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CIRCUIT COURT
DANE COUNTY, WI
2021CV003007

BY THE COURT:

DATE SIGNED: March 2, 2022

Electronically signed by Frank D Remington
Circuit Court Judge

STATE OF WISCONSIN DANE COUNTY BRANCH 8 CIRCUIT COURT

AMERICAN OVERSIGHT,

Petitioner,

vs. Case No. 21-CV-3007

ASSEMBLY OFFICE OF SPECIAL COUNSEL, et al.

Respondents.

DECISION AND ORDER

INTRODUCTION

The Wisconsin public records law entitles all persons to the "greatest possible information regarding the affairs of government." Wis. Stat. § 19.31. Last autumn, American Oversight asked for information from each of the Respondents. Robin Vos, Edward Blazel, and the Wisconsin State Assembly ("the legislative respondents") responded in part, but otherwise ignored an unambiguous statute which tells our government to take responsibility for the records of its outside contractors. Meanwhile, the Assembly Office of Special Counsel ("OSC") summarily declared in a misspelled email that their records must be kept secret on account of "strategic information to our investigation."

This decision is about why the Respondents' denials, delays, and refusals violate the letter and the spirit of Wisconsin's public records law. The Court begins with OSC, whose response about "strategic information" was not specific enough to explain the reason why it was withholding records. Having provided no specific reasons for its refusal, the Court looks only for "clear statutory exceptions" justifying secrecy, and finds none. OSC's records must be released.

Turning to the three legislative respondents, the assembly ignored the part of the public records law which requires an authority provide access to its contractors' records to "the same extent as if the record were maintained by the authority." Wis. Stat. § 19.36(3). The assembly's records must be released. Robin Vos ignored the requests altogether. His records must be released. Finally, although the Court continues to refer to the legislative respondents as a group, American Oversight fails to allege facts which would show that Edward Blazel wrongfully delayed or denied access to any records.

The Court proceeds as follows. In Part I, it recites the background of this case and the reasons for this litigation. In Part II, the Court sets forth the legal standard under which it judges a motion to quash a writ of mandamus. In Part III.A, the Court addresses several preliminary motions regarding the record and the manner in which the Court conducts its review. In Part III.B, the Court explains why American Oversight's petition states a claim. In Parts III.C and III.D, the Court rejects, in turn, each of the Respondents' arguments for why the relief sought by that petition may not be granted. In Part IV, the Court makes individualized findings of fact about each of the records or sets of records produced for in camera review. In Part V, the Court explains why the Respondents' denials were arbitrary and capricious, and why the public records law entitles American Oversight to punitive damages to deter this sort of conduct.

Consistent with the above, the Court orders the release of all responsive records subject to

OSC's motion for a stay pending appeal. That motion is held in abeyance until the conclusion of oral arguments at the March 8, 2022 hearing. Thereafter, either orally, or by a Part VI set forth in a companion decision, the Court will rule on the factors for a stay as expressed in *Waity v. LeMahieu*, 2022 WI 6, ¶49, __ Wis. 2d __, __ N.W.2d __, (quoting *State v. Gudenschwager*, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995)).

I. BACKGROUND

A. The Petitioner's requests.

Between September 15, 2021, and October 26, 2021, American Oversight submitted seven records requests to OSC and the legislative respondents. Colombo Aff., Exhs. A-N, dkt. 8-9, 14-25. American Oversight sought from each of the Respondents what they summarize as "organizing materials," "work product," and "communications." These requests sought copies of:

- 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. Colombo Aff. Exh. A, dkt. 9:2-3 (request to legislative respondents); Colombo Aff. Exh B, dkt. 8:2-3 (same, but to Michael Gableman).

- An updated request identical to the above but for a new date range. Colombo Aff. Exh. I-J, dkt. 20-21.[1]

- Interim reports, analyses, and other work product related to election fraud. Colombo Aff. Exh. C, dkt. 14:2 (request to legislative respondents); Colombo Aff. Exh. D, dkt. 15:2 (same, but to Michael Gableman).

- An updated request identical to the above, but for a new date range. Colombo Aff. Exh. K-L, dkt. 22-23.

- "All electronic communications" between OSC staff, plus any "calendars or calendar entries" relating to the investigation. Colombo Aff. Exh. E, dkt. 16:2 (request to legislative respondents); Colombo Aff. Exh. F, dkt. 17:2 (same, but to Michael Gableman).

[1] Exh. I-J is mislabeled on the Court's docket. Docket 20 is "I." Docket 21 is "J."

- An updated request identical to the above, but for a new date range. Colombo Aff. Exh. M-N, dkt. 24-25.

- Communications between the respective authority and forty-four entities, which American Oversight specified by name and email address. Colombo Aff. Exh. G, dkt. 18:2-5 (request to legislative respondents); Colombo Aff. Exh. H, dkt. 19:2-5 (same, but to Michael Gableman.)

B. The Respondents' responses.

The assembly and Edward Blazel responded by either producing some records or by telling American Oversight that no responsive records existed. Colombo Aff. Exhs. R-X, dkt. 33-39.[2] Robin Vos did not respond, later claiming that because he had already responded to American Oversight's earlier requests for similar records for different time periods, he did not need to respond to these requests, too. Dkt. 138:1.

OSC responded to American Oversight's multiple records requests by this email message, sent December 4, 2021:

Coms has shared OneDrive for Business files with you. To view them, click the links below.

open records part 2.pdf open records part 3.pdf Open records request.pdf

Good Afternoon,

Attached are the open records for the Office of Special Counsel up until December 1st, 2021. Some documents that contain strategic information to our investigation will continue to be help until the conclusion of our investigation. If you have any questions or concerns please feel free to contact our office at coms@wispecialcounsel.org

Very Respectfully,

Zakory Niemierowicz
WI Special Counsel

[2] Exh. T-U is mislabeled on the Court's docket. Docket 35 is "T." Docket 36 is "U".

Colombo Aff., Exh. P, dkt. 27:1. Attached to Mr. Niemierowicz' email were .pdf files containing digital copies of numerous records, collected through December 1, 2021. OSC now claims each of these was produced in error. OSC Br., dkt. 99:7.

C. Procedural Posture.

On December 20, 2021, American Oversight filed a petition for a writ of mandamus seeking to compel both American Oversight and the legislative respondents to produce records responsive to their requests. Dkt. 5. Alternatively, American Oversight sought a writ of alternative mandamus seeking an order commanding the Respondents to show cause for the alleged failure to produce records. Dkt. 11.

The next day, December 21, 2021, the Court granted the alternative writ of mandamus. Dkt. 42. The writ commanded the Respondents:

> [T]o immediately on receipt of this writ, release the records responsive to Petitioner's request, or in the alternative to show cause to the contrary before this court … on January 21st at 2:30 p.m.

Dkt. 42:2. The Court scheduled a hearing for January 21, 2022.

On January 19, 2022, OSC moved for a continuance of the writ's return date for several reasons, chief of which was an alleged failure by American Oversight to serve OSC with the writ. Dkt. 80. The Court denied that motion in a written order. Dkt. 82.

On January 20, 2022, both OSC and the legislative respondents moved to quash the writ. The Court struck the legislative respondents' motion for repeatedly and improperly citing to unciteable decisions of the Wisconsin Court of Appeals as though they were binding precedent. Dkt. 107. The legislative respondents would later amend and re-file their motion. Dkt. 111. Late that evening, OSC filed a motion to quash, and then an amended version of the same. Dkt. 98, 105.

The next day, January 21, 2022, was return date for the alternative writ of mandamus. The

Respondents appeared before the Court and, subject to their well-preserved jurisdictional objections, a briefing schedule was ordered. Dkt. 110. Pursuant to that briefing schedule, American Oversight filed briefs opposing the motions to quash (dkt. 125-137) and the Respondents filed replies (dkt. 150, 151.)

