signature pages, all of which taken together shall be construed as one and the same document. Facsimile and electronic (i.e., ".pdf") signatures of this First Amendment shall be treated as original signatures to this First Amendment and shall be binding on the Parties.

[signature page follows]

IN WITNESS WHEREOF, the Parties hereby enter into this First Amendment as of the date first written above.

THE WISCONSIN STATE ASSEMBLY

By: 

Robin J. Vos, Speaker

CONSULTARE LLC

By: _____
Michael J. Gableman, President

EXHIBIT A

BUDGET

[to be attached]

Ex. A to First Amendment

Wisconsin 2020 Election Special
Counsel Budget

WEC	Private Admin of Elections	Voting Machines	Total *
Special Counsel	18,334.00	18,334.00	56,000.00
Administrative Assistant	5,333.00	5,333.00	16,000.00
Investigator #1	8,334.00	8,334.00	25,000.00
Investigator #2	8,334.00	8,334.00	25,000.00
Investigator #3	25,000.00		25,000.00
Investigator #4			25,000.00
Investigator #5	8,334.00	8,334.00	25,000.00
Other			
Rent			10,000.00
Office Equipment			2,000.00
Outside Services			
Communications			15,000.00
Data Analysis Contractor		325,000.00	325,000.00
Outside Legal Counsel			50,000.00
Other Expenses			
Travel (reimb. @ federal rate)			25,000.00
Court Reporting			50,000.00
Service of Process/Filing			3,000.00
TOTAL			676,000.00

*5 months (08/01/21-12/31/21)
 +Investigators paid per month, plus reasonable expenses including reimbursement for mileage, lodging and food

11/4/2021

Report Election & Voter Fraud in Wisconsin 2021-2022 | wifraud

**EXHIBIT
38**



Wisconsin Election Fraud Reporting Platform

Report Election Fraud

See submitted election integrity reports



**FILED
01-31-2022
CIRCUIT COURT
DANE COUNTY, WI
2021CV003007**

EXHIBIT E
<https://www.wifraud.com>

11/4/2021

Report Election & Voter Fraud in Wisconsin 2021-2022 | wifraud



Report voter fraud in Wisconsin

2021 Assembly Resolution 3

First Name*

Last Name*

Email*

Phone*

Location* (city, country, voting site, etc.)

Do you wish to be contacted? Yes No

Message*

Please attach videos, pictures, documents, or other evidence to support your allegation(s)

Accepted file types: .jpg, .jpeg, .png, .pdf, .zip, .mov, .mp4 -- Max 6 images

Any publication of this report will not identify individuals

I'm not a robot

Send

1. Relating to: addressing election law violations.
2. Whereas, in the United States, the power to govern is given by the people
3. through the process of democratic elections. It is by this process that our government obtains legitimacy; and
5. Whereas, we have three branches of government, and the legislative branch, consisting of duly elected representatives of the people, is the branch charged with the power to write the laws. It is through this process that our government maintains legitimacy; and
9. Whereas, when the executive branch or administrative agencies charged with enforcing the laws instead choose to step outside of the law, or go beyond the law, or stretch the law to something other than what is written, the legitimacy of the government begins to erode; and
2. government begins to erode; and
3. Whereas, the 2020 election and the recount of the results of the presidential election have brought to light a number of areas in which the letter of the law is not being followed. Those circumstances of departure from the letter of the law include, but are not limited to, the following:
 1. Clerks provided absentee ballots to electors without applications, as required by Wis. Stat. § 6.86.
 2. Clerks and deputy clerks authorized by the municipal clerk failed to write on the official ballot, in the space for official endorsement, the clerk's initials and official title, as required by Wis. Stat. § 6.87 (1).
 3. Clerks issued absentee ballots to electors who were required to enclose a copy of proof of identification or an authorized substitute document, but who failed to do so under Wis. Stat. § 6.87 (1).
 4. Clerks failed to enter initials on ballot envelopes indicating whether the elector is exempt from providing proof of identification, as required by Wis. Stat. § 6.87 (2).
 5. Clerks in Milwaukee and Dane Counties declared electors in their counties to be "indefinitely confined" under Wis. Stat. § 6.86 (2), causing chaos and confusion, and failed to keep current the mailing list established under that subsection; more than 215,000 electors thus avoided identification requirements and safeguards that the legislature has established.
 6. Clerks and the boards of canvassers permitted absentee ballots returned without the required witness address under Wis. Stat. § 6.87 (2) to be counted in contravention of Wis. Stat. § 6.87 (6d).
 7. Clerks who received absentee ballots with improperly completed certificates or no certificates filled in missing information in contravention of Wis. Stat. § 6.87 (4), (9).
 8. The Wisconsin Elections Commission, in contravention of Wis. Stat. § 6.875, barred special voting deputies from entering qualified nursing homes and assisted living facilities, instead mailing ballots to residents directly, thereby avoiding safeguards the legislature put in place to protect our most vulnerable citizens and loved ones.
 9. The clerk of the City of Madison ignored Wis. Stat. § 6.855 and created an event named "Democracy in the Park" and, of her own accord, designated alternate sites where absentee ballots could be collected; these ballots were counted in contravention of Wis. Stat. § 6.87 (6) ; and
 10. Whereas, without legitimacy, the government of the people, by the people, and for the people shall not stand. Instead, our government will devolve into a system

11/4/2021

Report Election & Voter Fraud in Wisconsin 2021-2022 | wifraud

- 2. of coercion and bribery that seeks to use the guise of elections to hold a degree of
- 3. credibility; and
- 4. Whereas, the people of Wisconsin are demanding that the legislature address
- 5. questions of legitimacy; now, therefore, be it
- 6. Resolved by the assembly, That: the Wisconsin State Assembly recognizes
- 7. that the most important function for a government is to conduct fair and honest
- 8. elections that follow the duly enacted law, and, be it further
- 9. Resolved, That when there are significant portions of the population that
- :0. question the integrity of the elections due to the failure of election officials to follow
- :1. the letter of the law, it is incumbent upon the legislature to address the issues that
- :2. are in question, and, be it further
- :3. Resolved, That the members of the Wisconsin State Assembly place the
- :4. redress to these and other election law violations and failed administrative
- 1. procedures as its highest priority and shall take up legislation crafted to ensure civil
- 2. officers follow the laws as written.

Read Less

Submitted Election Integrity Reports

Submitted 07/28/2021

I was sitting right behind the counting machine and early afternoon the machine had a glitch and all the ballots went flying. Supposedly, they reset the machine but I didn't see anyone overseeing that. ... [Read More](#)

Submitted 07/28/2021

On Oct. 27 while poll watching, I observed one woman bring in 6 absentee ballots in envelopes and watched a poll worker write something (presumably the name and/or street address for the person who ha... [Read More](#)

Submitted 07/28/2021

On November 3, 2020, my wife and I were Poll Observers in Milwaukee we observed the following: After a Poll Worker registered a new voter, she told the voter to vote for the President beginning with ... [Read More](#)

Submitted 07/28/2021

I also contacted Rep. ***** but I'm reaching out to you as chairman of the Campaigns and Elections Committee. I have been on the phone all week with various lawyers about what I saw at our polling pla... [Read More](#)

Submitted 07/28/2021

I served as a recount observer in Milwaukee for four days, November 20, 21, 22, and the 23rd. Sunday I was assigned to observe wards in the city of Milwaukee. I observed two ballot envelopes that had ... [Read More](#)

Submitted 07/28/2021

The Nov. 3rd presidential election 2020 my fiancé and I voted in person, early, at City Hall in Elkhorn. When we checked the myvote site out it said we voted by absentee ballot at the Elkhorn National... [Read More](#)

Submitted 07/28/2021

After that task was complete, the poll workers at Table 54 were given another clear packet of ballots to process and told by the supervisor: "Just make sure these are all from Ward 15". I asked how ... [Read More](#)

Submitted 07/28/2021

I received your email address from my friend ***** I saved these photos which were posted on either Nextdoor (the neighborhood app), or Twitter from Democracy in the park collection sites. I di... [Read More](#)

Submitted 07/28/2021

When I first heard the radio ads for the City of Madison "Democracy in the Parks" events, being a Conservative I actually thought it was a parody. I have yet to hear a logical explanation on how their... [Read More](#)

Submitted 07/28/2021

I voted at the poll 11-3-2020. I witnessed the poll worker herding people away from one of the two scanners we were to scan our ballots through. I went to the scanner with no line, and it worked perfe... [Read More](#)

Submitted 07/28/2021

A gentleman who voted absentee then passed away prior to Election Day (after sending his ballot). The constituent says that it shows his ballot as being counted online (through myvote.wi.gov), despite... [Read More](#)

Submitted 07/28/2021

My wife and I would like to report Election Law violations in Eau Claire during the 2020 Presidential election. On multiple occasions during the 2020 Presidential election, my wife and I observed unma... [Read More](#)

11/4/2021

Report Election & Voter Fraud in Wisconsin 2021-2022 | wifraud

Submitted 07/28/2021

I have a voter who is a resident of Chicago. Address is ***** Division Street, Chicago, IL. Her Facebook page has her residence posted as being in Chicago. She requested an absentee ballot through M... [Read More](#)

Submitted 07/28/2021

I checked my vote/wigov and it indicates that I submitted a request for an absentee ballot on 2/10/20, it was approved on 2/10/20, absentee ballot prepared on 2/10/20, absent, he ballot sent on 2/10/20 and... [Read More](#)

Submitted 07/28/2021

I am reporting to you that L***** O**** used my address to vote in at least the last two elections. He does not live here! I was told by the Waukesha county clerk that he has been voting absentee ... [Read More](#)



Wisconsin Election Fraud Reporting Platform

© Copyright 2021



Wisconsin Legislative Council

Anne Sappenfield
Director

TO: REPRESENTATIVE GORDON HINTZ

FROM: Dan Schmidt, Deputy Director

RE: Application of the Public Records Law to the Assembly Office of Special Counsel

DATE: October 1, 2021

This memorandum, prepared at your request, responds to two questions you asked regarding the application of the Public Records Law and the Public Records Retention Law to the Assembly Office of Special Counsel (AOSC). Specifically, your first question is whether the AOSC is generally subject to the Public Records Law as expressed in ss. 19.31 to 19.39, Stats., and your second question is whether the AOSC is subject to Public Records Retention Law requirements under s.16.61, Stats. My response to both of these questions is that the AOSC, as I understand its organization, is generally subject to both the Public Records Law and the public records retention requirements under s. 16.61, Stats. My explanations follow.

BACKGROUND

The AOSC was created by the adoption of a motion by the Assembly Committee on Organization on August 30, 2021. This same motion also appointed the Assembly Special Counsel, who was hired earlier this past summer, to oversee this office. Specifically, the motion provides the following:

It is moved that the Committee on Assembly Organization authorizes the Speaker of the Assembly to designate the legal counsel hired pursuant to the May 28, 2021, ballot adopted by the Committee on Assembly Organization, as special counsel to oversee an Office of Special Counsel. The special counsel shall direct an elections integrity investigation, assist the Elections and Campaign Committee, and hire investigators and other staff to assist in the investigation.

PUBLIC RECORDS LAW AND THE AOSC AND ASSEMBLY SPECIAL COUNSEL AS AUTHORITIES

The definition of “authority,” for the purposes of the Public Records Law, includes the Assembly and any “formally constituted sub-unit” of the Assembly. [s. 19.32 (1), Stats.] As the AOSC was formally constituted by the motion described above, and the Public Records Law applies to authorities as defined under s. 19.32 (1), Stats., the Public Records Law, therefore, generally applies to records created or maintained by the AOSC, or by the Assembly Special Counsel on behalf of the AOSC.

