BY THE COURT:

DATE SIGNED: June 2, 2023

Electronically signed by Jacob B. Frost
Circuit Court Judge

STATE OF WISCONSIN **CIRCUIT COURT BRANCH 9** **DANE COUNTY**

American Oversight,

Plaintiff,

v. Case Number 22CV1583

Office of Special Counsel,

Defendant.

DECISION AND ORDER

Plaintiff, American Oversight, seeks a declaratory judgment and writ of mandamus against Defendant, the Office of Special Counsel. This is the latest in a series of cases against OSC. The prior cases resulted in a variety of orders regarding record requests submitted to OSC. This case seeks to resolve the broader question regarding whether and how state statutes regulating record retention apply to OSC.

On review of the pleadings, the Court granted American Oversight's ex parte request for a temporary restraining order against OSC. I then set briefing deadlines and a hearing on the request for a preliminary injunction. OSC next moved to dismiss the Complaint. Under Wis. Stat. §802.06(1)(b), OSC's filing of a motion to dismiss automatically stayed other proceedings for either 180 days or until the Court rules on the motion. Therefore, the Court could not proceed on the injunction hearing.

The parties briefed the Motion to Dismiss and the Court held oral arguments. At those arguments, the Court discussed with the parties whether recent developments the parties brought to my attention rendered this lawsuit moot. After oral arguments, the parties briefed this secondary issue and OSC filed a second Motion to Dismiss specifically on mootness grounds.

The Court reviewed all briefs and filings and issues this decision on the Motions to Dismiss and the Motion for Temporary Injunction. For the reasons explained below, I deny both Motions to Dismiss and grant a Temporary Injunction.

FACTUAL BACKGROUND

Though neither side discusses it, on a Motion to Dismiss, the Court must accept as true all well-pled facts in the Complaint and determine whether those facts state a claim for which the Court can grant relief.[1]

The relevant facts are as follows. On May 26, 2021, Assembly Speaker Robin Vos announced that the Assembly was hiring three former law enforcement officers and a supervising attorney to investigate the November 2020 election. In June 2021, the Assembly retained Michael Gableman as coordinating attorney to supervise the investigation. His duties included receiving investigative reports and keeping a weekly report of investigative findings. The Assembly agreed to pay Mr. Gableman $11,000 per month with a term starting July 1, 2021. At the end of July 2021, Speaker Vos announced an expanded investigation and empowered Mr. Gableman to hire additional investigators. On several occasions, Speaker Vos indicated that Mr. Gableman makes key decisions regarding the investigation, including over hiring of consultants and private investigators, whether to issue subpoenas and to whom.

On August 27, 2021, Speaker Vos sent a mail ballot to the Committee on Assembly Organization. It authorized "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." The Committee on Assembly Organization adopted Speaker Vos's mail ballot and a budget for the OSC on August 30, 2021.

Pursuant to an Amendment to the Agreement between the Assembly and Mr. Gableman, one of his duties as Special Counsel is to "act as the Custodian of Records with regard to the investigation" into the 2020 elections. Dkt. 9 at 1.

American Oversight submitted over 25 requests for records to the OSC and Assembly related to OSC's work. In a series of lawsuits filed before this suit, American Oversight secured a variety of orders directing OSC and/or Speaker Vos and the Assembly chief clerk to turn over various records. At hearings in those lawsuits, American Oversight also learned that OSC was routinely deleting records it created or received. Based on records received in those prior lawsuits and on statements made by OSC through Mr. Gableman and other staff, American

[1] *Voters with Facts v. City of Eau Claire*, 2017 WI App 35, ¶14, 376 Wis. 2d 479, 899 N.W.2d 706, aff'd on other grounds, 2018 WI 63, ¶14, 382 Wis. 2d 1, 913 N.W.2d 131.

Oversight believes that OSC failed and refused to turn over records that American Oversight requested in record requests that were not the subject of those prior lawsuits.

