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April 8, 2022

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Re: *American Oversight v. Assembly Office  
of Special Counsel, et al.*, Case No.  
21CV3007

Dear Counsel:

We are in receipt of your letter addressing certain alleged deficiencies in The Office of The Special Counsel's ("OSC") production ("AO Letter"). The OSC disputes the allegation that its production "does not comply with the Court's January 25 Order[.]" It further disputes that statements have been made which call into question the OSC's willingness to comply with the Court's order. The OSC has made every effort to comply with the Court's order and will continue to do so.

In addition, in an effort to ensure transparency, the OSC has voluntarily released additional records (not requested) on their website. This release is a continued fulfillment of the Special Counsel's pledge—first made before the investigation started—to make available to all members of the public every document the OSC relied upon in forming its conclusions. The Special Counsel has routinely honored and reaffirmed this pledge as he has repeatedly and publicly stated that he does not want to ask the public to take his word for any of the OSC's conclusions, but rather wants the public to be able to judge for itself whether its conclusions are sound.

This does not suggest an effort to disregard the Court's order. Instead, it suggests a willingness for the OSC to pursue transparency in *all* records in its possession (not just those requested by AO), so long as the disclosure of such additional records will not impinge further investigation by the OSC.

Finally, the OSC also affirmed—and continues to affirm—that it will release *all* records relevant to its reports and recommendations at the conclusion of its investigation.

**EXHIBIT  
B**

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### **I. American Oversight Requests**

In September and October of 2021, American Oversight (“AO”) propounded multiple public records requests upon the OSC. The Court summarized the seven requests as follows:

- “Any contracts between the legislative respondents and the OSC; resumes, applications, work proposals, and the like; any records related to ‘the scope of the investigative authority of’ OSC; any records ‘detailing the steps or procedures to be followed in each aspect of the investigation;’ invoices in connection to the investigation; and ‘criteria, schedule, or other guidelines’ for completion of the investigation.”
- “An updated request identical to the above but for a new date range.”
- “Interim reports, analyses, and other work product related to election fraud.”
- “An updated request identical to the above, but for a new date range.”
- “‘All electronic communications’ between OSC staff, plus any ‘calendars or calendar entries’ relating to the investigation.”
- “An updated request identical to the above, but for a new date range.”
- “Communications between the respective authority and forty-four entities, which American Oversight specified by name and email address.”

Opinion, ECF 165, at 3-4 (internal citations to the record omitted). Each request asked for documents from the date the request was submitted through the date the search was conducted.

The OSC performed their searches on all accounts and databases at the beginning of December. These searches produced a total of 761 pages of documents. Despite denying the requests, these responsive documents were printed and saved in accordance with Wis. Stat. § 19.35(5), in case production was later ordered. The digital copies of the documents were then deleted as a matter of routine procedure. *See* Part II.B.2.d (describing the OSC’s process for retaining or deleting documents).<sup>1</sup> Thereafter, the Circuit Court required that the OSC produce these documents to the Court by January 31, 2022.<sup>2</sup>

In accordance with the Circuit Court’s order, the OSC produced all of these responsive documents to the Court on January 31, 2022. This production included the printed versions of all

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<sup>1</sup>The OSC only deleted digital documents that were identical to retained hard-copy documents.

<sup>2</sup> The OSC did not discover that such hard copies failed to include certain attachments until counsel reviewed the documents prior to its January 31, 2022, production; however, the identical digital copies had already been deleted, per routine office procedure. *See* Part II.B.2.d.

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responsive documents that the OSC found and saved while performing their required searches. The documents were released to AO following the hearing on March 8, 2022.

## **II. Alleged Deficiencies**

AO has alleged multiple deficiencies, which the OSC responds to in turn. First, the OSC addresses records that were not previously produced due to an oversight and attaches those documents still in its possession to this response. Second, the OSC disputes the other issues raised by AO. As a preliminary note, OSC disputes that AO's allegation that only "four email accounts were searched[.]" *See* AO Letter, at 3. All OSC e-mail accounts and databases were searched and any responsive documents were saved, and subsequently produced in accordance with the Court's order.