- 2 -

It is important to note that, while the Assembly Special Counsel and the AOSC are generally subject to the Public Records Law, certain records may be excepted from disclosure under certain circumstances as they are for any authority. Such exceptions may include express statutory exceptions, common law exceptions, or exceptions created by an authority under the Public Records Law balancing test analysis. Examples of potential exceptions specific to the AOSC and the Assembly Special Counsel may presumably include those relating to the release of records regarding certain current investigations¹ or records regarding certain confidential informants.²

PUBLIC RECORDS RETENTION LAW AND THE AOSC

Section 16.61, Stats., the Public Records Retention Law, generally requires that state agencies maintain records in accordance with prescribed schedules established by the Public Records Board (PRB). Public records are the property of the State and may not be disposed of without the approval of the PRB. [s. 16.61 (4) (a), Stats.]

Under the Public Records Retention Law, a “state agency” is broadly defined to include “any officer, commission, board, department or bureau of state government.” [s. 16.61 (2) (b), Stats.] For the purposes of records retention under s. 16.61, Stats., “public records” generally includes most items made or received in connection with the transaction of public business, subject to certain specified exceptions, including an exception for “records and correspondence of any member of the legislature.”³

While one may question at first glance whether the Public Records Retention Law’s definition of a state agency was intended to apply to the Legislature or its sub-units, the fact that the “records and correspondence of any *member* of the legislature” are excluded from the definition of “public records,” negates any effect that the retention requirement has on legislative “members”. Similarly, the absence of any specific legislative rules to the contrary regarding the general disposition of legislative records appears to indicate that the legislative intent of this section was to apply the retention requirements to legislative agencies and bodies that are not members of the Legislature or their offices.⁴

As noted above, the Assembly Special Counsel is an officer appointed by the Committee on Assembly Organization to oversee the AOSC and not a member of the Legislature. Therefore, the Special Counsel

¹ See, for example, s. 19.36 (10) (b), Stats., and *Kroepelin v. DNR*, 2006 WI App 227 ¶ 31.

² See, for example, s. 19.36 (8), Stats., and *Mayfair Chrysler-Plymouth, Inc. v. Baldarotta*, 162 Wis. 2d 142, 164-68, 469 N.W.2d 638 (1991).

³ Section 16.61 (2) (b), Stats., specifically defines “public records” as “all books, papers, maps, photographs, films, recordings, optical discs, electronically formatted documents, or other documentary materials, regardless of physical form or characteristics, made or received by any state agency or its officers or employees in connection with the transaction of public business, and documents of any insurer that is liquidated or in the process of liquidation under ch. 645. “Public records” does not include: (1) records and correspondence of any member of the Legislature; (2) any state document received by a state document depository library; (3) duplicate copies of materials the original copies of which are in the custody of the same state agency and which are maintained only for convenience or reference and for no other substantive purpose; (4) materials in the possession of a library or museum made or acquired solely for reference or exhibition purposes; (5) notices or invitations received by a state agency that were not solicited by the agency and that are not related to any official action taken, proposed, or considered by the agency; (6) drafts, notes, preliminary computations and like materials prepared for the originator's personal use or prepared by the originator in the name of a person for whom the originator is working; or (7) routing slips and envelopes.

⁴ Note that this conclusion is further supported by the fact that legislative agencies have long been required to file records disposition agreements with the PRB and that legislative chairpersons are generally required to maintain committee records for deposit with the Secretary of State or transmittal to the legislative library. [See s. 13.16, Stats., and the Senate and Assembly Committee Clerk’s Manuals, respectively.]

- 3 -

and his or her office are generally subject to the Public Records Retention Law requirements under s. 16.61, Stats.

Please let me know if I can provide any further assistance.

DWS:ksm

FILED
01-31-2022
CIRCUIT COURT
DANE COUNTY, WI
2021CV003007



Office of the Special Counsel

First Interim Report

Delivered to the Wisconsin State Assembly November 10, 2021

“I am writing this, as I feel my mother was taken advantage of in her mental state. Parents and loved ones should be protected, not exploited, for an ink mark on a piece of paper and questionable agenda.” *Judy Weshphal-Mitchell, discussing how actions of the Wisconsin Election Commission affected her family*

Elections in the United States are the bedrock of our constitutional republic. They are subject to the law, including the fundamental laws found in the Constitutions of the United States and the State of Wisconsin. But fair elections are not a mere checkbox exercise. To secure republican government it is important not just that the law is followed, but that the citizens have confidence the law is followed. In the run up to the election of November 3, 2020, polling showed a majority of Americans did not have confidence their vote would count. In a democracy, this is as untenable as it is unacceptable.

To help address these concerns, the state Assembly established a new office, the Office of the Special Counsel, to investigate the recent elections in our state. As head of this new office, I am authorized by law to take all reasonable steps to investigate what happened in regard to the November 2020 election, what should have happened, why there was a difference between the two, and to recommend steps to enhance the transparency of our elections as well as restore public confidence in elections going forward.

This interim report is a first step in discharging that mission.

While this report does not definitively answer all questions that might be asked about the November 2020 election, it takes an important step in collating those questions and presenting them in a structured manner.

Over the approximately sixty days since my office was created and has been funded, we have spoken with, and listened to, everyone who has wanted to talk. This open-door policy will remain throughout the entirety of this investigation, and any future investigation with which this office is charged. We have drawn some criticism from those in the media who would suggest my discussions with various individuals or groups implies an endorsement of their views. This is not the case. I do not apologize for this open-door policy: the views of all Wisconsinites matter and sidelining or even laughing

at serious concerns of any citizen of this state would call into question whatever may be discovered by my investigation.

In the short time the Office of the Special Counsel has been funded, we have not only met with many individuals and groups, but we have collected, and in some cases compelled by law, the production of relevant information. Further, our investigation has gone beyond, and will continue to go beyond, the investigation recently conducted by the Legislative Audit Bureau (LAB). One purpose of this interim report is to lay out for the public how my Office's investigation differs significantly from the LAB investigation.

Notwithstanding lawsuits and threats of more lawsuits supported by high-priced, out-of-state lawyers, my office expects to depose government officials, under oath, to determine whether state and federal law were followed in our elections, whether good management held, and if not, who might have been responsible. If necessary, we stand prepared to refer all relevant information to appropriate state and federal law enforcement authorities. The wagon-circling by government entities in our state is concerning and is not limited to my investigation: the City of Madison, the City of Milwaukee, and the town of Little Suamico all refused to fully cooperate even with the LAB investigation, cooperation to which our legislature and the people are entitled by our State Constitution.

Make no mistake: I sincerely hope the law was followed in Wisconsin. It would give me the greatest satisfaction to deliver to the speaker of the Assembly and the public a final report which analyzes the November 2020 election in a complete and thorough manner, concludes no major overhaul of our laws or practice are necessary, and the election was administered in a legal and appropriate manner. And yet, as the following interim report demonstrates, many important questions remain unanswered. These questions include: were all lawful votes, and only lawful votes, counted? Did the machines work as advertised and expected? Were all election processes followed to the letter? Did clerks and other election officials have all the tools they needed to deal with the unprecedented

challenge posed by the COVID lockdowns and historic levels of absentee voting? Did outside corporate money unduly influence the election and/or the administration of the election? Above all, what changes can the state of Wisconsin make to ensure our future elections are not only secure, but as important, widely known to be secure?

In the coming weeks, my Office will continue to collect and analyze information about the November 2020 election, because the public has a right to know what happened. I have no partisan agenda: I am not running for office, and I do not know of any lawful remedy in the state of Wisconsin to change the certification of its electors from our current President Joe Biden to former President Donald Trump. Furthermore, I do not come with preconceived answers to any questions. Why were so many voter registrations at a single address? Why were so many voter registrations given under a single phone number? Why was there a “blip” at 4:00 a.m. in the reported statewide returns the morning after the election? All of these questions may have innocent explanations. My investigation intends to discover facts which will allow the legislature and the people of Wisconsin to draw their own conclusions about the integrity of the November 2020 election.

Many of these answers might have already been obtained were it not for unjustified obstruction of this investigation. Specifically, I requested information from the Wisconsin Elections Commission (WEC) and certain clerks about election procedures and information they possessed. With a large degree of political theater, some of this information has been withheld. I issued subpoenas, as I am lawfully authorized to do as part of my Office’s investigation as a function of legislative oversight. Rather than simply provide the information, WEC has filed a lawsuit in an attempt to quash the subpoenas and avoid providing governmental data and information to my office. I am aggressively defending the subpoenas in our state courts—courts which I once helped to oversee in my capacity as a Justice—but WEC’s actions beg the question: What are WEC and the recalcitrant city clerks hiding from the public and our legislature?

Nevertheless, I have had many productive conversations with government officials. In fact, in the many discussions my Office has had with the fine public servants in the state of Wisconsin, I have learned that complicated questions may have simple answers. But many complicated questions deserve honest answers that take time to process and report. I ask each reader of this interim report to take this as a jumping-off point for learning about the administration of elections in Wisconsin. And again, please reach out to my office if you have any information of relevance. Your voice matters.

Michael J. Gableman

Special Counsel

What is the OSC Investigation?

November 3, 2020, was election day nationwide, and was, in our State of Wisconsin, the culmination of months of work by dedicated election workers and volunteers. It was a monumental and expensive undertaking which is critical to our representative democracy. However, it is beyond debate that questions remain about the integrity of that election. In discharging its duty under both the Federal and State Constitutions, the Wisconsin State Assembly saw fit, on June 26, 2021, to appoint a Special Counsel, establish the Office of the Special Counsel to investigate the election, make findings, and report those findings and recommendations to the Assembly. This report is a first step in fulfilling that duty.

The Office of the Special Counsel is an authorized agency of the State of Wisconsin. Its staff, including and especially the Special Counsel himself, take care to abide by all applicable state and federal laws, including open records laws and regulations relating to the practice of law. My Office will abide by the highest ethical standards to maintain a commitment to transparency, inclusion, and accountability. As such, the Office has established various internal policies, continues to maintain records, and commits to full disclosure of all public records upon the conclusion of the present investigation.

To-date, my Office has already collected and reviewed thousands of governmental and other documents. My Office has interviewed numerous witnesses and will continue to do so until the conclusion of the present investigation. The Office has been allocated a comparatively modest budget and has relied heavily upon volunteers and input by citizens' groups: the vast majority of the Office's budget, while allocated, has not been spent.

The Office may be reached at (262) 202-8722 or online at www.wifraud.com. As noted below, testimony compelled by this Office bears with it the promise, mandated by Wisconsin law, that any information so compelled may not be used in a criminal

proceeding against the individual from whom it was provided. *See* Wis. Stat. § 13.35. This Office has already been in contact with certain whistleblowers and commits to taking all steps to protect their interests and those of future whistleblowers.

Constitutional Authority

Pursuant to the federal Constitution, Article I, Section 4, it is state legislatures who are authorized to set “The Times, Places and Manner of holding Elections for Senators and Representatives...” The Supreme Court of the United States has clarified that this means the Wisconsin legislature bears primary responsibility for establishing rules regarding things like voter registration, poll watching, penalties, ballot counting, and certification. This primacy of the state legislature is ratified by the Wisconsin Constitution, which in Article IV, Section 1 declares “The legislative power shall be vested in a senate and assembly.” Whether this means the state Assembly and Senate may, by joint resolution and without gubernatorial signature, tighten up or loosen election security for federal elections, and whether there are limits on how much of this constitutional responsibility can and should be delegated to other state actors (such as the Wisconsin Elections Commission), is an open question in state law.