On January 26, 2021, OSC accepted service of the pleadings and waived its jurisdictional objection. Dkt. 116 (OSC had disputed American Oversight's allegation that it served a person "in charge" of OSC's office. *See* Wis. Stat. § 801.14(2)).

OSC was required to have submitted the withheld records under seal by January 31, 2022. On the afternoon of the due date, OSC's counsel telephoned the Branch 8 clerk to complain that he did not understand how to e-file records. The Court responded by letter, instructing OSC: "For now, we will accept hard copies." Dkt. 121. While OSC provided paper copies, as of this decision, OSC still has not e-filed the records. *See* Wis. Stat. §§ 801.18(2)(c) ("Mandatory users [lawyers] shall be required to use the electronic filing system…") and 801.18(16)(a)2 ("Users are responsible for timely filing of electronic documents to the same extent as filing of paper documents.")

Since the Court issued its scheduling order, several additional motions have been filed. OSC has moved to stay the briefing schedule and to brief the Court, ex parte. Dkt. 153. American Oversight opposes that motion. Dkt. 155. American Oversight seeks to strike OSC's reply brief and to strike part of OSC's responsive pleading. Dkt. 154, 158-160.

II. STANDARD OF REVIEW[3]

A motion to quash a writ of mandamus "shall be deemed a motion to dismiss the complaint…" Wis. Stat. § 783.01. Like a motion to dismiss, a motion to quash "admits all facts

[3] The Court construes the Respondents' motions to seek to quash the alternative writ of mandamus issued by this Court on Dec. 21, 2021. Dkt. 42.

which are well pleaded for the purposes 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) (quoted source omitted); *Mazurek v. Miller,* 100 Wis. 2d 426, 430, 303 N.W.2d 122 (1981) ("A motion to quash a writ of mandamus is treated as a motion to dismiss a complaint… [T]he issue is whether the facts alleged in the petition state a claim.")

III. DISCUSSION

The Court begins by addressing a series of procedural motions about the record. American Oversight moves to strike portions of two of the Respondent's papers. OSC moves to stay the Court's decision and to file supplemental briefing. The Court next sets forth the elements of a claim for mandamus and compares those elements to American Oversight's petition to determine if it alleges facts which, if proven, would satisfy each of those elements. Finally, the Court rejects, in turn, each of the Respondents' arguments for why the writ must be quashed.

A. Preliminary motions.

1. OSC's reply brief exceeds the length limits of Local Rule 115.

American Oversight has filed dual motions to strike. Their first motion seeks to strike OSC's reply brief as over long. Dkt. 154:1-2. Dane County Local Rule 115, "Length of Briefs," specifies that a reply brief "shall be limited to 10 pages":

> Unless otherwise ordered by the court, typed initial and/or response briefs of a party or guardian ad litem shall include all information required in the caption pursuant to Dane County Circuit Court Rule 107, and have the following format:
>
> - Limited in length to forty (40) pages;
> - One inch top and bottom margins and one inch side margins;
> - Double spaced; and,
> - Typed size/font no smaller than 10 cpi, or 12 point proportional.

> Hand written initial and/or briefs of a party or guardian ad litem shall not exceed 20,000 words. Reply briefs and briefs by non-parties shall be limited to 10 pages formatted as above, and hand written reply and non-party briefs shall not exceed 4,000 words, unless ordered by the court.

Dane County Local Rule 115, available online at https://courts.countyofdane.com/Prepare/Rules, (last visited Feb. 24, 2022).

The Court has not ordered longer briefing, yet OSC's reply brief is twenty-one pages. Dkt. 150. OSC concedes its brief was overlong and seeks relief from the local rule because it "inadvertently missed this Court's page length requirement for replies." Dkt. 156:1. In the alternative, OSC seeks additional time to amend and re-file its reply brief. *Id.* at 2.

Inadvertence is one reason for which the Court may grant relief from its scheduling order, which required OSC to file a reply by February 10, 2022. Wis. Stat. § 806.07(1)(a); *See* dkt. 110. However, such an order must be "upon such terms as are just." *Id.* Further delay and inconvenience to the Petitioner and to this Court would be unjust under these circumstances. The Court therefore strikes the offending material, beginning on page eleven (dkt. 150:11-21) and denies OSC's alternative motion to refile.[4]

[4] The Court would also reject each of the arguments in pages 11-19 of OSC's reply as both redundant and meritless. Therein, OSC argues:

(i) that Wis. Stat. § 12.13(5) extends to OSC. This is redundant because OSC has copy-pasted, word for word, two entire pages from its brief in support of reconsideration. *Compare* dkt. 118:5-6 *with* dkt. 150:11-12.

(ii) that OSC's files are like a prosecutor's investigatory files. This was already argued in OSC's brief in chief, dkt. 99:17-18.

(iii) that exceptional public policy reasons justify secrecy. This was already argued in OSC's brief in chief, dkt. 99:18-20.

(iv) OSC then makes a series of confusing statements that have no relation to the writ OSC seeks to quash. Specifically, OSC states:

> That it will not produce "'documents' that are not considered 'records' under Wis. Stat. § 19.32." OSC Reply Br., dkt. 150:17.
> That OSC will not retain records which the law does not require it to. OSC Reply Br., dkt. 150:18.

2. A portion of OSC's answer is redundant, but the issue is moot.

American Oversight's second motion (dkt. 154:2-4) seeks to strike a portion of OSC's answer in which OSC both asserts an affirmative defense concerning an alleged failure to state a claim and also "renews its motion to quash or dismiss" for the same reason. Dkt. 140:8. While this is perhaps repetitious, there is no practical effect because the Court denies OSC's motion(s) for the reasons stated below.

3. OSC's motion for individualized document review is denied.

The final procedural matter to address is OSC's motion to submit ex parte briefing. Dkt. 153:1-7. OSC also seeks a tentative stay pending appeal, which the Court will address after oral argument, and in a separate decision. Dkt. 153:7-12.

OSC's argument here is that:

> Without context, the Court cannot conduct informed, competent review of content or properly balance the interests favoring disclosure against those favoring confidentiality, including the consequences of disclosure such as compromise of the investigation and violations of privacy interests and proprietary rights.

Dkt. 153:6. OSC neither cites any authority in support of this argument nor any standard by which the argument should be evaluated.

While there are sometimes good reasons to allow outside participation in a court's review process, the decision is discretionary. *Milwaukee Journal v. Call*, 153 Wis. 2d 313, 320-21, 450 N.W.2d 515 (Ct. App. 1989). Here, the Court determines that there would be no benefit to further briefing from OSC for several reasons:

That the Court should not enter a declaratory judgment. OSC Reply Br., dkt. 150:19.

The writ which OSC seeks to quash does not seek documents that are not records. It does not command OSC to produce records. It says nothing about a declaratory judgment. *See* Alternative Writ of Mandamus, dkt. 42.

First, without invitation to do so, OSC *has already* briefed the Court on the balancing test. OSC Br., dkt. 99:18-20; OSC Reply Br., dkt. 150:17; OSC ex parte Br., dkt. 153:5. As the Court explains more fully below, OSC forfeited any public policy arguments by not raising them in their initial response to American Oversight. In other words, the balancing test has no application to the issue of whether or not these particular records must be released pursuant to the alternative writ of mandamus.

Second, OSC's briefing would only serve to delay these proceedings even further. American Oversight first requested records from OSC on September 15, 2021. The public has waited long enough to see the affairs of its government.