### **A. Documents not previously produced due to an oversight.**

In seeking to comply with the Court's order, the OSC produced all documents which were found and saved from its searches. For certain documents, the OSC inadvertently failed to include the attachments to e-mails. The OSC has searched again for all such unprinted attachments and is producing those still in its possession. These include documents for Production at 43, 69, 306, 400. Documents still in its possession include documents that the OSC separately saved or archived because the investigation related to those documents is ongoing or because the documents were relevant to the OSC's reports/recommendations. These attachments are produced from those saved/archived documents.

It also inadvertently failed to include a few contracts and two calendars<sup>3</sup>. The OSC attaches each of these documents to this response. Mr. Lancaster has redacted personal information, which is not related to the OSC or its investigation, from his calendar.

Finally, the OSC directs AO to its website for a copy of all subpoenas. *See* <https://www.wielectionreview.org/Resources/Records>.

### **B. The OSC did not "ignore" portions of AO's requests, it simply did not have any responsive documents.**

AO alleges that certain categories of records were "entirely ignore[d.]" AO Letter, at 2. But the OSC produced all documents responsive to AO's pending public records requests. It has found no other responsive records.

#### **1. The OSC is not required to create records.**

"The open records law affords the right to inspect and make or receive a copy of a 'record.'" *George v. Record Custodian*, 169 Wis. 2d 573, 579, 485 N.W.2d 460, 462 (Ct. App. 1992). "A non-existent record cannot be inspected or copied. The open records law does not require the custodian to collect or compile statistics or create a record for the benefit of a requester." *Id.*

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<sup>3</sup>Note that only two persons in the OSC maintained a calendar.

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Accordingly, the OSC cannot and did not produce any documents that did not exist, and was under no obligation to create such records (such as additional calendars).

**2. The OSC lawfully deleted records prior to the public records requests being submitted.**

**a. The public records law does not require a custodian or authority to retain records prior to a request being submitted.**

Prior to the submission of a public records request, the OSC was not required to retain documents, even if those documents would otherwise fall under the category of “records.” The public records law does require custodians or authorities to retain documents or records (except in limited circumstances when a request is pending<sup>4</sup>). *See also State ex rel. Gehl v. Connors*, 306 Wis. 2d 247, 257 (Wis. Ct. App. 2007) (“The public records law addresses the duty to disclose records; it does not address the duty to retain records.”).

Accordingly, any argument that suggests that the OSC was to retain records prior to a records request being submitted is without legal support.

**b. The Wisconsin Public Records Retention Law does not apply to the OSC.**

The Wisconsin Public Records Retention Law (“**retention law**”) does not impose a duty upon the OSC to retain documents.

Under Wis. Stat. § 16.61 the public records board is required to preserve records of state agencies; however, the retention law *only* applies to state agencies. Wis. Stat. § 16.61. A state agency is defined as “any officer, commission, board, department or bureau of state government.” Wis. Stat. § 16.61(2)(d). The OSC is not a state agency subject to the retention law, as it is clear that the OSC is not a “commission, board, department or bureau of state government.” Rather, it is an independent contractor contracted by the Assembly to assist in the investigation of the 2020 Election. As such, it is also not an officer for purposes of the public records retention law.

And unlike Wis. Stat. § 19.32(1), relating to public records, which states that an authority “means any of the following . . . the assembly or senate . . . or *a formally constituted subunit of any of the foregoing*,” (W.S. § 16.61(2)(d) (emphasis added)), such language is notably absent from the retention law. So, even if the OSC could be considered a formally constituted subunit of a state agency, the retention law does not apply to such subunits. Put simply, the OSC is not contesting its obligation to comply with established public records law, it is plainly not subject to the retention law, notwithstanding the memo produced by the Legislative Council.

Further, the Legislative Council Memo which opines that the OSC is subject to the retention law cites no precedent and provides no precedential value. A legislative council memo offers insight

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<sup>4</sup> See Wisc. Stat. § 19.35(5).