In light of the events summarized above and in particular in response to OSC staff's admission to routinely deleting records, American Oversight filed this suit to resolve whether OSC is subject to the Public Records Retention Law and to direct OSC to comply with that and the Open Records laws, if applicable.

LEGAL ISSUES

OSC raises a variety of arguments to support its Motions to Dismiss and opposing the request for a temporary injunction. I address and reject each in turn.

I. AMERICAN OVERSIGHT HAS STANDING TO PURSUE ITS CLAIMS.

OSC first argues that American Oversight lacks standing to bring this lawsuit. The parties agree on the law regarding standing, though they dispute its application to the facts. I borrow from both party's briefs for aspects of the law.

To begin, I borrow OSC's recitation of the general rules regarding standing:

> Wisconsin courts determine standing by consideration of:
>
> > (1) whether the party whose standing is challenged has a personal interest in the controversy (sometimes referred to in the case law as a "personal stake" in the controversy);
> > (2) whether the interest of the party whose standing is challenged will be injured, that is, adversely affected; and
> > (3) whether judicial policy calls for protecting the interest of the party whose standing has been challenged.
>
> *Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n, Inc.*, 2011 WI 36, ¶ 5, 333 Wis. 2d 402, 410, 797 N.W.2d 789, 793. When a statute is at issue, a court determines whether an injury exists that falls within the ambit of the statute. *Id.* at ¶ 6.

Dkt. 105 at 2-3.

This lawsuit falls within Wisconsin's Declaratory Judgement Act, Wis. Stat. §806.04. Thus, I must consider that statute. As OSC explained:

> A declaratory judgment is fitting when a controversy is justiciable. *Loy v. Bunderson*, 107 Wis. 2d 400, 410, 320 N.W.2d 175, 182 (1982). A controversy is justiciable when the following factors are present:

> (1) A controversy in which a claim of right is asserted against one who has an interest in contesting it.
> (2) The controversy must be between persons whose interests are adverse.
> (3) The party seeking declaratory relief must have a legal interest in the controversy—that is to say, a legally protectible interest.
> (4) The issue involved in the controversy must be ripe for judicial determination.
>
> *Id.* A party's standing to bring a declaratory judgment action is generally analyzed under the third factor. *Voters with Facts v. City of Eau Claire*, 2017 WI App 35, ¶ 15, 376 Wis. 2d 479, 495, 899 N.W.2d 706, 714, aff'd on other grounds, 2018 WI 63, ¶ 15, 382 Wis. 2d 1, 913 N.W.2d 131.

Dkt. 105 at 3.

American Oversight agrees that only the third factor is relevant here. It further agrees 'where a plaintiff seeks a declaration of "rights, status or other legal relations . . . affected by a statute," Wis. Stat. § 806.04(2), courts ask "whether an injured interest . . . falls within the ambit of the statute." *Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n, Inc.*, 2011 WI 36, ¶6, 333 Wis. 2d 402, 797 N.W.2d 789.' Dkt. 117 at 12. The Court must also keep in mind that standing is not a difficult burden to meet - "The law of standing in Wisconsin is construed liberally, and even an injury to a trifling interest may suffice." *McConkey v. Van Hollen*, 2010 WI 57, ¶15, 326 Wis. 2d 1, 783 N.W.2d 855 (internal quotation omitted).

OSC argues that because the Retention Law does not specifically enumerate a cause of action to enforce the law, American Oversight (and all persons interested in ensuring the law is enforced, apparently) lack standing to seek a court order compelling a governmental actor to comply with the law. If I accept OSC's arguments, there is no mechanism to enforce the Retention Law. OSC notes that "Arguably" the public records board could perhaps seek enforcement or "might be able to provide an administrative process through its rule-making power for enforcement," yet questions whether even that is possible. OSC notes no such process currently exists.

OSC's position cannot be correct or this law would become meaningless for all practical purposes. In short, there would be a right without a remedy – the public has a right to all state actors covered by the Retention Law preserving their covered records, but would have no remedy to counter noncompliance with that law. When interpreting statutes, I must avoid an interpretation that renders statutory language meaningless or absurd. *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110.