Finally, even if there was a reason to conduct a balancing test, and to repeat: there is not, OSC's assertion that the Court "cannot conduct informed, competent review of content" has no basis in law or reason. Courts are well-equipped to balance the public's interest in secrecy. *State ex rel. Youmans v. Owens*, 28 Wis. 2d 672, 682, 137 N.W.2d 470 (1965) ("the proper procedure is for the trial judge to examine *in camera* the record…")[5]

B. The petition states a claim.

Next, the Court turns to American Oversight's pleadings to determine whether they state a claim. The facts which must be pleaded to entitle a petitioner to enforce a public records request are simple: "If an authority withholds a record … the requester may bring an action for mandamus

[5] I further base my decision on a career in the service of the Wisconsin Department of Justice, during which service I investigated how tobacco corporations illegally marketed cigarettes to children and how international pharmaceutical giants systematically defrauded our State by manipulating prices, and during which I served in the Attorney General's unit prosecuting Medicaid fraud; and further base my decision on my eleven years of service as Circuit Judge.

Nothing in these particular records bespeaks any investigation at all, let alone one demanding strategic secrecy. In other words, if OSC has a reason why this Court needs ex parte briefing, it should just say so.

asking a court to order release of the record." Wis. Stat. § 19.37(1)(a).[6]

American Oversight's petition alleges facts suggesting that the Respondents are "authorities," from whom American Oversight "requested records," and that:

- OSC responded to the records requests with a vague response about "strategic information." Petition, ¶50.
- Therefore, "OSC has improperly withheld records responsive to American Oversight's Requests…" Petition, ¶67.
- Robin Vos did not respond to the requests at all. Petition, ¶51.
- Edward Blazel and the assembly did not produce any records from what American Oversight alleges to be their contractor. Petition, ¶52, 54.
- However, the petition does not allege any facts from which to infer that Edward Blazel had any contractors. *Cf.* Petition, ¶55 (referring to Blazel's alleged failure to search files "maintained by the Assembly's contractors.")
- Therefore, "Vos … and the Assembly have improperly withheld records responsive to American Oversight's Requests…" Petition at 23.

Accordingly, this petition alleges facts which, if proven, would entitle American Oversight to the relief it seeks against Robin Vos and the assembly, but not against Edward Blazel.

C. OSC's amended motion to quash is denied.

The Court next turns to the Respondents' motions to quash the writ of alternative mandamus, beginning with OSC's. OSC argues that the writ must be quashed for three reasons: (1) failure of service, (2) lack of subject matter jurisdiction, and (3) failure to state a claim upon which relief may be granted. OSC Amend. Mtn. to Quash, dkt. 105. The Court addresses these arguments in turn.

[6] The legislative respondents appear to agree. Assembly Amend. Br., dkt. 111:4 ("the Legislature has created a statutory scheme that always authorizes a mandamus action to … compel the custodian to respond…") OSC does not offer any analysis of the petition. *See e.g.* OSC Br., dkt. 99:8 (OSC launches directly into substantive reasons for which to withhold some records, arguing without any citation that "[a]ny one of these reasons is sufficient to quash the petition."); OSC Reply Br., dkt. 150:2 (same).

1. The Court has personal jurisdiction.

OSC's first grounds for quashing the writ is a failure to effect sufficient service. OSC Amend. Mtn., dkt. 105:1. Since the filing of the Amended Motion to Quash, OSC has accepted service. Dkt. 116 (A letter from Atty. Dean instructing the Court that he had accepted service on behalf of OSC.)

2. The Court has subject matter jurisdiction.

OSC's second grounds for quashing the writ is a lack of subject matter jurisdiction. OSC Amend. Mtn., dkt. 105:1. OSC is wrong: "A circuit court is never without subject matter jurisdiction..." *Vill. of Trempealeau v. Mikrut,* 2004 WI 79, ¶1, 273 Wis. 2d 76, 681 N.W.2d 190.

3. OSC may only assert clear statutory exceptions to disclosure.

OSC's third grounds for quashing the writ is that the petition fails to state a claim upon which relief may be granted. OSC Amend. Mtn., dkt. 105:1. This is really a series of arguments, expanded upon in OSC's brief, for why certain records cannot be released. Before addressing those arguments, the Court notes that OSC sometimes ignores the standard for a motion to quash a writ, which "admits all facts which are well pleaded..." *Hilgen,* 258 Wis. at 431. More crucially, OSC categorically ignores its failure to initially tell the requester all of their reasons for nondisclosure in order to "provide a basis for review in the event of court action." *Newspapers, Inc. v. Breier,* 89 Wis. 2d 417, 427, 279 N.W.2d 179 (1979).

An authority's obligation to provide all reasons for nondisclosure in its response is an important part of the public records law. It simplifies the process for the requester and is "an integral part of the routine duties of officers and employees whose responsibility it is to provide such information." Wis. Stat. § 19.31. In accordance with those duties, courts do not "hypothesize or consider reasons to deny the request that were not asserted by the custodian." *Osborn v. Bd. of*

Regents, 2002 WI 83, ¶16, 254 Wis. 2d 266, 647 N.W.2d 158. Rather, "[i]f the custodian states insufficient reasons for denying access, then the writ of mandamus compelling disclosure must issue." *Id.* Here, the only reason OSC ever gave for its denial of public access was that "some documents" would be withheld because they contained "strategic information." Dkt. 27:1.[7]

Assuming that "strategic information" is a sufficient reason (it is not), an authority must also specifically explain its reason for secrecy. *Mayfair Chrysler-Plymouth, Inc. v. Baldarotta,* 162 Wis. 2d 142, 160, 469 N.W.2d 638 (1991). OSC does not explain why "strategic information" is a specific reason. OSC Br., dkt. 99 *passim.* Instead, OSC encourages the Court to reject a "'strict interpretation' that ignores the purpose of the specificity requirement." OSC Reply Br., dkt. 150:4. OSC does not then discuss that purpose, which our supreme court has explained as really being two purposes:

> First, the specificity requirement provides a means of restraining custodians from arbitrarily denying access to public records without weighing whether the harm to the public interest from inspection outweighs the public interest in inspection.
>
> Second, specific policy reasons are necessary to provide the requester with 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, 162 Wis. 2d at 160.

OSC's explanation that "documents that contain strategic information to our investigation

[7] Later in its brief, OSC explains that this message was really two reasons: "first, that that the documents withheld at that time contained strategic information, and second, that the documents were necessarily withheld for the continuation of the investigation." OSC Br., dkt. 99:19.

The Court does not address OSC's second reason, that records "will continue to be hel[d]" because, of course, simply telling a requester what you will do is not a "reason" at all. *See e.g. State ex rel. Riemann v. Cir. Ct. for Dane Cnty.*, 214 Wis. 2d 605, ¶14, 571 N.W.2d 385 (1997) ("The word 'reason' is commonly defined as an underlying fact or cause that provides logical sense for a premise or an occurrence…") (quotations and citation omitted.)

will continue to be help (sic)" does not serve the first purpose of specificity, which is restraining an authority from arbitrarily denying access. On the contrary, an authority who chose a "strategy of concealing information" could proceed to simply do so with no concern for the public's interest.

OSC's explanation does not serve the second purpose either, which is to enable the requester to challenge the withholding and the courts to understand that challenge. *Breier,* 89 Wis. 2d at 427; *See e.g. Vill. of Butler v. Cohen,* 163 Wis. 2d 819, 826, 472 N.W.2d 579 (1991) ("mere legal conclusions … insufficiently justify refusal because such reasons lack specificity.") This response did nothing more than imply the existence of non-strategic reasons justifying secrecy, but what are those reasons? Doesn't OSC have "careful plans"[8] to ensure, for example, that it does not reveal statutorily-protected financial information?