There is some debate that the Elections Clause of the United States Constitution authorizes states to regulate legislatures alone to dictate the time, places, and manner of elections. While the word “legislature,” is used several times in the federal constitution, its meaning differs according to the context in which it appears, dependent upon the character of the function which the legislature is called upon in each respective instance to exercise. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 808 (2015) (citing *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 434 (1932)). Even if the constitution authorizes the Assembly and Senate to jointly amend parts of our election code without gubernatorial signature, the Wisconsin constitution provides that the legislature should create bills of law which become effective only when signed by the governor. Wis. Const. Art. 4, Section 17; Article 5, Section 10. It may be the case that the

Senate and Assembly can change election regulations in the absence of a statute on the books, indeed Wisconsin law appears silent on this question, but it would be another matter for the Senate and Assembly to seek to repeal an extant portion of the election code.

This brings up a second, equally important issue—certification of the vote. There are serious and legitimate questions that the certification of Wisconsin's election results may have been undertaken in an unlawful and unconstitutional manner. While the Wisconsin legislature has specified how presidential electors are selected, that statute does not empower the governor or WEC to certify the results of the election. The acceptance of electors by the governor while recount challenges were pending deprived the legislature of the right to certify the vote pursuant to Article II of the United States Constitution. Hasty certification of electors in a tightly contested election may disenfranchise voters to the same extent as missing a deadline and failing to certify electors at all. While hasty certification may violate the state constitutional duties of the legislature, delaying certification of electors until resolution of relevant issues does no such violence to our legal system.

Statutory Authority

The authority of the Legislature brings with it the legislative prerogative to gather information, debate bills, and pass laws. In discharging these duties, the legislature bears the constitutional obligation and has the authority to conduct oversight, including the ability to compel production of documents and testimony. Under Wis. Stat. § 13.31, the legislature has the authority to subpoena information from individuals. Because this legislative subpoena is a part of common law legislative authority which holds that without access to all available information a legislature cannot properly legislate—and because this subpoena does not directly relate to or contemplate criminal proceedings, criminal due process rights are not implicated. *See* Wis. Stat. § 13.35. To this end, § 13.35 expressly provides that documents and testimony provided by a witness pursuant to a

legislative subpoena cannot “be used in any trial or criminal proceeding against such person in court.” This does not preclude this Office from turning over information to relevant law enforcement agencies, or by talking with this Office any given individual is somehow immune from criminal prosecution.

This office has, to-date, issued seventeen subpoenas for documents as well as testimony for governmental information from sitting government officials and has obtained some voluntary compliance. These subpoenas, properly issued pursuant to and in furtherance of the legislature’s core oversight function, have nevertheless been attacked by the media, are subject to pending litigation, threats of more litigation, and have involved nationwide attention and the work of out-of-state partisan attorneys. Given the substantial recent history of municipal non-compliance with the LAB investigation and the plenary authority of the legislature, the Assembly and this Office are defending these subpoenas. The legislature, and the public, have a right to all available information and the testimony of election officials about elections administration in Wisconsin.

A. How This Investigation Differs from the LAB’s Investigation.

The LAB, established in 1971, is authorized by Wisconsin statutes to “conduct...audits of the accounts and other *financial* records of departments to assure all *financial* transactions have been made in a legal and proper manner.” Wis. Stat. § 13.94(1) (emphasis added). LAB has a large staff and a laudable history of working with all state instrumentalities, but its relatively narrow mission is to ensure taxpayer money is well-spent. Its report issued October 22, 2021, notes up-front that it is concerned with “audits and evaluations of public finances and the management of public programs.” As such, its interest is neither in addressing policy concerns nor the concerns of the full legislature, but of responding to directed audits of the “records of each department” of the state of Wisconsin. Further, as the recommendations in the LAB report suggest, its ability to make recommendations is statutorily limited to the four corners of current Wisconsin law and it does not generally make recommendations to improve the law. When it does, as

in the case of the current report, these changes are extraordinarily modest, perhaps recognizing its limited authorization. Finally, its sole product is a “detailed report” to the legislature, which includes discussion of any “illegal or improper expenditures.” To the extent illegal or improper conduct does not implicate the state fisc, that conduct is beyond the purview of LAB inquiry.

By contrast, my Office’s investigation has a wide mandate to investigate elections in Wisconsin, beyond mere “waste, fraud, and abuse,” as well as the authority to gain access to necessary testimony and documents, even when recalcitrant individuals or municipalities are not otherwise inclined to “cooperate.”

Can Private Groups be Involved in Running Wisconsin Elections?: Delegation and Undue Corporate Influence

While this Office draws no conclusions yet, initial interviews and discussions with clerks suggest there is widespread and substantial confusion about the appropriate role of outside money in the administration of Wisconsin elections. Evidence is already in this Office’s possession indicates undue influence by well-funded private groups, who leveraged large grants to certain Wisconsin cities in order to co-opt our election apparatus to their benefit. The recent LAB investigation did not comprehensively investigate or address these concerns by clerks and the public, concerns which led to frustration and untimely resignation of at least one long-serving clerk and numerous unanswered complaints to WEC. Indeed, contracts made between outside groups and certain municipalities led directly to actions contrary to Wisconsin state law, which some clerks noted harmed both election security and the physical safety of voters. The public has a right to know if there was a *quid pro quo* arrangement between outside groups and cities, and if so, what the terms of that agreement were.

How much authority can clerks contract away to private organizations? As the LAB report contends: “Statutes do not specify the actions and responsibilities that consultants

are allowed to take at polling places and central count locations on Election Day.” Nevertheless, for the purposes of legislative inquiry, this is not, and cannot, be the end of the story. Whether certain organizations and individuals operated within a grey area in state law does not preclude obtaining all relevant facts and attempting to draw fine distinctions to facilitate legislative oversight, dialogue with the public, present legislative recommendations, and restore confidence in Wisconsin’s system of elections. We need to gather all facts so the legislature can address any problems.

Oblique reference to at least one major issue is made in the LAB report which bears mentioning. Specifically, the LAB report notes the following:

“We asked the clerks of all thirty-nine municipalities [that used central count locations] whether consultants worked at central count locations during the November 2020 General Election. Clerks indicated consultants associated with private organizations worked at the central count locations in two of the thirty-nine municipalities. Specifically:

- ” One municipality indicated a consultant attended the August 2020 primary as an observer, helped to modify the municipality’s election training materials from August 2020 until October 2020, and was at the central count location on Election Day in November 2020 to provide technical assistance for electronic voting equipment. The municipality indicated at least five poll workers monitored such assistance at all times.
- ” A second municipality indicated a consultant provided logistical support and offered elections administration recommendations but did not have the authority to make decisions and did not count ballots. The municipality indicated the consultant initially wore a city employee identification badge at the central count location on Election Day in November 2020 but subsequently became an observer after the deputy clerk spoke with WEC’s administrator about this individual.”

This cursory reporting is concerning, because it substantially waters down already-public information relating to the involvement by a number of private groups in election administration, and it suggests problems were raised and adequately resolved by clerks and WEC.

In fact, in both instances, evidence is already available to this Office that is inconsistent with the LAB's report, and which indicates a more widespread and deeper issue. For example, one private organization referred to in the LAB report was directly involved in all aspects of management of election officials, was entrusted with the only sets of physical keys to the city's central count location, managed the transportation of ballots, and instructed the counting of unlawful ballots that had arrived at the central count location beyond the lawful time window.

Furthermore, under Wis. Statutes § 7.41, there are express rules for "members of the public" to exercise their right to observe Wisconsin elections, which include limitations on the ability of observers to obtain confidential voter information or to communicate with election officials. Individuals are, under Wisconsin law, either election officials or members of the public, and do not "become" observers, as the LAB report suggests. Finally, issues involving possible unauthorized access to election materials or impersonation of a municipal employee cannot be remedied by *ex parte* discussion with a single bureaucrat at WEC. None of these issues are directly addressed by the LAB report.

The LAB report also fails to address to what degree state instrumentalities may properly contract with private groups for purposes of administering public elections. Clerks have already raised concerns to this Office that there are certain election administration functions which they are simply unable to perform. Clerks and the public have raised concerns about the ability of outside contractors to legally bind election officials with onerous contractual terms.

Contracts with private groups for election administration and management.

This Office is reviewing contracts between municipalities and private groups which gave preferential access to voter data to those private groups and prohibited contracting municipalities from exercising their legal right to change election procedures, lest they be on the hook for paying substantial sums of money back to those groups. Clerks have also raised concerns about technical contracts which limit their ability to review the inner workings of equipment and software related to voter registration and vote tabulation.

A major concern raised by numerous members of the public is whether outside contractors abided by all applicable state and federal antidiscrimination laws, a question not addressed in the LAB report.

This Office has also already uncovered evidence of selective targeting of voters by these private groups, raising questions as to what extent nonpartisan government agencies were turned into partisan get-out-the-vote operations, or whether this targeting was performed on any other unlawful basis. Some of this targeting was apparently in the context of recommending ballot “drop boxes” in certain locations, but not others, a violation of Wisconsin Stat. § 6.855 (see below). Each of these facts, if true, are concerning, and this Office continues to investigate the extent of this entanglement. Furthermore, without statutorily mandated training for clerks, the possibility of undue outside influence in our elections increases. In the vacuum created by WEC, understaffed and overworked clerks can find it all-too-easy to take money and personnel from private groups that might not have compliance with the law as their top priority.

Some clerks have noted to this office the complexity and scope of Wisconsin elections will *always* and *necessarily* require delegation of at least some election functions to private companies. But clerks have suggested a line must be drawn somewhere and many express concern over the 2020 election. Indeed, one current clerk specifically recommended to this Office that private money be prohibited. This Office continues to

investigate precisely how much authority was ceded to private entities and whether that subservience hindered the fair administration of elections and/or diminished public confidence in that fairness.

Who Runs Wisconsin Elections? Finger-Pointing and the Wisconsin Elections Commission

Clerk Authority

The core of the constitutional and statutory responsibility for election administration in Wisconsin resides with county and municipal clerks. Under Wisconsin Statute § 7.15(1), the municipal clerk has “charge and supervision” of not only state, but also federal elections within a municipality. In turn, these municipal clerks report electoral results to the county clerk and provide county clerks with all materials the county clerks need to discharge their lawful duty to administer elections in their county. While municipal clerks are appointed by political officials such as mayors, county clerks in our state are directly elected.

Government Accountability Board Scandal and Creation of Wisconsin Elections Commission

To assist with developing best practices, the Wisconsin Elections Commission (WEC) was established in 2016. Prior to 2016, a large, opaque, politically partisan, and unaccountable agency, the Government Accountability Board (GAB), was charged with administering vast swaths of statewide ethics and election law. In the wake of a major statewide scandal that drew national attention, the John Doe investigations, the legislature and Governor took the unprecedented step of abolishing that agency and amending state election laws. However, rather than returning the state to a system of clear delegations of authority and broad clerk autonomy, those amendments created WEC, drawing criticism from many quarters, including Kevin Kennedy, the outgoing Director of GAB, who remarked that

the new system **would have essentially no changes, and that the new system would be “no more transparent” than the old one.**

One example of Kennedy’s fulfilled prophecy is the abundance of inconsistent information relating to voter data in the registration database. In its waning days of 2015, the GAB was confronted with 28,906 voters whose information about their name and address as reported to the DMV was inconsistent with information for the same voter in the voter registration database. The GAB dismissed those concerns. However, as of 2021, those same numbers not only continue to exist and have never been adequately explained but increased in number under WEC’s tenure.