As OSC also asserts, the Public Records Law does not afford a means to ensure compliance with the Retention Law. OSC correctly states: 'The Retention Law is a separate statute from the Public Records Law and "alleged records retention violations cannot be reached through a claim under the public records law",' citing *State ex rel. Gehl v. Connors*, 2007 WI App 238, ¶1, 306 Wis. 2d 247, 742 N.W.2d 530. *Gehl* makes clear that the public records law is not the vehicle for pursuing violations of the Retention Law. However, *Gehl* and the case it discusses go no further. The plaintiffs in those cases never raised a claim under the Retention Law. As such, *Gehl* does not address, much less hold, that there is no means to enforce the Retention Law. Indeed, that the Public Records Law does not assist here supports finding standing for American Oversight to enforce the Retention Law directly.

I also disagree with OSC's assertion that American Oversight cannot have standing under the Retention Law because that law does not seek to protect American Oversight's interest here. The Retention Law per its plain language exists to ensure state government retains specific public records for the benefit of the public. Wisconsin Statute §19.31 provides context to the important policy of requiring the government to retain records. The Public Records Law states its purpose as follows, which confirms records must be preserved so they can be provided to the public:

> 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. 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.

Id.

The Public Records Law and Retention Law statutes are closely related. The right to review government records is, for all practical purposes, meaningless if government agencies are not required to preserve records long enough for parties to request review. In other words, American Oversight's right to review public records rests on the right to ensure agencies covered by the Retention Law in fact retain the required records. Thus, the Retention Law protects American Oversight's interests.

The Supreme Court over a decade ago confirmed that these statutes must be read together. *Schill v. Wisconsin Rapids School District* noted that the Public Records Law directs the Attorney General to advise persons on the applicability of that law, and therefore "[t]he opinions and writings of the attorney general have special significance in interpreting the Public Records Law". 2010 WI 86, ¶106, 327 Wis. 2d 572, 786 N.W.2d 177. The Supreme Court then approvingly noted that the Attorney General issued an opinion interpreting Wis. Stat. §19.32(2) in connection with §§16.61 and 19.21. That Court ultimately ruled consistent with the Attorney General's opinion. These statutes are interpreted in the context of one another.

Further, my decision rests on the powerful statements our Supreme Court made over the decades regarding Wisconsin's statutory commitment to open records. As but some of those declarations, the Supreme Court declared:

> If Wisconsin were not known as the Dairy State it could be known, and rightfully so, as the Sunshine State. All branches of Wisconsin government have, over many years, kept a strong commitment to transparent government.
>
> Open records and open meetings laws, that is, "Sunshine Laws," "are first and foremost a powerful tool for everyday people to keep track of what their government is up to.... The right of the people to monitor the people's business is one of the core principles of democracy."
>
> The legislature states the importance of open government and open records this way: "[I]t is ... 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 government officers and employees.
> ….
> In enacting the Public Records Law, the Legislature provided an explicit statement of its intent and the policies and purposes underlying the Public Records Law, as well as directions regarding a presumption to be used in the interpretation of the Law. In Wis. Stat. § 19.31, the Declaration of Policy, the legislature has declared that "all persons are entitled to the greatest possible information regarding the affairs of government" and that the Public Records Law "shall be construed in every instance with a presumption of complete access, consistent with the conduct of government business." The text of § 19.31 is an important aid in interpreting the meaning of "record" in § 19.32(2).
>
> The full legislative directive in Wis. Stat. § 19.31 is as follows:
>
> > 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. 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.
>
> Statutory interpretation strives to give "full, proper, and intended effect" to the law we are interpreting.

Schill v. Wisconsin Rapids Sch. Dist., 2010 WI 86, ¶¶1-3, 76-78, 327 Wis. 2d 572, 786 N.W.2d 177.