Accordingly, the Court concludes as a threshold matter that OSC provided no specific reason for non-disclosure. It may not assert additional reasons now. *Breier,* 89 Wis. 2d at 427. The Court's review is therefore limited to "clear statutory exceptions" justifying secrecy. *Journal Times v. Police & Fire Com'rs Bd.,* 2015 WI 56, ¶74, 362 Wis. 2d 577, 866 N.W.2d 563; *State ex rel. Blum v. Bd. of Educ.,* 209 Wis. 2d 377, 387-88, 565 N.W.2d 140 (1997). Those arguments are addressed in part III.C.6 of this decision, below.

For thoroughness, the Court proceeds by addressing each of OSC's remaining arguments, after which the Court concludes that OSC failed to provide a "sufficient" reason, too.

4. OSC confuses the petition and the writ.

OSC's first argument is that the petition seeks a declaratory judgment. OSC Br., dkt. 99:8. Thus, OSC argues, because the public records law does not provide for such a remedy, "[t]his

[8] Strategy means "a careful plan or method." *www.merriam-webster.com/dictionary/strategy*, last visited Feb. 26, 2022. Or "a plan, method, or series of maneuvers or stratagems for obtaining a specific goal or result." *www.dictionary.com/browse/strategy*, last visited Feb. 26, 2022.

Court should quash the petition." *Id.* OSC does not cite any authority for "quashing a petition," and in any event, the Court has already issued a writ commanding Respondents to provide responsive records or explain why they cannot. Alternative Writ, dkt. 42. That writ is silent as to any declaratory judgment.

5. OSC fails to demonstrate that the assembly requires it to keep records confidential.

OSC's second argument is that "the Assembly determined that the proper manner of the investigation" was confidentiality, and, consequently, "OSC is bound by that determination." OSC Br., dkt. 99:8. OSC relies on a line of cases discussing the legislature's "plenary power except where forbidden to act by the Wisconsin Constitution." OSC Br., dkt. 99:9 (citing *In re Falvey,* 7 Wis. 630, 638 (1858); *State ex rel. McCormack v. Foley,* 18 Wis. 2d 274, 277, 118 N.W.2d 211 (1962); *Town of Beloit v. Cnty. of Rock,* 2003 WI 8, 259 Wis. 2d 37, 657 N.W.2d 344; *Goldman v. Olson,* 286 F. Supp. 35, 43 (W.D. Wis. 1968); and *Libertarian Party of Wisconsin v. State,* 199 Wis. 2d 790, 801, 546 N.W.2d 424 (1996)).

Before discussing OSC's argument any further, the Court observes that none of these cases involved the legislature or a part of the legislature suspending a statute and then giving away that right in a contract. In *Goldman,* on which OSC relies most heavily, Judge Doyle explains that the legislature's investigation power exists because of, and is subordinate to, its power to make or unmake written laws:

> The legislature has very broad discretionary power to investigate any subject respecting which it may desire information in aid of the proper discharge of its function to make or unmake written laws…

Goldman, 286 F.Supp. at 43 (quoting *State ex rel. Rosenhein v. Frear,* 138 Wis. 173, 119 N.W.2d 894 (1909)). Furthermore, OSC does not explain, assuming the legislature's investigatory power

includes the power to "unmake written laws," why the legislature may also contract away that power. *See Milwaukee Journal Sentinel v. Wisconsin Dep't of Admin.,* 2009 WI 71, ¶53, 319 Wis. 2d 439, 768 N.W.2d 700 (rejecting the argument that parties could "contract away the public's rights under Wis. Stat. § 19.35(1)(a).")

Nevertheless, the Court understands OSC's argument to rest on these three premises:

- That the Wisconsin Constitution does not prohibit the legislative suspension of statutes, therefore the legislature properly wields its plenary powers when the assembly suspends the public records law for investigative purposes. OSC Br., dkt. 99:10.

- In accordance with the legislature's plenary power to suspend statutes, that 2021 Assembly Resolution 15 was an exercise of that power, and that it suspended Wis. Stat. §§ 19.21-39. OSC Br. Exh. 1, dkt. 101.

- The license granted by 2021 Assembly Resolution 15 extends to Consultare, LLC, through their contract, which OSC has filed with the Court at dkt. 108 (incorporating the prior contract, Colombo Aff. Exh. U, dkt. 36:1).

Thus, OSC concludes, it has a constitutional right to keep its records secret.

Although the Court is skeptical of the notion that the assembly or a part of the assembly can suspend statutes enacted by the entire legislature[9] and signed into law by the governor, the Court need not discuss the initial premise of OSC's argument because it rejects the other two. *See In re Guardianship of James D.K.,* 2006 WI 68, ¶3 n.3, 291 Wis. 2d 333, 718 N.W.2d 38 ("We do not normally decide constitutional questions if the case can be resolved on other grounds.") (citation omitted).

a. The assembly did not suspend the public records law.

Putting aside the question of whether the assembly may suspend the public records law, the Court turns to 2021 Assembly Resolution 15 to determine whether or not the legislature

[9] *See* Wis. Const. art. IV, § 1 ("The legislative power shall be vested in a senate and assembly.")

actually intended to do so. OSC relies on the resolution as granting the assembly the authority for its later contract.

When interpreting legislation, courts begin "with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry." *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. The resolution is plainly silent as to confidentiality, Consultare, LLC, Michael Gableman, OSC, and the public records law. It simply "directs the Assembly Committee on Campaigns and Elections to investigate the administration of elections in Wisconsin…" OSC Br. Exh. 1, dkt. 101. The Assembly Committee on Campaigns and Elections does not appear to have understood the resolution to provide any confidentiality, either. The committee's motions to hire investigators, and later, to create OSC, are similarly silent as to confidentiality and the public records law. OSC Br. Exh 2-3, dkt. 102-103.

In sum, OSC fails to point to any evidence that the assembly has actually done what OSC says it has done. To borrow the oft-cited admonition, no careful and perceptive analysis is needed: "this wolf comes as a wolf":

> This is what this suit is about. Power. … Frequently an issue of this sort will come before the Court, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf.

Morrison v. Olson, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

Accordingly, and without deciding the constitutional issue of whether the assembly may suspend the public records law, 2021 Assembly Resolution 15 plainly did not provide for any such suspension.

b. Even if the Legislature had suspended the public records law, it did not contractually assign confidentiality to OSC.

The Court also rejects the third premise of OSC's argument, which is that the assembly ever gave a confidentiality power to OSC. In other words, assuming that the legislature could suspend the public records law, and further assuming it did so, either by 2021 Assembly Resolution 15 or simply by inserting it into a contract, the Court would not agree that OSC has been given such a right.

To explain why, the Court turns to the document which OSC claims to be the contract assigning such a confidentiality right. At the January 21, 2022, oral arguments, the Court asked OSC's counsel whether there was a contract between OSC and the assembly. OSC's counsel responded that there was, and that he would produce it. Dkt. 148:26-27 (Trans. of oral arguments). A few days later, OSC filed the document at dkt. 108 (hereafter, the "First Amendment.") Before looking any deeper into the First Amendment, the Court sets forth basic principles of Wisconsin contract law.

"Contract interpretation is a question of law." *FPL Energy Point Beach, LLC v. Energy Resources of Australia, Ltd.,* 565 F.Supp.2d 999, 1004 (W.D. Wis. 2008) (citations omitted). The elements of a contract are an offer, consideration, and, relevant here, "acceptance." *Runzheimer Intern., Ltd. v. Friedlen,* 2015 WI 45, ¶20, 362 Wis. 2d 100, 862 N.W.2d 879 (citations and quotations omitted). Acceptance is an "expression[] of assent." *Id.* It "may be made by a communication to the offeror, either in writing or orally; acceptance may also be implied from the conduct of the parties." WIS JI-CIVIL 3014; *See also* Restatement (Second) of Contracts, § 18 (1981) ("Manifestation of mutual assent to an exchange requires that each party either make a promise or begin or render a performance.")

