

FILED
01-28-2022
CIRCUIT COURT
DANE COUNTY, WI
2021CV003007

BY THE COURT:

DATE SIGNED: January 28, 2022

Electronically signed by Frank D Remington
Circuit Court Judge

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 8

DANE COUNTY

AMERICAN OVERSIGHT

Petitioner,

Case No. 21CV3007

vs.

ASSEMBLY OFFICE OF SPECIAL
COUNSEL, et al.

Respondents.

**DECISION AND ORDER
DENYING THE WISCONSIN STATE ASSEMBLY OFFICE OF SPECIAL COUNSEL'S
MOTIONS FOR RECONSIDERATION OR TO AMEND THE BRIEFING SCHEDULE**

INTRODUCTION

On January 22, 2022, the Court ordered the Wisconsin Assembly Office of Special Counsel (“OSC”) to “file all records, documents, and things responsive to Petitioners’ requests under the Open Records law” by Monday, January 31, 2022. Dkt. 110:2. OSC now asks the Court to reconsider that order, or, in the alternative, to amend other parts of the scheduling order “to require plenary briefing prior to submission of the documents.” Motion for Reconsideration, dkt. 118:1 (“the Motion.”)

The basic premise of OSC’s argument is that Wis. Stat. § 12.13(5), which bars

“investigators” of election crimes from releasing “investigatory information,” applies to the OSC. This is not a new argument. Instead, the OSC now elaborates on one already rejected by the Court. In its latest motion, the OSC principally relies on this renewed interpretation of Wis. Stat. §12.13 to argue, incredibly, that this statute prohibits it from forwarding responsive documents and records despite the fact that the Court ruled that the records and documents will be sealed. The OSC is wrong on the law and offers no reason, old or new, for this Court to reconsider its Order.¹

STANDARD OF REVIEW

A motion for reconsideration must either present newly discovered evidence or establish a manifest error of law or fact. *Koepsell’s Olde Popcorn Wagons, Inc. v. Koepsell’s Festival Popcorn Wagons, Ltd.*, 2004 WI App 129, ¶44, 275 Wis. 2d 397, 685 N.W.2d 853. “A manifest error is not demonstrated by the disappointment of the losing party.” *Id.* A manifest error is “the wholesale disregard, misapplication, or failure to recognize controlling precedent.” *Id.*

DECISION

OSC’s new argument is that it cannot comply with a Court order to release documents because such an order subjects it to criminal penalties. This argument rests on two false premises: first, that sections of the Wisconsin Statutes empowering the Wisconsin Elections Commission

¹ This Court observes in its recent motion, the OSC offers no other argument other than the erroneous application of Wis. Stat. § 12.13. The OSC does not argue that it cannot do what the Court ordered, but only that it prefers that the Court address the underlying legal issues before the OSC has to file the documents, records and things. The Court agrees with the OSC that the underlying legal issues can, and maybe should, be decided before the Court undertakes a review of the documents, records and things. The Court observes that the record custodian gave only one reason to justify withholding of the documents, records and things, that is, because it is claimed they are part of an “investigation.” As observed by this Court, a liberal reading of the cryptic response is that the Custodian was undertaking a balancing test. That is why for the convenience of this Court and the conservation of scarce judicial resources it ordered the filing of the responsive documents and records and things, so the Court would be in a position, if necessary and without delay, to undertake its responsibility to decide the legal questions and examine whether the Custodian properly conducted a sound and rational balancing test as the Custodian and this Court are required to do by the Public Records Law. In that sense, the present motion is nothing more than a challenge to how this Court has decided to set the schedule for addressing the issues present in this case. Well settled law in Wisconsin is that the Circuit Court has wide latitude in how it schedules its cases.

also apply to the OSC, which is an investigatory subunit of the Wisconsin Assembly, and second, that the prohibited “release” of documents by the Wisconsin Elections Commission includes “submission for in camera review by a Wisconsin circuit court” which subjects the OSC to criminal penalties.

To clean up the operative statutory language on which OSC relies:

[N]o investigator ... may disclose information related to an investigation or prosecution under chs. 5 to 10 or 12 ... prior to presenting the information or record in a court of law.

Wis. Stat. § 12.13(5).

There are three problems with OSC’s argument. First, OSC does not really seek reconsideration as much as it simply rehashes its previous arguments presented in its Motion to Quash or to Dismiss (dkt. 98-99). OSC does not address the Court’s reasons, orally stated, for rejecting its argument at the January 20, 2022 show cause hearing.

Second, even if the Court set aside the other problems with OSC’s argument - such as sovereign immunity, or that the Office is not a natural person, but instead a body politic, or the rule of lenity² - OSC does not explain why an act demanded by the Order of the Court would or even could be criminally prosecuted.

Third, and most important of all, the Wisconsin Attorney General directly and conclusively rejects the basic premise on which OSC’s argument relies, which is that Wis. Stat. § 12.13 applies to any “investigator.” In Att’y Gen. Op. OAG-7-09, the former Republican Attorney General, Attorney General Van Hollen³ answered “several questions arising from the Wis. Stat. § 12.13(5)

² See *State v. Guerrero*, 2015 WI 72, 363 Wis. 2d 857, 867 N.W.2d 400 (“The rule of lenity provides that when doubt exists as to the meaning of a criminal statute, “a court should apply the rule of lenity and interpret the statute in favor of the accused.”) (quoted source omitted); See Att’y Gen. Op. OAG-7-09 at 12.

³ The notation in the Attorney General’s Opinion indicates the approval by the former Deputy Ray Taffora and the former Division Administrator Kevin St. John.

prohibition against disclosure.” Every one of the OSC’s latest arguments interpreting Wis. Stat. §12.13(5) was carefully considered and soundly rejected by Attorney General Van Hollen.

Courts must carefully consider such opinions because:

The legislature has expressly charged the state attorney general with interpreting the open meetings and public records statutes ... Thus the interpretation advanced by the attorney general is of particular importance here.

State v. Beaver Dam Area Dev. Corp., 2008 WI 90, ¶37, 312 Wis. 2d 84, 752 N.W.2d 295; *Schill v. Wisconsin Rapids Sch. Dist.*, 2010 WI 86, ¶¶106-116, 327 Wis. 2d 572, 786 N.W.2d 177 (“The opinions and writings of the attorney general have special significance in interpreting the Public Records Law...”) OSC, on the other hand, appears to have not considered the opinion at all. Therefore, this Court accepts Attorney General Van Hollen’s analysis as persuasive authority and shares his conclusion:

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 [WEC].⁴

Att’y Gen. Op. OAG-7-09 at 12 (footnote added).

ORDER

In conclusion, the Court **DENIES** the OSC’s motion for reconsideration and **DENIES** its motion to amend the scheduling order. The OSC remains ordered to file all documents, records and things responsive to Petitioner’s requests under seal on or before the close of business January 31st, 2022. Willful failure to comply with the Order of the Court dated January 25th, 2022, may

⁴ See 2015 Wisconsin Act 118 (changing the name of the “Government Accountability Board” to the “Wisconsin Elections Commission.”)

subject the OSC to contempt of court.

This is NOT a final order for purposes of appeal. Wis. Stat. § 808.03(1).