Pursuant to Wisconsin law, WEC is tasked with certain portions of “the administration of...laws relating to elections.” Wisconsin Statutes § 5.05(1). Precisely how far this delegation goes is an open question. WEC authority as expressly laid out in that section contemplates public rulemaking, investigation, and enforcement. However, the election code sections over which WEC has regulatory authority include numerous provisions which expressly delegate authority to individual actors, such as county and municipal clerks. In fact, Wisconsin law delegates to the “board” the duty to certify the state’s electors in a presidential election, a job fulfilled in 2020 solely by the Chairperson of WEC, without board vote. *Compare* Wis. Stat. § 7.70(5). The LAB report does not make an effort to systematically review these delegations but does note in several places the “shared” election administration responsibilities.

Confusion about WEC Authority

While this Office draws no conclusions yet, initial interviews with clerks suggest there is widespread confusion about the lawful role of WEC in the state, and concern that WEC has acted outside its lawful purview. There is evidence numerous complaints by clerks to WEC were ignored. This problem is exacerbated by a lack of clarity as to the legal status of WEC guidance: some clerks are convinced compliance with WEC guidance

provides them with a legal “safe harbor” in the event the Clerk’s directives consistent with the guidance are challenged in court. In a recent statement, WEC expressly disavowed that its actions could provide a basis for a defense but instead opined that it is the clerks who bear all the responsibility for election related litigation.

Additionally, WEC guidance, such as online FAQs, are apparently issued without a full Commission vote. Other documents, as the LAB report notes in the case of the March 2020 Commission-approved guidance regarding Special Voting Deputies are flatly contrary to law. As noted above, much authority is delegated to the WEC administrator. Importantly, under Wisconsin law, there is slight legal recourse other than a petition to WEC to challenge such unlawful behavior. When WEC implicitly or explicitly authorizes actions contrary to Wisconsin law, such as enabling poor security for access to statewide voter registration data systems or authorizing “shortcuts” such as issuing absentee ballots without applications or enabling widespread ballot curing, voters and candidates are left with no choice but to file expensive and time-consuming lawsuits. The LAB report, consistent with the LAB mission discussed above, did not investigate these issues, which this Office continues to investigate and collate.

Lack of Legal Remedies

Furthermore, the LAB did not investigate various decisions WEC and others made in the run-up to the 2020 election, some of which appear designed to prevent the Wisconsin courts, including the Wisconsin Supreme Court, from weighing in. Specifically, the decision by WEC to quickly issue ballots without a Green Party candidate was the determining factor in the Wisconsin Supreme Court declining to address the merits of that exclusion. WEC’s action was of dubious legality. In the 2020 case of *Hawkins v. Wisconsin Elections Commission*, the 4-3 majority held that because WEC had claimed it had already issued an unknown number of ballots, there was no time to properly address the claims of the excluded Green Party candidate. In other words, WEC’s own actions operated to neuter the ability of our state’s highest court to address whether WEC’s

actions were lawful and to provide a remedy if they were not. Then Chief Justice Patience D. Roggensack wrote a forthright dissent, noting “The court's silence not only affirms lawless conduct by the Commission, but also provides no directive for the required treatment of nomination papers in the future.” This Office continues to formulate legislative options to ensure this remedial gap in Wisconsin law is repaired.

Absentee Balloting

A second action has evaded both LAB and state judicial review and involves the issue of absentee balloting. Precisely what rules govern the requirements for mail-in and in-person absentee voting in the state of Wisconsin? It is clear in some instances the safeguards mandated for the protection of honest absentee ballots were ignored by WEC.

Many of these safeguards were apparently abrogated by WEC and municipalities in 2020, with COVID-19 as a proffered excuse. One issue involved the illegal mass self-certification of individuals as “indefinitely confined” under the statute, a category which enables a voter to evade state voter ID requirements, but which is intended to apply to physically or physiologically immobile residents confined to their home because of their condition. Presented to the Wisconsin Supreme Court, again the majority ducked a ruling on the merits, prompting then Chief Justice Roggensack to note that it appears the Court “cannot be bothered with addressing what the statutes require to assure absentee ballots are lawfully cast.” It is up to the state legislature to investigate if, how, and why state law was not followed and take legislative action.

One major issue identified involves “Democracy in the Park,” which were citywide events in Madison before the election exclusively related to absentee ballots. The LAB report mentions this issue in passing as a “Special Event” occurring in a “specified outdoor setting.” Without explaining the issue, the report recommends the Legislature “clarify” statutes so individuals know whether or not they can engage in absentee ballot activities contrary to the procedures laid down in Wis. Stat. § 6.855. In other words, the

LAB report implicitly notes the statutes were violated by Democracy in the Park and recommends the law be changed.

What was Democracy in the Park, and why has it been the subject of numerous citizen complaints, lawsuits, and legislative inquiries apart from this Office's investigation?

While this Office draws no conclusions, we possess evidence that the events, which occurred on September 26 and October 3, 2020, involved numerous possible violations of state law, calling into question the validity of over 17,000 absentee ballots. Specifically, these involved large outdoor gatherings where purported designees of the City Clerk's office assisted with absentee ballots that yielded over 17,000 votes. Furthermore, it is not clear that all of the workers at those events were properly deputized and trained, swore and filed the mandatory oath of office, or documents related to absentee ballots were properly handled. Finally, this Office also seeks to review the processing of those ballots. Each of these fact-intensive avenues of inquiry are crucial for determining what was improper and how to prevent future impropriety in absentee voting.

Clerk Training

In addition, this office has obtained evidence that WEC failed to complete its statutorily mandated training duties. As the LAB report notes, Wisconsin Statutes § 12.01 *et seq.*, lays out training protocols for clerks. But county clerks are politically accountable to their voters, and WEC certification or lack of certification does not affect a clerk's legal rights. However, if a clerk is *not* certificated by WEC, such as for failing to be properly trained, WEC is required by law to notify the "governing body" of that clerk's county or municipality. In other words, WEC is mandated by law to train clerks, and clerks who fail to complete training are reported by letter to the mayor or county board. Yet, as the LAB found, at least 17.5% of clerks were not properly trained, and no letters from WEC went out notifying cities and boards about the failure to complete training. This Office continues to review the issue. Moreover, this Office already has ample evidence that in

the absence of this legally mandated training, certain private groups filled the vacuum, perhaps for their own, self-interested purposes, providing some municipalities with incorrect and even unlawful advice. In a statement, at least one clerk has noted outside advice negatively impacted the security of the vote and the physical safety of voters.

Exploitation of Elders

This Office continues to review the issues involving WEC more generally, as well as other plain rules that are apparently without remedy in Wisconsin law, such as the editing of ballot applications by clerks and voting procedures at nursing homes. A recent investigation and report by the Racine County Sheriff's Office highlighted the exploitation of some of our most vulnerable citizens. Furthermore, complaints were apparently made to WEC and ignored, in a system which the sheriff described as leading to our election system being "not just broken, but shattered." I believe many Wisconsinites share the Sheriff's sentiment. It is my hope a continued investigation and final report from this Office will help change those perspectives and sentiments.

In the run-up to the November 3, 2020, election, clerks and WEC took numerous steps to alleviate public fears about COVID-19. But in this perceived crisis there was the opportunity for electoral partisan advantage. For example, Wisconsin law mandates individuals in various types of communal living facilities may have special access to absentee voting in person, but only subject to the rules of § 6.875. These rules govern the "Special Voting Deputies" that a municipality may, in turn, train and authorize to collect absentee votes in person: this is the *only* lawful method for collecting absentee ballots outside normal procedures, as Special Voting Deputies swear an oath and become duly authorized "election officials." Without the availability of Special Voting Deputies under the statute, it would be much more difficult for many senior citizens or those in assisted living facilities to vote. Yet in 2020, at the recommendation of its top administrator, WEC voted to unilaterally prohibit the use of Special Voting Deputies, explaining that COVID-19 made it too dangerous to allow for Special Voting Deputies to enter these facilities.

This Office has evidence that WEC and some clerks instructed residential care employees to act in a manner prohibited by law, collecting and assisting in completing ballots for individuals in these group facilities, including those with dementia. This led to record-high voting by individuals who had not voted for nearly a decade and may have lacked the cognitive ability to vote.

On its face, this type of activity could lead to criminal referral for the residential care employees, as the Chairperson of WEC has suggested. But residential care staff represent the “little fish” in this alleged criminal enterprise. This Office is reviewing the relevant Wisconsin statutes to facilitate the criminal referral process and make legislative recommendations. This includes reviewing legal methods for ensuring our senior citizens are not bullied or taken advantage of, and neither nursing homes nor their residents are used for any unlawful election activity, merely because these citizens are vulnerable, easy targets for partisan predators.

WEC: Self-Policing and Self-Serving

Numerous members of the public, as well as the clerks, have questioned the independent authority clerks have to administer an election consistent with state law in light of WEC’s guidance, which in several instances was contrary to those voting laws. Some clerks feel WEC may legally bind the clerks in granular decisions about their local needs. Other clerks are concerned about repercussions for not following WEC guidance. Many clerks have expressed disagreement with WEC conclusions, and some have done so publicly. Numerous members of the public have raised concerns about WEC’s ability to police itself: the discretionary nature of WEC intake, review, and response to complaints, and the fact that complaints about WEC are handled – or not handled, as the case may be – by WEC itself.

This Office continues to interview clerks and expects to discuss with WEC staff precise nature of WEC's role in future Wisconsin elections.

How can the Public be Confident in Our Elections? The Black Box

As former GAB Director Kevin Kennedy noted, the new WEC system is, apparently, "no more transparent" than the old one which he ran. Without robust legislative oversight, many Wisconsinites are at risk of feeling their vote does not count, or that there is widespread election fraud in the state. Worse, their fears may be well-grounded. Two major areas of inquiry are being looked at by my Office, both dealing with the appropriate level of transparency for our election systems. First, my Office is reviewing the laws and procedures relating to the use of technological tools in administering elections: the "voting machines" and the various election databases used by WEC. Second, my Office is reviewing barriers to public access to information, such as excessive charges for public access to public registration data.

While this Office draws no conclusions, interviews with clerks, citizens, and other groups suggest there is widespread concern about the inability of an average citizen to track how elections are run. This inability has huge downstream consequences, as citizens are often presented with snippets of information reminiscent of the "confusopoly" in health insurance. Presented with outdated data sets of dubious accuracy, citizens seeking to use public information to confirm election results are unable to do so, while those with money and access (or preferential contracts, as noted above) can access better data, more quickly. Further, the precise operations of voting machines are not readily accessible or understood by the public, or by commissioners on WEC itself. As with health insurance, the system operates on autopilot, with the insured praying their bill is accurate, and with voters praying the system is working as it is supposed to.

Election systems in Wisconsin are governed by state and federal law. Specifically, the federal Election Assistance Commission (EAC) created under the Help America Vote Act

of 2002 (HAVA) is tasked with approving all voting systems used in federal elections, and with approving all modifications of voting systems used in federal elections. 52 U.S.C. § 20971. As a part of this, voting systems vendors submit their proposed systems to the EAC for approval. Typically, once a system is tested and approved by the EAC, the vendor will make a similar application to WEC, which may approve the system for sale and use within the state of Wisconsin. However, beginning in 2015 the state of Wisconsin allowed GAB (and now WEC) to approve systems for use in the state which are not approved by the EAC. Wis. Stat. § 5.591. While there is thus wide discretion vested in WEC to approve changes to voting systems, federal law mandates that “all records and papers... relating to any application, registration, payment of poll tax, or other act requisite to voting in such election” be preserved by the State for twenty-two months following the election. 52 U.S.C. § 20701.