Returning to the text of the First Amendment, the Court observes that it is an offer to amend an earlier agreement between the Wisconsin Assembly and Consultare, LLC, a limited liability

company of which Michael Gableman is apparently the president. Dkt. 108:1-2. That earlier agreement purports to have contractually required Consultare, LLC to "[k]eep all information/findings related to the services rendered under this agreement confidential." Colombo Aff. Exh. U, dkt. 36:2.[10] Therefore, if Consultare, LLC accepted the First Amendment, it would be bound under the same confidentiality terms of the original contract.

One familiar way to accept an offer, and thereby create a binding contract, is by a signature. The First Amendment discusses acceptance by signature:

> 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.

First Amendment, § 4, dkt. 108:1. The drafters of this offer thus contemplated the manner in which it should be accepted – by signature – and declined to create exceptions. Thus, to prove acceptance, OSC need only produce one of several "counterpart signature pages." It fails to do so.

Here is the signature section from the assembly's offer:

[10] Exh. U is mislabeled. Docket 36 is "U." Docket 35 is "T."

IN WITNESS WHEREOF, the Parties hereby enter into this Frist Amendment as of the date first written above.

THE WISCONSIN STATE ASSEMBLY

By:_____
Robin J. Vos, Speaker

CONSULTARE LLC

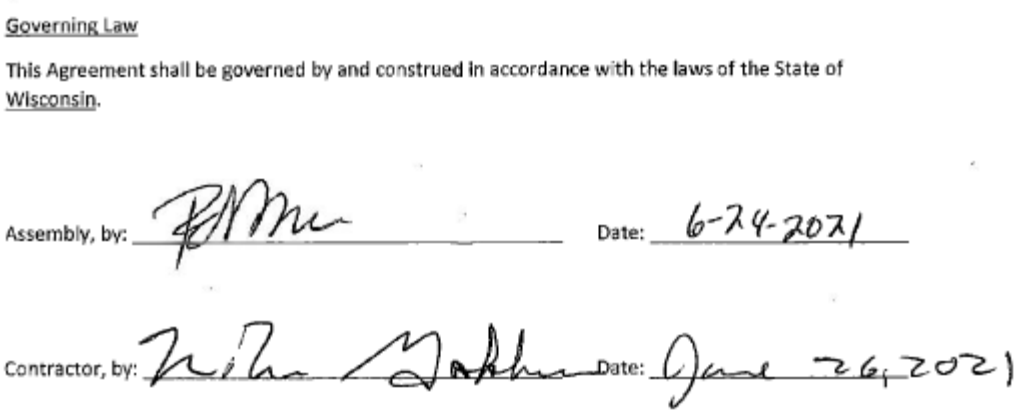
By: /s/
Michael J. Gableman, President

Dkt. 108:2.

It doesn't matter, ultimately, why the signature line bears the symbol "/s/," except to say that it is not evidence that Michael Gableman accepted the assembly's offer. This conclusion is buttressed by the assembly's counsel, Dkt. 148:24 (Trans. of oral arguments) (Mr. Stadler said that he had only ever seen a contract "with one signature on it.") and by the "point of contact" for the offer, Steve Fawcett, Westerberg Aff., dkt. 126 (in Dane County Case No. 21-CV-2440, dkt. 99:64, the assembly's Steve Fawcett testified that he did not know whether Michael Gableman ever signed the above amended contract), and the unsigned copy in OSC's records, submitted for in camera review. Dkt. 144:41 (OSC's production of the First Amendment as a responsive record.)

Furthermore, while the Court doubts any Wisconsin attorney would sign their name on an important contract by using a confusing symbol like "/s," the Court need not speculate about what happened here. The manner in which Michael Gableman signs his name is well-represented in the record: Here, for example, is his signature on the original contract between Consultare, LLC and

the assembly:



Governing Law

This Agreement shall be governed by and construed in accordance with the laws of the State of Wisconsin.

Assembly, by: _____ Date: 6-24-2021

Contractor, by: _____ Date: June 26, 2021

Independent Contractor Agreement, dkt. 144:47 (the original contract expired October 31, 2021, "unless altered or extended by mutual agreement…" Dkt. 144:44.)

OSC does not provide any other evidence of Michael Gableman's acceptance of the "First Amendment," either orally or through his actions.[11] The Court must conclude, therefore, that OSC fails to demonstrate the existence of any enforceable contract, or any other grant of power, between itself and the assembly.

6. There are no statutory exceptions to disclosure.

OSC's third argument is that two different statutory exceptions to disclosure apply. OSC Br., dkt. 99:14-17. These are Wis. Stat. § 12.13(5), which prevents "investigators" from disclosing information "related to an investigation," and Wis. Stat. § 19.85, which allows for governmental bodies to convene in closed sessions.

[11] At oral argument, OSC's counsel suggested some form of constructive agreement existed between the assembly and Consultare, LLC, citing vague principles of Wisconsin contract law. OSC appears to have abandoned this argument. OSC Br., dkt. 99 *passim*. The Court declines to abandon its neutrality to develop the argument further. *State v. Petitt*,171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

The Court's own review suggests that OSC *has not constructively accepted the offer by its actions.* For example, the independent contract agreement incorporated by the First Amendment requires Consultare, LLC as one of its six core duties to "keep a weekly report of investigative findings." Dkt. 144:44. Where are those weekly reports?

a. Wis. Stat. § 12.13 only applies to the WEC.

OSC's first statutory exception argument is that Wis. Stat. § 12.13(5), which bars "investigators" of election crimes from releasing "investigatory information," applies to the OSC.[12] OSC Br., dkt. 99:14. OSC's brief in chief failed to address Att'y Gen. Op., OAG-7-09, which directly and persuasively refutes this argument.[13] In its reply, OSC argues that AG Van Hollen's opinion should be discarded for three reasons.

The first reason, given without any citation to authority, is that the (2009) opinion is too old to be persuasive because it predates the creation of OSC. OSC Reply Br., dkt. 150:9. If OSC could explain why the AG opinion should have accounted for OSC, this argument might have some merit. OSC does not even attempt to do so – it proceeds only by making a general observation about persuasive authority and a textual argument about superfluity. As such, the Court emphatically rejects this argument: reliance on old opinions is a "foundation stone of the rule of law." *Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446, 455 (2015).

The second reason OSC advances for why the AG opinion should be discarded is because the law has changed, or at least OSC says so. OSC cites *Green Bay Educ. Ass'n v. State,* 154 Wis. 2d 655, 453 N.W.2d 915 (Ct. App. 1990) for the proposition that legislative changes can diminish

[12] The statute reads, in full:

> 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.

Wis. Stat. § 12.13(5)(a).

[13] https://www.doj.state.wi.us/sites/default/files/dls/files/OAG-7-09.pdf, last visited Feb. 28, 2022.

an opinion's persuasive authority. OSC then argues that "legislative changes since 2009 should 'significantly' diminish any persuasive authority of the 2009 AG opinion." OSC Reply Br., dkt. 150:10. OSC does not explain what these legislative changes are, and indeed there have been no substantive amendments to this section.

OSC's third argument[14] is that the Attorney General is wrong because he "combines multiple words or phrases in the statute and then defines them to mean the same thing." OSC Reply Br., dkt. 150:10. OSC then offers its own interpretation which "makes clear that this section applies to more than just WEC and its employees—it applies to two other subgroups, namely (1) investigators and their employees and (2) prosecutors and their employees." OSC Reply Br., dkt. 150:10. The unspoken premise of this argument is that Wis. Stat. § 12.13 is ambiguous and bears interpretation. Thus, the argument necessarily fails because OSC, having failed to provide specific reasons for its denial of public access, is now limited to "clear statutory exemptions." *Journal Times,* 2015 WI 56, ¶74. An ambiguous statute cannot be one of those "clear" exemptions.