Considering that the "law of standing in Wisconsin is construed liberally, and even an injury to a trifling interest may suffice", American Oversight's interests here are more than enough to confer standing. *McConkey v. Van Hollen*, 2010 WI 57, ¶15, 326 Wis. 2d 1, 783 N.W.2d 855 (internal quotation omitted).

Though not necessary to reach this decision, I further agree with American Oversight that the opinion of three members of the Wisconsin Supreme Court stated in *Teigen v. Wisconsin Elections Commission*, though not the majority holding, supports this result specifically as to OSC retaining records and the interest in ensuring it follows the law being one of public importance. There Justice Grassl Bradley noted that judicial policy favors hearing cases where the issues are "carefully developed and zealously argued" and the Court can consider judicial efficiency when addressing a challenge to standing. *Teigen v. Wisconsin Elections Comm'n*, 2022 WI 64, ¶¶17-18, 403 Wis. 2d 607, 976 N.W.2d 519, reconsideration denied, 2022 WI 104. Justice Grassl Bradley also recites Thomas Paine and the US Supreme Court for the point that the right to vote is a primary right in our free country. Surely, then, Justices Grassl Bradley, Ziegler, and Roggensack, at a minimum, would agree the public interest in the OSC preserving all its records investigating the 2020 election and in being able to request and review those records is paramount.

II. I DENY THE MOTION TO DISMISS COMPLAINT COUNT 2.

OSC's Motion to Dismiss lacks nuance. It states it seeks dismissal of the entire Complaint without ever tailoring its discussion to Complaint Count 2, under which American Oversight seeks to compel OSC's production of documents under the Open Records law. This issue is distinctly different from Count 1.

Neither side addresses the standards the Court applies on a Motion to Dismiss. I know and apply them. "A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint." *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶19, 356 Wis.2d 665, 849 N.W.2d 693 (quoted source omitted). A court must "accept as true all facts well-pleaded in the complaint and the reasonable inferences therefrom." *Id.* ¶19. However, a court must not accept as true any legal conclusions stated in the complaint, and a mere "formulaic recitation of the elements of the cause of action" is not enough to state a claim. *Id.* ¶25.

Plaintiff alleges two causes of action. One, for declaratory judgment that OSC is subject to the Wisconsin Public Records Retention Law, Wis. Stat. §16.61, and violated it. Two, for mandamus relief compelling OSC to produce requested records as required by the Wisconsin Open Records law, Wis. Stat. §§19.31 et. seq.

OSC concedes in its briefs that it is subject to the Open Records law. Accepting the Complaint as true, Plaintiff alleges that it made numerous records requests to OSC, attaches those requests to the Complaint, and alleges that OSC did not respond as required by law. That states a claim for relief on Count 2. OSC never argues otherwise. I deny the Motion to Dismiss as to Count 2 of the Complaint.

III. I DENY THE MOTION TO DISMISS COMPLAINT COUNT 1.

OSC likewise fails to show a basis to dismiss Count 1 of American Oversight's Complaint. American Oversight is entitled to seek a declaratory judgment as to whether the Record Retention Law applies to OSC. As I explain below, that law applies to OSC and required it to retain records.

Wisconsin law provides that "[a]ll public records made or received by or in the custody of a state agency . . . may not be disposed of without the written approval of the [public records] board." Wis. Stat. §16.61(4)(a). A "state agency" is "any officer, commission, board, department or bureau of state government." Wis. Stat. §16.61(2)(d).

The Complaint alleges facts sufficient to survive the motion to dismiss. Specifically American Oversight accurately summarizes the facts it alleged as follows:

> The OSC is a creature of state government. It was created by the Wisconsin State Assembly Committee on Assembly Organization, and it is funded entirely by the Assembly and, ultimately, Wisconsin taxpayers. Exs. 2, 47, 48, 4. Gableman was appointed Special Counsel to "oversee" the OSC and to "direct an elections integrity investigation, assist the Elections and Campaign Committee, and hire investigators and other staff to assist in the investigation." Ex. 3, at 2.