But as was made eminently clear in a recent WEC meeting held after a preservation request issued by this Office, WEC officials and staff are not at all clear as to what “modifications” to voting machines require WEC approval, which modifications can lawfully be made, or what certain software updates actually entail. Further, WEC approval of actions that might violate federal record keeping laws are no guarantee of legal immunity for clerks with final say over what happens to voting machines in their locales. In fact, as one machine vendor noted during that open meeting, in order to install a software update, that company would be obliged to entirely “wipe” a machine. That is, to delete all information from election hardware. Whether this technical process destroys election records in contravention of federal law is a question that WEC has yet been unable to answer.

In order to address this and related questions, this Office has been allocated a budget to engage neutral, certificated data security experts, and has already taken steps to initiate an open and full technical audit of various voting systems to understand and report on the security of these systems. Whatever the results, various clerks have already suggested they themselves do not know precisely how the voting machines work and

rely entirely upon private contractors to assure them of system integrity. This in and of itself may be a problem. The problem is further exacerbated in that WEC, who is responsible for training the clerks on the machines, may not itself know how the machines work.

Prior to the establishment of this Office, the Special Counsel did personally engage with various outside individuals relating to various voting machine concerns. This Office neither endorses the views of any particular outside individual nor has this Office yet uncovered any evidence of foreign hacking of elections in the state of Wisconsin. Nevertheless, the opacity of elections systems has given rise to numerous theories and concerns about the 2020 election.

A second issue related to the transparency of our election system in the state is the public availability of voter data. While this Office as yet draws no conclusions, there is already evidence that security surrounding the WisVote (SVRS) system is lax. This statewide system enables clerks to track absentee ballot requests and includes highly sensitive personal information. As such, it is supposed to be subject to a high level of security laid out in WEC guidance. Nevertheless, there is already some evidence of unauthorized access to this database. Further, several clerks have complained that they were provided by WEC with numerous, unrequested access keys, leading to a security headache and concerns that the statewide system was not secure.

In addition to concerns about too much access, concerns have been raised about not enough access, or about unequal access, to voter registration information. This is important because access to this data is necessary for tracking the accuracy of reported election results. WEC does provide statewide voter registration data for a fee up to, and usually, \$12,500. This fee is set by WEC administrative rule, and it is mandated by statute that the fee be set "at an amount estimated to cover both the cost of reproduction and the cost of maintaining the list at the state and local level." Wis. Stat. § 6.36(6). Nevertheless, it is apparently the case that the fee is charged for each reproduction, no matter the actual

cost, and that subsequent individuals requesting a list that has already been produced are charged the same rack-rate. Further, there is some evidence that outside groups were provided privileged access to this data without fee, and on an expedited basis. This Office continues to investigate this matter, and again, this issue is not addressed in the LAB report.

Conclusion

The people of the state of Wisconsin have a right to know how our elections are run. The legislature has the common law and constitutional right and obligation to investigate how our state laws are being administered. Without adequate information and oversight, citizens in a democracy justifiably lose confidence that their vote counts and their system of government is working properly.

This Interim Report seeks to build upon the good work of many citizens and government officials including the vast majority of county and municipal clerks, and to shine a light on issues and concerns of interest. It is a healthy exercise in good government, not an attempt to overturn any election. As this investigation continues, my Office will vigorously seek out and obtain all available truthful information, so that it can present this information to the public and to the Assembly.

If, in the course of this investigation, the Office obtains information that could be used in a criminal prosecution, this Office will cooperate fully with all appropriate law enforcement entities.

FILED
01-08-2022
CIRCUIT COURT
DANE COUNTY, WI
~~2021CV002440~~

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 3

American Oversight,

Petitioner,

-vs-

Case No. 21-CV-2440

Robin Vos, et al.,

Respondents.

MOTION HEARING

November 5, 2021

PROCEEDINGS HELD BEFORE THE
HONORABLE VALERIE L. BAILEY-RIHN,
CIRCUIT JUDGE, PRESIDING

APPEARANCES:

Pines Bach LLP,
by Attorneys Lester A. Pines and
Christa O. Westerberg,
122 West Washington Avenue, Suite 900,
Madison, Wisconsin 53703,
appearing on behalf of the Petitioner.

American Oversight,
by Attorneys Melanie Sloan and
Sarah Columbo,
1030 15th Street NW, Suite B255,
Washington, D.C. 20005, appearing on
behalf of the Petitioner.

Kopka Pinkus Dolin,
by Attorney Ronald S. Stadler,
N19 W24200 Riverwood Drive, Suite 140,
Waukesha, Wisconsin 53188,
appearing on behalf of the Respondents.

REPORTED BY:

Rowan L. Thompson, RPR, CRR
Court Reporter

1 (The following proceedings commenced at 1:34 p.m.)

2 THE COURT: This is 21-CV-2440,
3 American Oversight versus Robin Vos, et al.

4 Who do I have for the petitioner?

01:34PM

5 MS. WESTERBERG: Good afternoon,
6 Your Honor. You have Christa Westerberg and
7 Lester Pines from Pines Bach, as well as
8 Melanie Sloan and Sarah Columbo admitted
9 pro hac vice, on Zoom.

01:34PM

10 THE COURT: Okay. And who do I
11 have for the respondents?

12 MR. STADLER: Good afternoon,
13 Your Honor. Attorney Ron Stadler of
14 Kopka Pinkus Dolin appears on behalf of
15 Mr. Vos, Mr. Blazel, and the assembly.

01:34PM

16 THE COURT: Okay. So we're here on
17 the alternate writ of mandamus. I did review
18 the answer that was filed today. I don't
19 know if counsel for the petitioner had a
20 chance to review that answer that was filed
21 today.

01:34PM

22 MS. WESTERBERG: We did, Your Honor.

23 THE COURT: Okay. All right. And
24 so I guess I'll let the petitioner -- I have
25 reviewed the summons and petition, and I've

01:34PM

1 reviewed the answer. I've reviewed the
2 statutory authority on this issue. But I
3 will let the petitioner, since, actually, you
4 filed the petition, give me any additional
01:35PM 5 information before, and then also the
6 respondent will get an opportunity to give me
7 some information as well. And I may have
8 some questions.

9 So feel free to go ahead.

01:35PM 10 MS. WESTERBERG: Okay. Thank you,
11 Your Honor.

12 So, as you know, petitioner
13 American Oversight filed a petition for writ
14 of mandamus against Speaker Vos,
01:35PM 15 Clerk Blazel, and the assembly last month.
16 And this petition was filed to obtain records
17 of the assembly's contractors, in this case,
18 the records of the contractors investigating
19 the 2020 election.

01:35PM 20 As the Court knows, American Oversight
21 has filed a different suit to get records in
22 Speaker Vos's own files, but this is strictly
23 a case on records. That's proceeding on a
24 different track. But this is strictly a case
01:35PM 25 on contractors' records.

1 So with the open records law, there's,
2 of course, a presumption in favor of access.
3 And that includes access to records produced
4 or collected by third parties under a
01:36PM 5 contract of the governmental authority.

6 These records are on an extraordinarily
7 important topic, the process surrounding the
8 2020 election investigation. And the
9 records, of course, also get to the integrity
01:36PM 10 of this investigation, which, you know,
11 according to media reports and the experience
12 of American Oversight, has been very opaque
13 and confusing. You know, as we mentioned in
14 the petition, there were subpoenas issued and
01:36PM 15 then withdrawn and subpoenas coming from a
16 private e-mail address to clerks and others
17 with a fictitious name.

18 And there are, it is reported by the
19 *Milwaukee Journal Sentinel* recently,
01:36PM 20 investigators actively working to keep their
21 name secret. So we can't tell if they've
22 prejudged the matter, if they're related to
23 the parties, or if they have some other
24 conflict.

01:36PM 25 So we filed with our petition this

1 request for an alternative writ to require
2 the production of records to show cause. The
3 Court has signed that writ, the alternative
4 writ, and the petitioner met its prima facie
01:37PM 5 case to show a violation. We'll point out
6 that the respondents didn't file a motion to
7 quash. We have not received records. The
8 respondents have to show cause here today.

9 As you noted, Your Honor, they did file
01:37PM 10 an answer today, which we did receive last
11 night as a courtesy copy, to the petition for
12 alternative writ of mandamus, and that's not
13 exactly, you know, what we filed. We didn't
14 file a petition for alternative writ of
01:37PM 15 mandamus. But nonetheless, it seemed geared
16 at our application for the alternative writ.
17 It mostly contains legal argument.

18 The Court has already signed the writ.
19 It seems to us that the respondents should
01:37PM 20 have filed the motion to quash, and the
21 deadline for that was on October 22nd,
22 according to the hearing notice. So, you
23 know, in essence, this answer is untimely and
24 it's, you know, frankly, consistent with the
01:38PM 25 overall pattern of delay in producing

1 records. If it was filed earlier, we could
2 have asked to file a response.

3 But nonetheless, the answer concedes
4 that the respondents didn't provide
01:38PM 5 contractor records, again, the records of
6 Gableman, Sandvick, Page, and others; and
7 that the respondents only -- in response to
8 the records request we have filed, only
9 provided things in their own files, if they
01:38PM 10 provided anything at all.

11 So we are prepared to address some of
12 the arguments that have been made in this
13 answer as to why the respondent shouldn't be
14 held liable under the open records law. And
01:38PM 15 I can do that now, but then we would also
16 like to reserve time for rebuttal to respond
17 to any new alleged cause as to why they
18 cannot produce the records.

19 THE COURT: Okay. Let me ask you
01:38PM 20 this: What specifically -- I was trying
21 to -- I was trying to summarize, what
22 specifically were the requests for the
23 contractors' records? I know that they're --
24 in the affidavit was how the contractors were
01:39PM 25 organized, contractor work product,

1 contractor communications and calendar
2 events, and contractor resignations. Is that
3 the categories that you were seeking from the
4 respondents?

01:39PM

5 MS. WESTERBERG: Correct.
6 Organizing materials is one way we've
7 described it. Their work product,
8 communications, and resignation materials is
9 summarized on the chart on pages 14 and 15 of
10 the petition.

01:39PM

11 THE COURT: And what about the
12 argument, at least that I gleaned from the
13 answer, that these documents -- A, they
14 didn't have any of these documents and, B,
15 because this investigation is a subunit,
16 these had to be directed towards
17 Attorney Gableman himself and not the
18 respondents in this matter?

01:39PM

19 MS. WESTERBERG: Yes. Well, to the
20 first question, I don't think that the answer
21 says that the contractors didn't have any
22 records. So I think that there's probably an
23 agreement that the contractors themselves
24 would have records. And then the question
25 is -- the second question is whether this

01:40PM

1 Office of Special Counsel is a subunit and
2 the requests could only have been addressed
3 to that office.

4 So I have a number of responses to that.

01:40PM

5 And I'm going to set aside for the moment
6 whether the Office of Special Counsel was
7 properly created or it's the only authority
8 or that the people who work there aren't
9 contractors, because I don't think the Court
10 has to actually get to that to reject the
11 respondents' arguments here.

01:41PM

12 So the first thing I would point out is
13 that -- and this is all in the pleadings, is
14 that the Office of Special Counsel didn't
15 exist at the time these requests were made in
16 July and August of 2021. The requests were
17 made on July 20th and August 12th. And the
18 Office of Special Counsel was not
19 acknowledged by the assembly formally in any
20 way until later in August, August 27th
21 of 2021. And that's in paragraph 21 of the
22 petition.