Nevertheless, the Court turns to the Attorney General's opinion. AG Van Hollen began by recognizing that exemptions to the public records law must be narrowly construed. OAG-7-09, ¶6 (citing *Chvala v. Bubolz,* 204 Wis. 2d 82, 88, 552 N.W.2d 892 (Ct. App. 1996)). The AG then recognized that while investigator and prosecutor were broad terms, "the rules of statutory construction command me to consider the full text and structure of Wis. Stat. § 12.13(5) and closely related statutes." *Id.* ¶12 (citing *Kalal,* 2004 WI 58, ¶46.)) Looking to that structure, the AG concluded that Wis. Stat. § 12.13(5) was "enacted as part of a comprehensive reform" under 2007 Wisconsin Act 1. *Id.* ¶13. That reform "did not affect the ability of law enforcement and

[14] Although the Court strikes OSC's reply brief, beginning on page eleven, as overlong and redundant, it would also have rejected each of the remaining arguments. *See* fn. 4, *supra*.

district attorneys to pursue investigations…" *Id.* ¶14. Therefore, the AG understood the purpose of the act which created Wis. Stat. § 12.13 to leave "undisturbed" other "investigators." *Id.* ¶15.

After analyzing the context and structure of Wis. Stat. § 12.13(5), the AG turned to the statutory text to avoid superfluity. The AG observed that Wis. Stat. § 12.13(5)(a) "applies only if the group of persons to whom the prohibitions apply are not communicating with specified groups of other individuals." *Id.* ¶17. Thus, to avoid superfluity, the legislature must have meant to refer to two different groups:

> Each category of the exceptions contained in Wis. Stat. § 12.13(5)(b) to the application of Wis. Stat. § 12.13(5)(a) involve communications with those *outside* [WEC]… "Inside" communications would never need to be subject to an exemption because they are not covered by Wis. Stat. § 12.13(5)(a).

Id. ¶18 (emphasis in original).

The AG then turned to the interrelationship between Wis. Stat. § 12.13 and a statute directly cited by § 12.13, Wis. Stat. § 5.05(5s). When one statute refers to another, the two should be construed together. *Id.* ¶20 (citing *Appointment of Interpreter in State v. Le*, 184 Wis. 2d 860, 865, 517 N.W.2d 144 (1994)). Section 5.05(5s) "relates exclusively to [WEC]-records," which is another reason the AG concluded that the related § 12.13 applies only to WEC-investigators. *Id.* ¶20.

Finally, the AG explained the absurdity which would result from interpreting "investigator" broadly:

> To read the terms "prosecutor" and "investigator" in Wis. Stat. § 12.13(5)(a) to include district attorneys and law enforcement would criminalize conduct that the legislature expressly authorizes with respect to the [WEC] and curtail the flow of information that the legislature has specifically permitted.

Id. ¶28. In sum, the AG concluded that:

> 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].

Id. ¶33; *See also id.* ¶¶34-37 (discussing why the rule of lenity and the First Amendment support a narrow reading of Wis. Stat. § 12.13(5)).

OSC does not examine the context and structure of Wis. Stat. § 12.13(5), or criticize the AG's analysis. While OSC does offer its own superfluity argument, it does not address the AG's contrary argument. And OSC fails to address each of the AG's remaining arguments. Therefore, the Court is better persuaded by the AG's opinion. The AG's interpretation is more convincing, more thorough, and must be given special weight 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…")

Accordingly, Wis. Stat. § 12.13(5) does not apply to OSC and cannot be a reason for secrecy.

b. Wis. Stat. § 19.85 does not require secrecy.

OSC's second statutory exemption arises under Wis. Stat. § 19.85. OSC cites the proposition that "'the exemptions under which a closed meeting may be held pursuant to sec. 19.85 are indicative of public policy' and may be used to deny public access." OSC Br., dkt. 99:16

Presumably, OSC refers to Wis. Stat. § 19.35(1)(a), which reads, in full:

> The exemptions to the requirement of a governmental body to meet in open session under s. 19.85 are indicative of public policy, but may be used as grounds for denying public access to a record only if the authority or legal custodian under s. 19.33 makes a specific demonstration that there is a need to restrict public access at the time that the request to inspect or copy the record is made.

Wis. Stat. § 19.35(1)(a) (emphasis added).

When viewed in its unabridged form, this statute plainly applies "only if" the authority makes a specific demonstration "at the time that the request … is made." Unburdened by this statutory requirement, OSC proceeds to argue that several provisions of Wis. Stat. § 19.85 suggest that secrecy is statutorily required here. OSC Br., dkt. 99:16-17 (citing *Oshkosh Nwn. Co. v. Oshkosh Library Bd.*, 125 Wis. 2d 480, 373 N.W.2d 459 (Ct. App. 1985) (although that case does not support OSC's reading. As the court of appeals writes: "The statute further states, however, that where the exemptions in sec. 19.85 are used as grounds for denying access to a public record, the custodian must make a specific demonstration … at the time that the request to inspect … is made." *Id.* at 485.)

The Court declines to join OSC in ignoring inconvenient parts of Wis. Stat. § 19.35(1)(a). Having failed to make a specific demonstration at the time American Oversight made its requests, Wis. Stat. § 19.85 offers OSC no reasons justifying secrecy.

7. There are no common law reasons for nondisclosure.

OSC's fourth argument is that common law principles exempt OSC's records from disclosure. OSC Br., dkt. 99:17-18. As noted above, OSC failed to explain specific reasons in its refusal and may only raise "clear statutory exemptions" now. *Journal Times*, 2015 WI 56, ¶74. The Court proceeds purely for sake of completeness.

For the first such principle, OSC cites *Kroeplin v. DNR*, 2006 WI App 227, 297 Wis. 2d 254, 276, 725 N.W.2d 286, for what OSC labels a "codification of Wisconsin's common law." OSC Br., dkt. 99:17. What *Kroeplin* refers to is, indeed, a codification: Wis. Stat. § 19.36(10)(b). Statutes are not common law reasons for disclosure, and in any event, this particular statute, which restricts access to investigations into an authority's employees, does not apply to this case.

OSC next cites *State ex rel. Journal/Sentinel v. Arreola,* 207 Wis. 2d 496, 514, 558 N.W.2d 670 (Ct. App. 1996). That case also does not set forth any common law principle of exemption. That is, while OSC correctly quotes from the text of that decision that some records may be withheld "to maintain the effectiveness of ongoing investigations," the court of appeals was clearly explaining public policy reasons as part of its balancing test.

Finally, OSC turns to a series of cases which do set forth a common law reason for exemption, beginning with *State ex rel. Richards v. Foust,* 165 Wis. 2d 429, 477 N.W.2d 608 (1991), in which courts recognized that a prosecutor's file may be shielded from the public records law. OSC admits it is not a prosecutor. OSC Br., dkt. 99:18. Despite this, it argues without any elaboration that "the same concepts apply" to an advisory investigation of the legislature. OSC Br., dkt. 99:17 (citing *State ex rel. Spencer v. Freedy,* 198 Wis. 388, 223 N.W. 861 (1929)).

The Court does not agree that the same concepts apply. Only "documents integral to the criminal investigation and prosecution process are protected 'from being open to public inspection.'" *Nichols v. Bennett,* 199 Wis. 2d 268, 275 n.4, 544 N.W.2d 428 (1996) (quoting *Foust,* 165 Wis. 2d at 434). Further, allowing any sort of purely advisory investigation to claim the *Foust* exemption would have no stopping point. If the legislature can secretly investigate elections under *Foust,* then it could secretly investigate the visiting hours for state parks, changes to tax policy, or any other topic they chose, thereby annihilating the public records law.