> The OSC itself has removed any doubt about whether it is a state agency. In its first interim report to the Assembly, the OSC asserted that it "is an authorized agency of the State of Wisconsin." Ex. 40, at 7. The OSC also promised the Assembly that it would "abide by the highest ethical standards to maintain a commitment to transparency, inclusion, and accountability." *Id.* The OSC represented that it "continues to maintain records, and commits to full disclosure of all public records upon the conclusion of the present investigation." *Id.* These statements plainly indicate that the OSC considers itself a state agency bound to preserve and dispose of public records in accordance with Wis. Stat. § 16.61. Indeed, the OSC's representations about preserving public records would strain credulity otherwise. The OSC also prominently features the State of Wisconsin seal in its reports and on its websites. *See id.*; *see also* Exs. 43, 44. The OSC holds itself out as "an agency of the Wisconsin state government" in its agreements with contractors. Ex. 41, at 6, 16, 21. And the Wisconsin Legislative Council has also advised that the OSC must comply with the public records retention laws, including Wis. Stat. § 16.61. Ex. 42, at 2–3.

Dkt. 58 at 10-11.

Taking these facts as true, as I must on this Motion, OSC is a state agency.

If the fact that it repeatedly referred to itself as such is not enough, other provisions of Wis. Stat. §16.61 confirm that the Legislature intended this law to apply to its own body except as specifically excluded. The statute defines "public records" and then excludes from the definition of public records seven categories of documents. Relevant here, the statute excludes "Records and correspondence of any member of the legislature." Wis. Stat. §16.61(2)(b)1.

That the Legislature deemed it necessary to exclude these records of each member from the Retention Law means that it intended the law apply to all other records of the Legislature. This exclusion from the Retention Law of the records of each member of the Legislature would be unnecessary if the law did not apply to the Legislature – why would member's individual records need to be excluded if they were never included? I must interpret the statute to give meaning to every provision and avoid surplusage. *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110. Doing so requires that I find the law applies to the Legislature as a body, though each member's individual records are exempted.

Further, if the law only applied to the Executive Branch, as OSC seems to imply, multiple other parts of the statute become meaningless or require that I interpret terms contrary to their ordinary meaning. For example, the statute repeatedly refers to "state government" and "state agencies." The ordinary meaning of state government includes the Executive, the Legislative and the Judicial branches – all three equal branches of state government. To interpret "State" as only the

Executive branch ignores this usual meaning. Likewise, again, exempting individual members of the Legislature would be meaningless if the law only applied to the Executive branch.

Likewise, Ex. 49 to the Affidavit submitted with the Complaint and the Motion for Preliminary Injunction shows that the Wisconsin State Legislature and at least 7 Legislative agencies or subparts, including the Assembly and Senate, have identified record officials with the Wisconsin Public Records Board. These acts of the Legislature confirm that it believes the Retention Law applies to it.

Lastly, the definition of "state agency" in §16.61(2)(d) confirms the law applies to the Legislature. "State agency" is defined to include "any…department…of state government." Going back to the infancy of our State, the Wisconsin Supreme Court has consistently referred to the three branches of government as "departments". *See e.g. Serv. Employees Int'l Un. Local 1 (SEIU) v. Vos*, 2020 WI 67, ¶60, 393 Wis. 2d 38, 946 N.W.2d 35 (majority opinion as to this paragraph referred to an 1855 Supreme Court case issued "just a few short years after adoption of the Wisconsin Constitution" where the Court referred to the executive branch as the "executive department" and to the legislature as a "department."). The *SEIU* decision is broken into separate majority opinions. In his portion of the majority opinion, Justice Kelly likewise quoted case law that refers to the Legislature as one of the "departments" of government:

> Goodland v. Zimmerman, 243 Wis. 459, 466-67, 10 N.W.2d 180 (1943) ("[G]overnmental powers are divided among the three departments of government, the legislative, the executive, and judicial[.]").

Id. ¶95.