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into the legislative history/intent in passing a statute, “to be resorted to in cases of ambiguity.” *Mullen v. Coolong*, 132 Wis. 2d 440, 449 (Wis. Ct. App. 1986) (quoting *State v. Beets* 124 Wis. 2d 372, 382 n. 6 (1985)) (overruled on other grounds). The controlling statute here is not ambiguous. Nor does the Legislative Council Memo offer any insight into the knowledge available to legislators at the time of drafting. *See* Doc. 134. Therefore, it does not offer the court “any valuable information about the knowledge available to legislators.” *State v. Cole*, 264 Wis. 2d 520, 547 n. 12 (Wis. 2003).

**c. Retention obligations are issues considered separately from public records compliance and AO’s efforts to improperly intermingle the two is not in conformity with law.**

A public records lawsuit does not consider whether a state agency complied with the public records retention law. *See State ex rel Gehl*, 306 Wis. 2d at 249. An attempt to seek relief under the public records law for an alleged violation of the records retention law is unavailing “because . . . an agency’s alleged failure to keep sought-after records may not be attacked under the public records law.” *Id.* at 256 (citing *State ex rel. Zinngrabe v. Sch. Dist. of Sevastopol*, 146 Wis. 2d 629, 634-635 (Wis. Ct. App. 19988)). “The public records law addresses the duty to disclose records; it does not address the duty to retain records . . . . Accordingly, [courts] decline to reach [] arguments regarding the [respondent’s] records retention practices” in a public records request lawsuit. *Id.* at 257.

The OSC’s retention of documents is not a proper issue in this lawsuit.

**d. The OSC lawfully and properly deleted documents.**

Unlike the DOJ or other large governmental bureaucracies, the OSC does not have an abundance of administrative personnel. In fact, the OSC has one staff member to manage documents, and document management is only one of countless administrative responsibilities that fall upon that staff member. Nor does the OSC have unlimited filing space. Accordingly, in order to accomplish efficient record keeping, by retaining only those documents whose retention is necessary for office administration and oversight, the OSC does not retain any unnecessary documents.

When a document comes to the OSC, the OSC evaluates whether the document is of use to the investigation. If it is, that document is downloaded and kept for further investigation, or for use in the OSC’s reports and recommendations. If the document is irrelevant or useless to the investigation, the OSC deletes that document.<sup>5</sup> In light of this standard procedure, the OSC routinely deletes documents and text messages that are not of use to the investigation.

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<sup>5</sup>An irrelevant or useless document includes documents that the OSC is not intending to further investigate, and is not intending to rely upon for its recommendations or reports.

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This standard procedure ensures that the OSC is not overrun by irrelevant and useless documents, and keeps any documents that are essential and necessary to the investigation and its reports/recommendations in order. This also ensures that the OSC is not required to navigate a large number of documents that are of no use or relevance to the investigation.<sup>6</sup>

So, just like in the *Gehl* case, these documents “were lawfully deleted consistent with appropriate records retention laws” and cannot be challenged under the public records statute. *State ex rel. Gehl*, 306 Wis. 2d at 251.

At the time AO submitted its requests through the date of search:

- the OSC had no previously unreleased text messages, *see* AO Letter, at 3.
- the OSC had no previously unreleased documents related to subpoena work product, *see* AO Letter, at 2.<sup>7</sup>
- the OSC did not have any previously unreleased documents related to “reports” or “other work products,” *see id.*
- the OSC did not have any previously unreleased documents related to “budget info” or “a budget doc,” *see id.*<sup>8</sup>

In sum, there are no additional documents to produce for the above categories.

### **3. The OSC inadvertently failed to attach some e-mail attachments.**

As recited at the beginning of this response, when OSC produced earlier emails, it left unredacted reference to several attachments in those disclosed emails, however, it did not produce the physical attachments. As shown above (Part I), the OSC performed their required searches at the beginning of December, producing more than 700 pages of documents. Despite denying the requests, these responsive documents were printed and saved in accordance with Wis. Stat. § 19.35(5), in case production was later ordered.