01:41PM

01:41PM

23 So what the respondents are essentially
24 saying is that you can make a request to an
25 authority, as the petitioner did here, and

01:41PM

1 then the authority can, afterwards, create a
2 new authority. And then the original
3 authority can avoid liability by saying, "You
4 need to sue this post hoc authority."

01:41PM

5 And that kind of bureaucratic
6 game-playing, I think, would subvert the
7 whole purpose of the open records law, which,
8 you know, you've got to respond as soon as
9 practical and without delay. And we construe

01:42PM

10 the law broadly in favor of access. And to
11 permit that kind of a shell game would
12 subvert the whole purpose of the law.

13 Just as a small correction to the
14 answer, American Oversight did not submit any
15 of these requests to the Office of
16 Special Counsel. As such, they submitted
17 duplicates to Mr. Gableman --

01:42PM

18 Justice Gableman and Consultare LLC, kind of
19 as an abundance of caution because it was
20 sort of unclear at the time who to submit
21 these to and there were concerns about record
22 preservation. But that's not a concession

01:42PM

23 that the Office of Special Counsel is the
24 authority. And I think, you know, the Court
25 probably acknowledged that when it signed the

01:42PM

1 alternative writ.

2 The second point I'd make on that is
3 that Justice Gableman and other individuals
4 retained for the investigation, they're
01:43PM 5 contractors of the assembly. There's really
6 no way around it. Everyone who is associated
7 with this Office of Special Counsel is a
8 contractor. No one is directly employed by
9 the assembly.

01:43PM 10 There are contracts saying so. In
11 Exhibit H of the petition, that's
12 Document 28, there's a copy of one of these
13 fully executed -- well, there's copies of all
14 of the contracts that we have. But this one,
01:43PM 15 on page 6, is the one with Consultare LLC by
16 and through its president, Michael Gableman.
17 And it says, "This is an independent
18 contractor agreement entered into this
19 25th day of June 2021, by and between the
01:43PM 20 Wisconsin Assembly," that's underlined, "and
21 Consultare LLC and Justice Gableman, an
22 independent contractor in consideration of
23 mutual promises made herein." And it goes on
24 from there.

01:43PM 25 And the other contracts are the same.

1 There are these investigator contracts with
2 Mr. Sandvick and Mr. Page. So it cannot be
3 more clear that we have contracts, and it's
4 even more so with Justice Gableman because
01:44PM 5 he's an attorney for the assembly. There's
6 case law recognizing that. Of course,
7 attorneys are agents of their clients if
8 that's the relationship we're talking about
9 here. So there are -- these individuals are
01:44PM 10 contractors.

11 And the creation of records, I'd also
12 add, is specifically contemplated in the
13 contracts. The contracts say that they will
14 do things like receive investigative reports
01:44PM 15 from investigators and keep a weekly report
16 of investigative findings. So it's clear
17 there's going to be documents generated under
18 these contracts and that those documents are
19 things that are within the scope of the
01:44PM 20 requests made by American Oversight. They
21 are produced or collected under a contract
22 entered into by the authority. And that's
23 the language of Section 19.36(3) of the open
24 records law dealing with contractor records.

01:45PM 25 You know, there was case law out there

1 saying that this provision is broadly
2 construed like ***Juneau County Star-Times***
3 ***versus Juneau County***. And in that case, this
4 provision was understood to apply to records
01:45PM 5 created by an insurance defense law firm that
6 had been retained between a county and an
7 insurance company so that the law firm wasn't
8 even a contractor directly with the
9 authority, which was the county. But the
01:45PM 10 Court found that the records that that law
11 firm created, billing invoices in that case,
12 were records produced or collected under a
13 contract entered into the authority.

14 And so I thought it was puzzling in the
01:45PM 15 answer where the respondents say that we
16 don't identify what records we believe are
17 produced or collected under the contract
18 because we did include the contract in the
19 pleadings, and they're clear that there are
01:46PM 20 records that would be produced. So that's
21 another issue.

22 The third thing I would say on this
23 question is that there is a lot of case law
24 out there that confirms that respondents in
01:46PM 25 this case, Speaker Vos and Mr. Blazel and the

1 assembly, are the appropriate authority and
2 the appropriate defendants and not the
3 Office of Special Counsel or any of the
4 individual contractors, including
01:46PM 5 Justice Gableman.

6 Under the **WIREDATA** case, which we cited
7 in our application, but it's 2008 WI 69,
8 paragraphs 83 --

9 THE COURT: Slow down a little bit.
01:46PM 10 My court reporter is having a hard time
11 getting all this and, actually, I am as well.

12 MS. WESTERBERG: Okay.

13 THE COURT: So 2008 what?

14 MS. WESTERBERG: WI 69.

01:46PM 15 THE COURT: Do you have a Wis. 2d
16 cite for that?

17 MS. WESTERBERG: I do. It's
18 310 Wis. 2d 397.

19 THE COURT: All right.

01:47PM 20 MS. WESTERBERG: And that's
21 paragraph 83, that contractors are not the
22 appropriate recipients of an open records
23 request. They are not authorities.
24 Authorities are also the only ones that can
01:47PM 25 be held liable under the open records law in

1 19.37(1). The **WIREDATA** case confirmed that
2 also in paragraph 83, because the open
3 records statute, the enforcement provisions
4 only refer to filing a mandated action
5 against an authority. And contractors,
6 again, are not authorities. Authorities --

7 THE COURT: So let me ask you this:
8 So "authorities" is defined in 19.32. And it
9 says, "or a formally constituted subunit of
10 any of the foregoing." I think the argument
11 here is that the Office of Special Counsel is
12 a formally constituted subunit so -- because
13 it was created by a formal vote. Is there
14 any case law that talks about what a subunit
15 is versus a contractor?

16 MS. WESTERBERG: Not that I'm aware
17 of, Your Honor. But, you know, in our view,
18 it doesn't really matter because that subunit
19 wasn't created until after these requests
20 were submitted. And then, regardless,
21 there's nobody employed by that subunit, if
22 it is a subunit, that is not a contractor.
23 So you still need an authority.

24 You know, with this Office of
25 Special Counsel, there's no there there. You

1 know, you've got to go back to somebody who
2 is actually working for and employed by the
3 government to make this determination about
4 whether these records can be released.

01:48PM

5 THE COURT: And did you make an --
6 I think you said you served a copy of this to
7 Justice Gableman, an open records request, as
8 well?

01:49PM

9 MS. WESTERBERG: That's correct.
10 American Oversight did send copies of these
11 requests to the contractors.

12 THE COURT: Okay. All right.

01:49PM

13 MS. WESTERBERG: Yes. But I think,
14 you know, where this argument that the
15 respondents here are making is dangerous is
16 that, you know, again, we're dealing with a
17 shell game here where, you know, you could
18 avoid your duties as an authority under the
19 open records law by delegating records
20 creation and custody to an agent or to a
21 contractor.

01:49PM

22 And there's a lot of case law that says
23 you can't do that. That's in, again, the
24 ***Juneau County Star-Times*** case, which is
25 345 Wis. 2d 122, paragraph 40. It's in

01:49PM

1 ***Journal/Sentinel versus School Board of***
2 ***District of Shorewood.*** We cited that in our
3 application, but that's 186 Wis. 2d 443 at
4 452 to 453. In that case the Court said,
5 "The school board appellants' argument thus
6 resolves to whether a public body may avoid
7 the public access mandated by the public
8 records law by delegating both the record's
9 creation and custody to an agent. Posing
10 this question provides its answer: It may
11 not."

12 THE COURT: One other question. In
13 those cases, the contractors didn't have a
14 responsibility so there was an authority.
01:50PM 15 Here they're saying, at least as I understand
16 and I'd like to hear from counsel for the
17 respondents, that there is a subunit that can
18 properly have an open records request
19 directed at that subunit. And in that
01:50PM 20 situation, then, they would have to comply if
21 they are a subunit; correct?

22 MS. WESTERBERG: I'm a little
23 confused by their answer, actually, on that
24 because in some places they refer to the
01:51PM 25 Office of Special Counsel as an authority and

1 in some cases in their answer they refer to
2 it as a custodian. And a custodian and an
3 authority are distinct concepts.

4 So in paragraph 26 of their answer, they
5 refer to this as a legal custodian.

01:51PM

6 Paragraph 27, the same thing. And in 19.33
7 of the statutes, sub 7, this is part of the
8 open records law, it says, "The designation
9 of a legal custodian does not affect the

01:51PM

10 powers and duties of an authority under the
11 subchapter." And, again, the authority is
12 the only one that may be sued and the
13 authority is the only one to whom a records
14 request may be submitted.

01:51PM

15 And, you know, in some cases we've seen,
16 the contractor will provide, you know, the
17 response. But the authority then has to, you
18 know, accept or endorse that response, and
19 then they can be sued if it's not accurate.

01:52PM

20 That's what happened in the
21 ***Juneau County Star-Times*** case, is the
22 contractor provided the records. The
23 requestor said to the authority, "Is this
24 really your response?" And they said, "Yes."
25 And then the lawsuit followed from that.

01:52PM

1 THE COURT: All right. Let me --
2 just because -- on this train of thought, I
3 want to hear from the respondents, because I
4 must admit I'm not sure what their defenses
01:52PM 5 are. I'm gleaning it from their answer as
6 you are. I'd like to hear from the
7 respondents' counsel to tell me what exactly
8 the respondents' position is on these issues.

9 MR. STADLER: Thank you, Judge.

01:52PM 10 Let me start with a boiled-down, real
11 easy response to that, and that is: The
12 position is that the records, we're not
13 trying to say they can't be produced. We're
14 not trying to hide records. But the request
01:52PM 15 should go to the Office of Special Counsel.
16 And there is a distinction and we used the
17 two words in our answer about an authority
18 and about custodian or custody.

19 Because in the cases that counsel talks
01:53PM 20 about, when we're talking about **WIREDATA**,
21 **Juneau County Star-Times**, even the
22 **Journal/Sentinel** case, all of those involved
23 one authority. It was the school district.
24 It was the county. They were a single
01:53PM 25 authority. And here, we put in our answer,

1 you know, Mr. Vos is an authority, Mr. Blazel
2 is an authority, and the assembly is an
3 authority. But so, too, is the Office of
4 Special Counsel. It is that formally
01:53PM 5 constituted subunit, so it exists as an
6 authority as well. So we're different than
7 what those cases are because here we have two
8 authorities.

9 And so we go back to the definition
01:53PM 10 under 19.32(1) in regard to an authority.
11 And if we look at that, what it says is,
12 "Authority means any one of the following
13 having custody of a record." And that's the
14 issue in this case, is that the Office of
01:54PM 15 Special Counsel has custody of those records.

16 The request was made to Justice Gableman
17 for the records and he has responded, and
18 it's included in the petition. He has
19 responded and said, "I received your request
01:54PM 20 and I will respond to it." So what we have
21 is petitioners seeking a mandamus against the
22 assembly and Mr. Vos and Mr. Blazel for these
23 records when they're within the custody over
24 at Justice Gableman's office and he has
01:54PM 25 intended and stated that he will offer a

1 response. That's where this case should be.

2 So it's not about us trying not to
3 produce. It's that we don't have them. And
4 the problem -- and we pointed this out in our
01:55PM 5 answer -- is it's not just as easy as saying,
6 "Oh, hey, records exist. Here, we'll give
7 them to you." The party having the custody
8 of the records has the obligation to say,
9 "Yes, we're going to produce them," or, "No,
01:55PM 10 there's a reason why they can't be produced."