The parties focus their arguments on whether Mr. Gableman is an officer and whether OSC fits within one of the categories set out in the definition of "state agency." This is unnecessary. As the statute applies to the Legislature, by necessity it applies to all subparts thereof except for members. To hold otherwise would again render part of the law meaningless. How could the law apply to the Legislature if the Legislature could simply avoid the duty to preserve records by assigning the records to a subordinate office within the Legislature? Therefore, as the Legislature must comply with the Retention Law, OSC, as an office established by and under the umbrella of the Legislature, must also comply.

One might argue that the prior paragraph renders the rest of the statute defining state agency meaningless, as the three departments of state government cover all aspects of government. As such, why does "state agency" include any definition beyond that? This interpretation does not render any of the statute meaningless. The definition of state agency is also applies to what persons or subunits of state government must comply with the rules under Wis. Stat. §16.61 regarding retaining records, destroying records, creating record retention schedules, etc. Therefore,

even though all subordinate parts of the Legislature must retain records, that "state agency" is defined to include "any officer, commission, board, department or bureau" makes clear that each "officer", each "commission", each "board", each "department" and each "bureau" must separately follow the requirements of §16.61 and the public records board as to the public records in its possession. Each of these subunits of the branches of government can make requests to the Board and shall provide for its own record retention and destruction. This reflects reality of government – the Legislative, Executive and Judicial Branch would surely need to establish separate practices for each subunit of its branch. The statute recognizes and proactively does so. Thus, each separate term in §16.61(2)(d) retains meaning.

Even if my above holding were incorrect, OSC is also a "bureau" of state government. The Court must interpret statutes according to their plain meaning and can resort to dictionaries for that plain meaning. *Kalal*, 2004 WI 58, ¶53. Merriam-Webster defines "bureau" in relevant part as "a specialized administrative unit." Merriam-Webster, https://www.merriam-webster.com/dictionary/bureau (Last visited May 31, 2023). Under OSC's argument, it is clearly a bureau of the Legislature – a specialized administrative unit appointed by the Assembly to investigate the 2020 election. Nobody argues that the Legislature is not part of "state government." Thus, OSC is also a bureau of state government subject to the Retention Law.

OSC tries to argue that Special Council's status as an independent contractor employed to assist the investigation of the 2020 election means he is not subject to the Retention Law. This misses the point. The Assembly Committee on Campaigns and Elections is a state agency subject to the Retention Law. The OSC office is also subject to the law as a bureau. How OSC or the Committee chooses to employ staff, such as Mr. Gableman, is irrelevant to the agency/bureau's obligation to retain records.

As I declare OSC subject to the Retention Law, I deny the Motion to Dismiss. American Oversight alleges specific facts showing that OSC did not retain public records and destroyed records. This states a claim.

IV. OSC'S OTHER ARGUMENTS IN SUPPORT OF DISMISSAL DO NOT WITHSTAND SCRUTINY.

In addition to the above arguments, OSC throws a variety of arguments against the wall to try to avoid the Retention Law. These arguments all fail. First, OSC asserts that the Assembly's plenary authority to conduct investigations as part of its legislative function somehow renders the Retention Law inapplicable. This argument ignores reality and makes no sense.

American Oversight and this Court do not dispute OSC's lengthy recitation of the Legislature's rights to perform investigations on issues relevant to their legislative

authority. If the Assembly deemed it appropriate and necessary to investigate aspects of the 2020 election, it certainly has the right to do so. Nobody asserts otherwise.

The premise of OSC's argument, though, is that because it can investigate, this Court cannot make any orders relating to the conduct of that investigation. This argument fails. American Oversight's effort to enforce the Retention Law against OSC does not interfere with the Assembly's lawful authority to conduct investigations for at least two reasons. One, I agree with American Oversight that this law is a process requirement, not a control on how the Legislature conducts its investigation. OSC can investigate however the Assembly deems fit, the law merely requires it preserve the records that it obtains and creates in that investigation.