After the OSC saved the responsive documents, thereby completing their obligations to save and retain documents under the public records law, the OSC continued their standard procedure of deleting the digital versions of any saved documents that were not relevant or of further use to

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<sup>6</sup>The OSC does not delete any sought-after documents when a public records request is pending, unless an identical record exists in hard-copy or electronic copy.

<sup>7</sup>The OSC does not retain drafts of subpoenas; however, finalized versions can be found on its website. *See* Part II.A.

<sup>8</sup>It is irrelevant whether other entities or persons have produced documents (i.e. text messages), as the OSC was not and is not required to retain documents prior to a public records request being submitted.

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the OSC, that is, documents that were not related to the ongoing investigation or the OSC's reports/recommendations.<sup>9</sup> The deleted digital documents were identical to the retained hard-copy documents.

However, the OSC has discovered that some hard copies failed to include certain attachments that were referenced in the publicly-disclosed emails. The OSC has again searched for these attachments and has produced any and all attachments in its possession (i.e. any documents that were separately saved or archived because they relate to an ongoing investigation or to the OSC's reports/recommendations). *See* Part II.A.

The following is a summary of the produced documents for which no attachment can be found:

1. Digital copy was deleted after hard-copy was saved for production. *See* Part II.B.3.
6. Digital copy was deleted after hard-copy was saved for production. *See id.* The OSC does not typically retain older drafts of documents, but only saves finalized versions. *See* Part II.B.2.
40. Digital copy was deleted after hard-copy was saved for production. *See* Part II.B.3.
49. Digital copy was deleted after hard-copy was saved for production. *See id.* Any expenses would have been submitted to Ted Blazel, so a copy of such expenses can be obtained from him.<sup>10</sup>
- 57-58. Digital copy was deleted after hard-copy was saved for production. *See id.* The OSC does not typically retain older drafts of documents, but only saves finalized versions. *See* Part II.B.2.
68. Digital copy was deleted after hard-copy was saved for production. *See* Part II.B.3.
84. Digital copy was deleted after hard-copy was saved for production. *See id.*
100. Digital copy was deleted after hard-copy was saved for production. *See id.*
101. Digital copy was deleted after hard-copy was saved for production. *See id.*
102. Digital copy was deleted after hard-copy was saved for production. *See id.*
104. Digital copy was deleted after hard-copy was saved for production. *See id.*
111. Digital copy was deleted after hard-copy was saved for production. *See id.*

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<sup>9</sup>*See* Part II.B.2.d.

<sup>10</sup>For some requests that are no longer in OSC's possession, the OSC notes, in good faith, that these records could be obtained through records requests to the original source. This is not to suggest that such request must be made by AO, but offers another route for obtaining the desired information.



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302. Digital copy was deleted after hard-copy was saved for production. *See id.*

305. Digital copy was deleted after hard-copy was saved for production. *See id.* However, Production 306 is the same with a typographical error corrected. The attachment to 306 is attached to this response.

369. Digital copy was deleted after hard-copy was saved for production. *See* Part II.B.3. The complaint against Meaghan Wolfe is publicly available and would contain the attachments. *See* n. 10.

400. Digital copy was deleted after hard-copy was saved for production. *See* Part II.B.3. Any expenses would have been submitted to Ted Blazel, so a copy of such expenses can be obtained from him. *See* n. 10.

416. Digital copy was deleted after hard-copy was saved for production. *See* Part II.B.3. Any expenses would have been submitted to Ted Blazel, so a copy of such expenses can be obtained from him. *See* n. 10.

419. Digital copy was deleted after hard-copy was saved for production. *See* Part II.B.3. This clerk list can be obtained from WEC. *See* n. 10.

430. Digital copy was deleted after hard-copy was saved for production. *See* Part II.B.3. The OSC does not typically retain older drafts of documents, but only saves finalized versions. *See* Part II.B.2.

In an effort to remedy the issue of any unprinted attachments, the OSC is contacting each of the persons in the emails above and asking such persons to re-send the attachment. The OSC will produce any attachments obtained as soon as it receives them.

Sincerely,

THE BOPP LAW FIRM, PC

A handwritten signature in cursive script that reads "Courtney Turner Milbank".

James Bopp Jr.  
Courtney Turner Milbank