Regardless of the merits of OSC's analogy, this common law exemption does not further OSC's motion to quash because courts look to the "nature of the documents" sought to be shielded, rather than apply a "blanket exemption." *Id.* at 274, 278. The Court would not quash the writ of mandamus unless it concluded that each of the documents OSC withheld were of a nature "integral to the criminal investigation and prosecution process." As the Court finds below in its individualized review, none of the records are of this nature.

8. The balancing test weighs in favor of disclosure.

OSC's fifth argument is that exceptional public policy reasons in favor of secrecy outweigh the public's interest in disclosure. OSC Br., dkt. 99:18-20. This is a "balancing test," in which "[i]t is the burden of the party seeking nondisclosure to show that public interests favoring secrecy outweigh those favoring disclosure." *John K. MacIver Institute for Public Policy, Inc. v. Erpenbach*, 2014 WI App 49, ¶14, 354 Wis. 2d 61, 848 N.W.2d 862 (quoted source omitted). As noted above, OSC failed to explain specific reasons in its refusal and may only raise "clear statutory exemptions" now. *Journal Times,* 2015 WI 56, ¶74. The Court proceeds purely for sake of completeness.

For this balancing test to weigh in favor of secrecy, the Court would have to find an "extraordinary" public interest in secrecy, that is, that the records actually contain "strategic information" and that information somehow outweighs "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, 731 N.W.2d 240 (citation omitted).

Here is OSC's explanation of the public interest in secrecy:

> The public has an interest in assuring the investigation is not compromised by the premature disclosure of information, particularly if investigators have not had sufficient time to develop facts, leads, or strategy. Any premature

> disclosure heightens the risk that incomplete records or information lacking context is released to the public, which may only serve to heighten public confusion and is the antithetical to the intent of the public records statute.

OSC Br., dkt. 99:19.

The Court finds little in these particular records which justifies labelling this an investigation, and nothing at all which would "heighten public confusion." Those findings are set forth more fully the Court's individualized review, in Part IV of this decision. In sum, the Court finds minimal public interest in secrecy. The public's interest, on the other hand, need not be measured: "The legislature has already answered that question." *Milwaukee Journal Sentinel v. Wisconsin Dep't of Admin.,* 2009 WI 79, ¶59, 319 Wis. 2d 439, 768 N.W.2d 700 (internal citations and quotations omitted).

Accordingly, if the Court applied the balancing test, it would conclude that the public interest in disclosure greatly outweighs the public interest in secrecy, and the records must be released.

9. The meaning of, and the duty to retain, "records."

Finally, OSC's brief provides a sort of general complaint that "most of the documents Petitioners demand are not 'records' subject to the open record law at all," and that "any argument that suggests that the OSC was to retain certain records fails." OSC Br., dkt. 99:20, 22. The Court struggles to connect these statements with the writ of mandamus or why that writ should be quashed.

If OSC seeks permission to destroy the records they are commanded to produce by this Court's writ, they may not "until after the order of the court in relation to such record is issued." Wis. Stat. § 19.35(5). The Court declines to offer any general advice about OSC's records

practices.[15]

If OSC is arguing that there should be a "work product" exemption added to the definition of "record," which exemption arises from "public policy and plain common sense," then the Court rejects that argument. OSC Br., dkt. 99:21. Wisconsin Statute already exhaustively defines "record":

> "Record" means any material on which written, drawn, printed, spoken, visual, or electromagnetic information or electronically generated or stored data is recorded or preserved, regardless of physical form or characteristics, that has been created or is being kept by an authority. …
>
> [The statute lists numerous non-exclusive examples.]
>
> "Record" 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). As a rule, courts narrowly interpret exemptions to disclosure. *Chvala,* 204 Wis. 2d at 88. This includes the "drafts" exemption. *Voice of Wisconsin Rapids, LLC, v. Wisconsin Rapids Public Sch. Dist.*, 2015 WI App 53, ¶21, 364 Wis. 2d 429, 867 N.W.2d 825 (citing 77 Wis. Op. Att'y Gen. 100 (1988)) ("if one's notes are distributed to others for the purpose of communicating information … the notes would go beyond mere personal use and would therefore not be excluded from the definition of a 'record.')

The Court is unpersuaded by OSC's claim that "irrational burdens" result from a disclosure of work product, for example, to judges who must "likewise disclose *their* internal work product." Few government officials are in the public eye as much as judges, whose work product generally falls into two categories: either it is transcribed by a reporter and immediately becomes public

[15] Courts do not issue advisory opinions. In any event, OSC already has received one such opinion advising it not to arbitrarily destroy records. *See* Legislative Council Memo, dkt. 134:1-3 ("Therefore, the Special Counsel and his or her office are generally subject to the Public Records Retention Law requirements under s. 16.61, stats.")

record, or it takes the form of drafts prepared by, or in the name of, the judge. *See* Wis. Stat. § 19.32(2).

The Court therefore declines OSC's invitation to broadly read "work product" into an unambiguous statute.

D. The legislative respondents' motion to quash is denied in part and granted in part.

The Court next turns to the legislative respondents' motion to quash, proceeding in the same manner as above. Assembly Br., dkt. 111.

1. The legislative respondents also confuse the writ and the petition.

The legislative respondents' first argument for why the writ must be quashed is that the petition seeks a declaratory judgment, or that the petition seeks to somehow challenge the adequacy of their search. Assembly Amend. Br., dkt. 111:3-8. The Court rejects this argument for the same reason it rejected OSC's similar argument: the writ only commands the Respondents to produce responsive documents. Dkt. 42. The petition is legally sufficient to entitle American Oversight to such a writ. *Supra;* Dkt. 5. Whether or not the petition also seeks unavailable remedies does nothing to alter this.[16]

2. American Oversight's cause of action is not pending in another case.

[16] As the legislative respondents correctly argue in a later section of their brief:

> The only facts of consequence in a mandamus action under the Public Records Law is whether there was a record request to an authority and whether the authority wrongly withheld a record or failed to respond to the request.

Assembly Amend. Br., dkt. 111:16 (citing itself at pages 3-6).

Courts do not "abandon our neutrality to develop arguments." *Indus. Risk Ins. v. Am. Eng'g Testing, Inc.,* 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82. To explain its ruling however, the Court notes that while this initial argument is perhaps better framed under mootness or as a motion to strike, the legislative respondents do not seek such a remedy. They do not explain what allegations relate only to unavailable remedies. Instead, they seek only to strike contextual allegations they label "propaganda."

The legislative respondents' second argument is that this cause of action is already pending in Dane County Case No. 21-CV-2440. Assembly Amend. Br., dkt. 111:8. The legislative respondents rely on Wis. Stat. § 802.06(2)(a)10, which sets forth a defense to a claim if there is "[a]nother action pending between the same parties for the same cause." They further cite to *RBC Eur. Ltd. v. Noack,* 2014 WI App 162, ¶26, 353 Wis. 2d 183, 844 N.W.2d 643, a case in which the plaintiff:

> [B]y its own admission, stated that the underlying case and the related case are "substantially similar," "arise out of the exact same transactions and occurrences," and involve " intertwined claims [that] concern the exact same investments involving the exact same parties."

Id. ¶25.

American Oversight's claim in this case is that the Respondents wrongfully withheld records responsive to their requests, dated September 15 (Westerberg Aff. Exhs. A-F) October 15 (Westerberg Aff. Exh. G-H) and October 26 (Westerberg Aff. Exhs K-N). These are not the same claims in Dane County Case No. 21-CV-2440. There, American Oversight's claim is that the Respondents failed to produce records responsive to a different set of requests for a different period of time altogether. Dane County Case No. 21-CV-2440 (Petition for Writ of Mandamus, dkt. 4, alleging failures to reply to requests sent July 20 and August 12).