11 And we kind of pointed that out to the
12 Court. There could be issues involved in
13 regard to some of those records as to whether
14 there's attorney/client privilege, as to
01:55PM 15 whether there's work product issues, as to
16 whether there is a common law exemption that
17 would apply to some of those records during
18 the middle of an investigation. But from our
19 side, we don't have the knowledge or the
01:55PM 20 information to be able to make those
21 arguments or to be able to assert those.

22 So when I look at this case, it's very
23 different than **WIREDATA**. **WIREDATA**, it talked
24 about delegating the records and not making
01:55PM 25 your contractor responsible for that. But

1 the specific holding in **WIREDATA** was -- first
2 of all, it was a local government issue, not
3 a state government issue. And so we had the
4 statutory definition of whether their
01:56PM 5 independent contractors who served as
6 assessors were an authority, and the Court
7 said they can't be an authority because
8 there's a specific definition within the
9 local public official definition in the
01:56PM 10 statutes under 19.42 and they don't meet
11 that. Therefore, they're not an authority;
12 and, therefore, the only authority that could
13 have answered in that case was the village
14 and not **WIREDATA** itself.

01:56PM 15 So that's the distinction here. We do
16 have multiple authorities here, but the
17 authority having custody is Justice Gableman.
18 The request has been made.

19 THE COURT: But I don't
01:56PM 20 understand -- if that was the position, were
21 there any documents turned over regarding the
22 document requests?

23 MR. STADLER: There were responses
24 to the document requests. You know, they
01:56PM 25 asked about -- they wanted the contracts.

1 They wanted payment invoices. They're all
2 attached as exhibits to the petition.

3 So I know the case has been
4 characterized kind of like they got
01:57PM 5 stonewalled. They didn't get stonewalled.
6 They got the documents that Mr. Blazel had.
7 They got the documents that Mr. Vos had.
8 There is a subset of documents that they
9 still want, and those haven't been.

01:57PM 10 But this is not a case about, oh, we
11 simply didn't give them anything or we
12 ignored them completely.

13 THE COURT: What is the subset of
14 documents that they still want that haven't
01:57PM 15 been provided?

16 MR. STADLER: I'm not entirely --
17 the petition doesn't really identify with
18 specificity what documents they want. I
19 believe what they want are e-mail
01:57PM 20 communications between Mr. Gableman and the
21 investigators. And as I read their petition,
22 it looks like they want, like, drafts of any
23 investigation reports or drafts of status
24 memos, things of that nature. Again, I'm not
01:58PM 25 entirely clear on it. But I would

1 characterize what is still at issue to be the
2 internal workings of the investigatory
3 mechanism.

4 THE COURT: What about the
01:58PM 5 resignation letters of the two contractors?

6 MR. STADLER: If they were -- if
7 Mr. Blazel had them, they were produced. I
8 don't know if those have been produced.

9 THE COURT: All right. Here's --
01:58PM 10 and how is that a subunit -- is a subunit
11 versus -- in this situation where the subunit
12 is a contractor, what happens when you've
13 got, in other words, a dual role, that it's a
14 formally constituted subunit comprised of
01:58PM 15 contractors?

16 MR. STADLER: I don't see anything
17 within the statute. I know Ms. Westerberg
18 said, well, we can't direct a request over
19 there because there's no employees of the
01:59PM 20 Office of Special Counsel. I don't think
21 there's any requirement in the law as to who
22 has to respond for an authority. The
23 authority exists. It is acting right now
24 through Justice Gableman and his
01:59PM 25 investigators. That obligation will fall on

1 that office through those people to respond
2 to the public records request. But I don't
3 think you have to have a formal, you know,
4 per se, W-2 employee in order to be
01:59PM 5 considered to be a formally constituted
6 subunit.

7 The committee took action and created
8 these positions. And it exists. It's
9 formal. This is not ad hoc. And I wish
01:59PM 10 there was more guidance in the statute. Rest
11 assured, I spent a lot of time looking at
12 Lexis with the search term of "formally
13 constituted subunit" and did not find much
14 under the public records law. There is some
01:59PM 15 analysis of it under the open meetings law
16 but in a different context, a context that
17 wouldn't apply here. So there isn't a lot of
18 guidance on that.

19 Our position on it is when you have a
02:00PM 20 formally constituted subunit, it becomes an
21 authority and then the responsibility for
22 responding to that request goes to that
23 subunit.

24 THE COURT: All right. This is
02:00PM 25 what I see. This is an open records request.

1 We all know the law regarding open records
 2 requests, that they are -- the law is in
 3 favor of open records, public records.

02:00PM

4 And I think we all agree that if these
 5 were contractors, that the authority who is
 6 responsible for these contractors are
 7 required to provide or certify the records
 8 the contractors have.

02:01PM

9 It's an open question. And just --
 10 there is a presumption of openness.
 11 Wisconsin public records law declares it is
 12 "an essential function of the representative
 13 government to provide public records."
 14 That's Wis. Stat. Section 19.31.

02:01PM

15 This is "one of the strongest
 16 declarations of policy to be found in the
 17 Wisconsin Statutes," **Zellner versus Cedarburg
 18 School District**, 2007 WI 53.

02:01PM

19 To that end it's stated, "The denial of
 20 public access generally is contrary to the
 21 public interest, and only in an exceptional
 22 case may access be denied."

02:01PM

23 So in this case, even assuming that
 24 there is -- well, setting aside the fact that
 25 it doesn't appear that there was a full and

1 responsive denial of the -- as to what the
2 grounds for the denial of these records, I
3 first learned of this denial on the answer
4 that I reviewed this morning. But even
02:02PM 5 assuming that there was a formally
6 constituted subunit created on August 27th,
7 any records that existed before that are
8 subject to the open records requirements and
9 do need to be produced.

02:02PM 10 I agree that any records that were
11 created post April 27th when the legislature
12 did a formally constituted subunit should be
13 produced by that subunit at that time. But I
14 do believe that this would be a shell game if
02:02PM 15 you could retroactively protect documents by
16 having a subunit created after the fact.

17 And I think that's what's going -- I
18 don't want to say it's going on here, but
19 that's what the effect of this is. You can't
02:03PM 20 have open records requests that are valid on
21 their face to an authority in July and
22 August and then say, "Okay. We're going to
23 make a subunit and then we can deny these
24 record requests because it's not us. It's a
02:03PM 25 subunit."

1 So to the extent that there are records
2 that are responsive to the open records
3 requests that occurred prior to August 27th,
4 they need to be turned over or there has to
02:03PM 5 be a reason why they're not turned over, none
6 of which has really been addressed by the
7 respondents other than, "We don't have them."
8 And if they do have them, then they need to
9 be produced.

02:03PM 10 So I think that's the only way to read
11 this statute, is, yes, you can have a
12 subunit. Maybe the subunit is the proper
13 recipient of the request versus the
14 contractor situation when there is only one
02:04PM 15 authority. But you can't retroactively
16 protect records by a subunit that already
17 were properly requested prior to that subunit
18 becoming into existence.

19 So I'm going to give -- I gave 30 days
02:04PM 20 with the hope that the parties would at least
21 review the records and see if there were any
22 additional records. That didn't occur.

23 These records have been pending since July.

24 How long do you think -- I mean, I'm
02:04PM 25 going to give 10 days to review these records

1 and figure out if there's any additional
2 records that haven't been produced between
3 when they're responsive to August 27th.

02:04PM

4 MS. WESTERBERG: We have just a few
5 points of clarification, Your Honor.

6 THE COURT: Sure.

02:05PM

7 MS. WESTERBERG: The subunit issue,
8 you know, one concern we have about that is
9 even if the Office of Special Counsel is a
10 subunit of an authority, that does not mean
11 that the assembly and Mr. Vos and Mr. Blazel
12 are not also authorities that would be
13 responsible for that. So, you know, I'm
14 not --

02:05PM

15 THE COURT: So you're saying as a
16 subunit, that the actual authority over the
17 subunit is the one that is responsible?

02:05PM

18 MS. WESTERBERG: Yes. In this
19 case, it still would be. And I don't think
20 that's impractical to ask the authority to
21 still be responsible for those requests. You
22 know, like I was saying before, this happens
23 all the time where, you know -- of course,
24 you know, an authority retains a contractor
25 to do work it can't or won't do all the time.

02:05PM

1 And, of course, the contractor will have the
2 day-to-day records, which is what we are
3 seeking here.

4 But that's not a bar to the authority
02:05PM 5 getting the records from that contractor and
6 then turning them over -- reviewing them and
7 turning them over to the requestor. And I
8 think it is appropriate for the authority,
9 you know, the governmental entity which is
02:06PM 10 the one that can best do the balancing test,
11 to consider the public's interest in the
12 records to be the one to decide what to
13 release. You know, you can't have a
14 contractor making that call. You know,
02:06PM 15 they're not the ones that are in the best
16 position to assess, you know, the open
17 records law.

18 THE COURT: The only question I
19 have is that -- I understand your argument.
02:06PM 20 And it says, "Any of the following having
21 custody of a record or a formally constituted
22 subunit of any of the foregoing." So you
23 have the authority. You have a subunit. I
24 guess the question is: Who has the custody
02:06PM 25 of the record?

1 MS. WESTERBERG: Yes. Well, and I
2 think the open records law goes to the
3 custody and control. And so, you know, the
4 authority would still have the ability to get
02:07PM 5 those records from the contractor or, you
6 know, if it's a subunit, from the subunit.
7 So that's one thing.

8 The other overall question or
9 clarification we're wanting is, you know, the
02:07PM 10 respondents in this case did not assert
11 any -- you know, for them to now assert
12 reasons for denial that they didn't assert
13 before, I think it's too late. You know, and
14 there's case law on that, too.

02:07PM 15 THE COURT: I agree with you on
16 that. It hasn't asserted anything to this
17 Court. It didn't assert anything in its
18 responses. I think it's too late. I think
19 it needs to turn over the documents that it
02:07PM 20 has in its possession, at least up to
21 August 27th. And then the only question I
22 have is: Who is the custodian? "Any of the
23 following having custody of a record," and it
24 says, "or a formally constituted subunit of
02:07PM 25 any of the foregoing."

1 So I can understand their argument is,
2 I'm assuming, correct, Counselor, that the
3 custodian of the records are at the Office of
4 Special Counsel?

02:08PM

5 MR. STADLER: Correct.

6 THE COURT: But to the extent that
7 the authorities have these records in their
8 possession, they also, too, need to turn them
9 over. I don't think they can get out of

02:08PM

10 having -- if they have them in their
11 possession, they have custody of the record.

12 MR. STADLER: If we would have had
13 them, Your Honor, they would have been
14 produced. We're not relying on the -- that

02:08PM

15 we didn't have them in our possession -- I'm
16 sorry. It's not that we didn't say we
17 wouldn't produce them. It's that we don't
18 have them within our possession. They're
19 within the custody of the Office of

02:08PM

20 Special Counsel.

21 THE COURT: But I find it somewhat
22 troubling to think that -- these documents
23 that were, in fact, in the possession of the
24 respondents prior to August 27th, are you

02:09PM

25 saying that they don't have any of those

1 documents that were created prior to
2 August 27th in their possession?

3 MR. STADLER: And I think that's a
4 misunderstanding that seems to exist here.
02:09PM 5 The respondents didn't have these and then,
6 all of a sudden, on August 27th, they were
7 transferred away. These have always been
8 over with Justice Gableman or the
9 investigators doing the work that they're
02:09PM 10 doing.