Two, the Legislature enacted §16.61. It imposed this record retention requirement on itself. OSC offers no law holding that the courts cannot declare that the Legislature must follow the laws it passed. That the Legislature chose to impose such standards by statute rather than through an internal procedural rule shows the Legislature's commitment to transparent government. Had it used an internal procedure, the Assembly would have the right to alter or revoke that procedure at its pleasure. When it enacts process requirements by statute, the Assembly thereby declares it must and will comply with that law until it is undone legislatively. The Legislature has not removed or revised §16.61. It thus must comply with the law. The Court can continue to exercise its judicial role in declaring what the law is and whether it applies to OSC.

OSC can still investigate as it or the Assembly see fit. The Retention Law statute merely requires public records created or received in that investigation be preserved and only disposed of as allowed under §16.61 pursuant to policies established by the public records board.

OSC also argues that the Assembly "did not require that any documents be retained" by OSC. That the Assembly did not specify in its contract with Mr. Gableman any record retention rules does not exempt OSC from §16.61, but rather confirms that the statutes control. The Assembly need not specify that OSC must comply with state law. The laws apply whether specifically invoked. Equally important, the Assembly never stated in its contract with OSC that OSC is not subject to Wis. Stat. §16.61.

I also reject OSC's argument that this case is moot. That the OSC office is currently suspended does not mean it cannot just as quickly be reinstated. Further, there remain questions regarding what, if any, records the office must retain. This issue also seems likely to become an issue again in the future. The Assembly may well choose to investigate another issue using an office of special counsel. To have a decision confirming the applicability of the Retention Law to such an office will be useful. The issues still warrant resolution.

V. I GRANT A TEMPORARY INJUNCTION.

American Oversight establishes grounds for a temporary injunction to preserve the status quo pending resolution of this lawsuit. I borrow American Oversight's summary of the law I apply:

> Wisconsin Statute § 813.02(1)(a) permits a court to issue temporary injunctive relief where "it appears from a party's pleading that the party is entitled to judgment and any part thereof consists in restraining some act, the commission or continuance of which during the litigation would injure the party." The award of injunctive relief is "within the discretion of the trial court." *State v. C. Spielvogel & Sons Excavating, Inc.*, 193 Wis. 2d 464, 479, 535 N.W.2d 28, 34 (Ct. App. 1995).
>
> To obtain a temporary injunction, the movant must show: (1) a reasonable probability of ultimate success on the merits; (2) that the movant would suffer irreparable harm in the absence of a temporary injunction; (3) that a temporary injunction is necessary to preserve the status quo; and (4) that the movant has no other adequate remedy at law. *See Werner v. A.L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520–21, 259 N.W.2d 310, 314 (1977); *Milwaukee Deputy Sheriffs' Ass'n v. Milwaukee Cnty.*, 2016 WI App. 56, ¶ 20, 370 Wis. 2d 644, 883 N.W.2d 154.

Dkt. 58 at 8-9.

As I explain above, American Oversight has a reasonable probability to succeed on the merits. American Oversight would also suffer irreparable harm without a temporary injunction. It asks the Court to require OSC to retain records pending the resolution of this case. If American Oversight won the case and secured a declaratory judgment finding that OSC needed to retain records pursuant to §16.61, but OSC destroyed all of the records prior to that ruling, American Oversight's victory would be severely undercut. Compared to that, a temporary injunction requiring OSC to retain its records as required by §16.61 and to only destroy records pursuant to the process that statute establishes will ensure that if American Oversight prevails, it can still request and review the relevant records. OSC suffers no harm by maintaining the records. Further, there is no adequate remedy at law. The records cannot easily be recreated once destroyed, if at all. Money cannot make up for the loss of the records and the right to review them.

Therefore, I grant American Oversight's Motion for Temporary Injunction. American Oversight shall submit a proposed order within 7 days.

ORDERS

1. I DENY OSC's Motions to Dismiss.
2. I GRANT American Oversight's Motion for Temporary Injunction.

The Court will set a scheduling conference in the near future.