11 That group was retitled Office of
12 Special Counsel on August 27th. Mr. Gableman
13 was hired as special counsel back at the end
14 of May. The only thing that changed was the
02:09PM 15 title of the office. There was no transfer
16 of the documents. We never had them and gave
17 them to him. And so that's -- you know,
18 that's --

19 THE COURT: But any documents he
02:09PM 20 would have had from May through August he
21 would have had as a contractor under the
22 authority of the respondents because there
23 wasn't a formally constituted subunit. So
24 they are responsible for the records in his
02:10PM 25 possession from whenever he started through

1 August 27th, at the very least.

2 MR. STADLER: I would argue that it
3 was a formally constituted subunit back in
4 May when he was hired to be special counsel
02:10PM 5 and appointed as special counsel by the
6 committee. Like I said, the only thing that
7 changed in August was the title. They gave
8 him a formal title of Office of
9 Special Counsel and put that in quotes and
02:10PM 10 capitals. But he was retained as special
11 counsel in May.

12 THE COURT: Right. But they didn't
13 vote on that. They didn't --

14 MR. STADLER: No, they did. And
02:10PM 15 that's set forth in the petition as well.

16 MS. WESTERBERG: I would disagree
17 with that, Your Honor. I think that they
18 didn't -- there was no mention of an
19 Office of Special Counsel in the May vote and
02:10PM 20 that the contract itself refers to
21 Mr. Gableman as a coordinating attorney under
22 this independent contractor agreement.

23 I also think it doesn't matter about the
24 physical custody of the records because the
02:11PM 25 open records law, the contractors

1 provision -- and, again, you know, there is a
2 contract. Justice Gableman was operating as
3 a contractor even if he is also a subunit,
4 which we don't concede.

02:11PM

5 But the statute says that records of a
6 contractor must be produced, quote, to the
7 same extent as if the record were maintained
8 by the authority. So it does not need to be
9 physical possession. They have to have the

02:11PM

10 ability to get the records from their
11 contractor.

12 THE COURT: Right. I agree.

13 Because in May it says hiring legal counsel
14 investigators. That was the vote. The
15 contractor was as a coordinating attorney.

02:11PM

16 That's starting in July. It wasn't until
17 after these record requests. And then, in
18 August, where there was -- they created this
19 special subunit.

02:12PM

20 And so between the beginning and
21 August 27th, the -- Justice Gableman is
22 acting under the auspice of an authority,
23 which is one of the respondents. And as a
24 contractor, they are responsible for the

02:12PM

25 records that he has. After August 27th, even

1 assuming the respondents' argument is correct
2 that a formally constituted subunit is the
3 proper party for an open records request,
4 which, for purposes of today, I'm accepting,
02:12PM 5 then the open records request needs to be
6 directed towards that subunit if that subunit
7 has custody of the records. But prior to
8 that time, the authority is required to
9 have -- produce the records even if they're
02:13PM 10 in the possession of a contractor.

11 And that's what I'm going to order, that
12 the records that were generated by
13 Justice Gableman while he was special counsel
14 or whatever his title was between May and --
02:13PM 15 or overseeing attorney, coordinating
16 attorney, May and August 27th, his records,
17 subject to that open records request, be
18 turned over to the petitioner.

19 After August 27th, then, that's a
02:13PM 20 separate issue that will be addressed in a
21 different matter.

22 MR. STADLER: Can I just ask a
23 question, Your Honor?

24 THE COURT: Yes.

02:13PM 25 MR. STADLER: There was a little

1 discussion earlier about comments that it's
2 too late to raise objections to records. I
3 would like to reserve our ability to argue
4 about that. I think in a case like this, I
02:14PM 5 understand the concept of if you make a
6 response and you don't include some of your
7 arguments, that it can be waived.

8 But here the response was, "These are
9 not our documents to produce and, therefore,
02:14PM 10 we are not going to produce them." There was
11 no balancing test applied because of the
12 position taken by the various offices, that
13 they didn't have the obligation to produce.
14 I don't think our system is designed to say
02:14PM 15 that, "Now we're going to penalize you and
16 you can never claim that there's any
17 exemption to production because you were
18 wrong on a different issue."

19 So I would like to reserve that. And we
02:14PM 20 may -- and, again, we have to review these
21 records to do that balancing test. But it's
22 not a situation where we did the balancing
23 test and didn't raise those issues. The
24 balancing test says you have to be conductive.

02:14PM 25 MS. WESTERBERG: And I would

1 disagree with that, Your Honor. If we're
2 going to brief it, we can brief it. But
3 there's a case that's directly on point that
4 says we can't assert new balancing test
02:15PM 5 arguments. That's the **Breier** case. And --

6 THE COURT: What's the cite to
7 that?

8 MS. WESTERBERG: That, Your Honor,
9 is at -- it's **Newspapers, Inc., versus**
02:15PM 10 **Breier**, 89 Wis. 2d 417 at 427.

11 That's been reiterated in cases like
12 **Journal Times versus Police and Fire**
13 **Commissioners Board**, which is at 2015 WI 56,
14 362 Wis. 2d 577, paragraphs 74 to 75.

02:15PM 15 And just recently -- this is my last
16 one, and I can provide these citations. Just
17 last week there was a case that reiterated
18 this point called **Mastel versus School**
19 **District of Elmbrook**. And it's so brand new
02:16PM 20 it doesn't have a recorder number or even a
21 public domain citation, but it's 2020 AP 1781
22 at Footnote 3 -- page 9, Footnote 3. It was
23 decided on October 27th.

24 So those cases --

02:16PM 25 THE COURT: All right. Under

1 **Newspapers, Inc., versus Breier**, B-r-e-i-e-r,
2 this is a 1979 case, 89 Wis. 2d 417, it
3 states, "If a custodian of public records
4 gives no reasons or gives insufficient
02:17PM 5 reasons for withholding a public record, a
6 writ of mandamus compelling production of the
7 records must issue. There's an absolute
8 right to inspect a public document in absence
9 of specifically stated sufficient reasons to
02:17PM 10 the contrary."

11 And you said -- that was at 427?

12 MS. WESTERBERG: That's right.

13 MR. STADLER: I'm sorry. 427?

14 MS. WESTERBERG: Correct.

02:17PM 15 THE COURT: Counsel, do you need a
16 copy of this case?

17 MR. STADLER: I'm looking at it,
18 Your Honor. Thank you.

19 THE COURT: "It is not the trial
02:18PM 20 court's or this court's role to hypothesize
21 reasons or consider reasons for not allowing
22 inspection which were not asserted by the
23 custodian. If the custodian gives no reasons
24 or gives insufficient reasons for withholding
02:18PM 25 a public record, a writ of mandamus

1 compelling the production of records must
2 issue."

3 MR. STADLER: And my response to
4 that, Your Honor, is that we have not yet
02:18PM 5 withheld any records. The respondents may
6 have been incorrect in the Court's view in
7 terms of whether they were the custodians at
8 the time of the record, but they have not yet
9 withheld any records. And so they've never
02:18PM 10 had the opportunity to assert yet that there
11 are public policy reasons as to why any of
12 these documents may not be produced. And it
13 may never come.

14 THE COURT: Well, the -- their
02:19PM 15 response was, A, we don't have these records
16 and, B, we're not -- what exactly -- when
17 these were requested, what was the response?

18 MS. WESTERBERG: For some of them
19 we -- the respondents said, "We're giving you
02:19PM 20 the records in our own files." For some of
21 them they said, "We have searched our files
22 and we don't have anything," because, of
23 course, the records were in the custody of
24 the contractor. I think that's what they
02:19PM 25 meant. And some of them we haven't gotten a

1 response to at all.

2 But I don't -- I don't think it really
3 matters because, you know, first of all, the
4 **Breier** case says if they haven't stated
5 sufficient reasons, your right is absolute.
6 And the respondents -- you know, this law
7 about contractors' records was well
8 established at the time they gave their
9 response.

02:19PM

02:20PM

10 And to say -- you know, to say give us a
11 second or third kick at the cat here, you
12 know, that could create an incentive for
13 custodians and authorities to delay their
14 responses or -- and I think blow a hole in
15 this concept that's stated here in **Breier** but
16 also in the open records law generally.

02:20PM

17 THE COURT: And when were these
18 responses provided to the petitioner?

19 MS. WESTERBERG: They were provided
20 at various dates, and those dates are
21 summarized in the complaint. At the petition
22 on pages 14 and 15, there's a chart that has
23 the dates they were submitted and it provides
24 citations to the response there and where
25 they are in the record.

02:20PM

02:20PM

1 THE COURT: Okay. So if these were
2 on July 20th, August date submitted, response
3 to subpoena -- specifically when the
4 responses were?

02:21PM

5 MS. WESTERBERG: There are various
6 dates. I'd have to go back and pull those
7 from the record. But they're in -- the
8 actual responses are attached, and those
9 would have the dates on them. So, for

02:21PM

10 example, the top one, July 20th was the date
11 the request was submitted and the response
12 was forwarded on September 3rd.

02:21PM

13 MR. STADLER: And if you look at
14 others, Mr. Blazel's first response was
15 July 29th. That's set forth in Exhibit H.
16 You can go to Exhibit I. It says response,
17 July 28th. You can go to Exhibit J, July 28th.

02:22PM

18 THE COURT: "I have no records that
19 are responsive to your requests and consider
20 this matter closed." These are all before
21 even the special subunit was created.

02:22PM

22 I think it's too late. I don't think
23 you can say, "We don't have these records."
24 It is very well known that contractors -- you
25 ask the authority, not the contractor for

1 documents that occurred prior to the subunit
2 was authorized. They -- again, it's a shell
3 game if you're going to say, "Well, we don't
4 have responsive documents." And if they
5 don't, they don't.

02:22PM

6 But if you are -- you have a contractor,
7 you are responsible to check with the
8 contractor and certify the documents. And if
9 you don't, you run the risk that you're going
10 to have waived your right.

02:23PM

11 And that case law does seem to be pretty
12 clear that once you give an insufficient
13 reason as to why you're not producing
14 documents, you do it at your peril. And you
15 can't later then say, "Oh, we have some other
16 defenses. And, oh, we may have made a
17 mistake. But, no, let's come up with some
18 additional defenses as to why we don't
19 produce them and then we'll fight about
20 that."

02:23PM

02:23PM

21 I don't think any of these requests on
22 their face seem to be -- well, and it's not
23 up to the trial court nor should the trial
24 court try to come up with defenses as to why
25 these weren't produced. So these need to be

02:23PM

1 produced, unless there is a darn good reason
2 why not. And I don't see one at this point
3 because these requests were back in July and
4 August and the documents, until August 27th,
02:24PM 5 were in the hands of a contractor and they
6 need to be produced.

7 All right. Do you want to put together
8 an order to that effect?

9 MS. WESTERBERG: Yes, Your Honor.

02:24PM 10 Thank you.

11 THE COURT: Thank you. We're
12 adjourned.

13 MR. STADLER: Thank you, Your Honor.

14 (Adjourning at 2:24 p.m.)
15
16
17
18
19
20
21
22
23
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE

I, Rowan L. Thompson, do hereby certify that I am the Official Court Reporter for the Circuit Court, Branch 3, Dane County, Wisconsin; and that I have carefully compared the foregoing document with the stenographic notes taken in conjunction with this proceeding by me on November 5, 2021; and that the same is a true and correct transcript of those notes.

Electronically signed by Rowan L. Thompson, RPR, CRR, Official Court Reporter for Branch 3 of the Dane County Circuit Court, on November 8, 2021.