3. American Oversight is not precluded from claiming that the legislative respondents are responsible for their contractor's records after Sep. 21, 2021.

The legislative respondents' third argument invokes the doctrine of issue preclusion. Assembly Amend. Br., dkt. 111:9-11. Issue preclusion prevents relitigation of an "issue of law or fact that has been actually litigated and decided in a prior action…" *Jensen v. Milwaukee Mut. Ins. Co.,* 204 Wis. 2d 231, 235, 554 N.W.2d 232 (Ct. App. 1996).

The issue of law or fact previously litigated, the legislative respondents argue, was that in Dane County Case No. 21-CV-2440, "Judge Bailey-Rihn definitely determined … that after September 1, 2021, [OSC] was the 'authority' responsible for these records." Assembly Amend. Br., dkt. 111:10-11. The identity of an "authority" is important because it is responsible for records and therefore the only entity subject to this kind of mandamus action. Wis. Stat. § 19.37(1). An "authority":

> [M]eans any of the following having custody of a record: a state or local office, elective official, agency, board, commission, committee, [etc] . . . the assembly . . . or a formally constituted subunit of any of the foregoing."

Wis. Stat. § 19.32(1) (emphasis added).

American Oversight concedes that OSC is an authority and that the legislative respondents are not responsible for OSC's records. AO Br., dkt. 137:12; Petition, dkt. 5, ¶30 (referencing "the date OSC was formally constituted.") Indeed, the contractors' records provision of the public records law does not extend to contracts between two authorities:

> 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. This subsection does not apply to the inspection or copying of a record under s. 19.35 (1) (am).

Wis. Stat. § 19.36(3) (emphasis added).

Rather, American Oversight's argument is that OSC "is wholly staffed by contractors or subcontractors to the Assembly, and none of those contractors are, themselves, authorities." AO Br., dkt. 137:13. Regardless of the merits of this argument, the legislative respondents fail to demonstrate that the argument was "actually litigated" in Dane County Case No. 21-CV-2440, and, accordingly, issue preclusion does not apply here.

4. The legislative respondents are authorities for their contractors'

records.

The legislative respondents next argue that "practical realities" make it impossible for them to be the authority of their contractors' records. Assembly Amend. Br., dkt. 111:13. The text of Wis. Stat. § 19.36(3) is unambiguous:

> 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.

The legislature chose not make exceptions for practical realities, and neither will this Court. *Kalal,* 2004 WI 58, ¶45.

However, the contractors whose records American Oversight seeks do not have contracts with each of the three of the legislative respondents – only the assembly. American Oversight does not allege that Robin Vos or Edward Blazel are custodians of the assembly. Petition, dkt. 5, ¶¶51-59, 71-82. On this point, American Oversight relies on *WIREdata, Inc. v. Vill. of Sussex,* 2008 WI 69, ¶87, 310 Wis. 2d 397, 751 N.W.2d 736 for the proposition that each of the legislative respondents remain the authority responsible for OSC's records, at least insofar as those records were generated pursuant to a contract. Pet'r Br., dkt. 137:13-14. But neither *WIREdata* nor the precedent on which it relies address a contract between two authorities.

Further, American Oversight repeatedly concedes that only the assembly had any contractors: "that office is wholly staffed by contractors or subcontractors to the Assembly … the individuals staffing OSC are contractors contracted to the Assembly…" Pet'r Br., dkt. 137:13. The Court therefore relies on the plain language of Wis. Stat. § 19.36(3), which makes an authority responsible only for contracts with "a person other than an authority." The assembly alone, therefore, is responsible for the records of any contractors which are not themselves a formally

constituted subunit.

5. The legislative respondents' alternative motion to strike is denied.

The Court turns, finally, to the legislative respondents' alternative motion to strike. Assembly Amend. Br., dkt. 111:15-17. The legislative respondents seek to strike paragraphs 16-28 and 56-57 as immaterial and impertinent. *Id.* at 17 (citing Wis. Stat. § 802.02(6)).

The Court has already denied this motion by written order:

> [The legislative respondents] do not explain their comparison of the challenged paragraphs to a "political propaganda piece," or how such a comparison relates to the legal sufficiency of allegations. They do not explain their one-sentence argument for why the "hearsay" rule applies to pleadings. Because they do not explain any of these things, the Court exercises its discretion to decline to strike any paragraphs from the Petition.
>
> … the Court also **DENIES** their motion to strike matters from the pleadings.

Decision and Order (January 21, 2022) dkt. 107:7 (emphasis in original).

The legislative respondents do not acknowledge this order, let alone provide a compelling reason for which the Court would disregard the law of the case: "courts should generally follow earlier orders in the same case and should be reluctant to change decisions already made…" *State v. Stuart*, 2003 WI 73, ¶23, 262 Wis. 2d 620, 664 N.W.2d 82 (citing *Ridgeway v. Montana High Sch. Ass'n,* 858 F.2d 579, 587 (9th Cir. 1988)).

Accordingly, this alternative motion is denied.

IV. FINDINGS OF FACT

The Court turns to the paper records submitted by OSC, filed under seal as dkt. 141-147, 149, 161-164.[17] The Court proceeds by discussing, and making findings of fact, as to each record

[17] The break between dkt. 142-149 and 161-164 was due only to the Court's digital scanning processes. To be clear, the Court received paper copies of all of the records on January 31, 2022.

or set of records. Consistent with the Court's conclusions above, the Court pays special attention to any clear statutory exceptions to disclosure.

Preliminarily, the Court notes that many of these records contain "personally identifiable information." *See* Wis. Stat. §§ 19.32(1r) and 19.62(5). Requesters have the right to view this kind of information. Wis. Stat. § 19.35(1)(am). There are several exceptions to this right, for example, if the information is collected in connection with an investigation "that may lead to an enforcement action … or court proceeding." Wis. Stat. § 19.35(1)(am)1. However, OSC has made clear that its investigation is strictly to advise the legislature.

Another exception to the release of personally identifiable information is for a "confidential informant." Wis. Stat. § 19.35(1)(am)2(b). "Confidential informant" is not defined by this or related statutes. Based on its context, the Court understands "confidential informant" to apply only to those informants in investigations which may lead to court proceedings, especially as regards prisoners under the control of the department of corrections. *See* Wis. Stat. §§ 19.35(1)(am)2(a) and (c)-(d).

Accordingly, the Court concludes there are no statutory reasons to redact any personally identifiable information.

1. General office emails, July-December (dkt. 142).

The first set of records is seventy-four pages of printed emails. Dkt. 142. These messages have been partially redacted, presumably by someone at OSC, with a transparent marker which shows up as opaque on the now-scanned and docketed copies.

Individually and as a group, these emails reflect the sort of mundane correspondence one would expect from any office. Few are connected to any others. One typical example is dkt. 142:54, in which OSC investigator Carol Matheis introduces herself and asks to schedule an interview.

The subject suggests "this evening when I am done with work." Carol responds "yes, thank you." Another set discusses the purchase of office supplies. Dkt. 142:60-64.

The only noteworthy email in this first set is perhaps the one at dkt. 142:11, in which OSC appears to have published its own dropbox.com password. However, no statute prohibits the release of passwords, and the public has no interest in keeping its government's irresponsible digital security[18] a secret.

The Court finds no public interest in the secrecy of these documents and no clear statutory reason for secrecy.

2. Wait / Heuer / Lindell emails (dkt. 143).

The next set of records is three series of emails, categorized by sender because of their relative volume. The first subset is twenty-three pages of printed emails, all involving Harry Wait. Dkt. 143:1-23. The second subset is ten pages of printed emails, all involving Ron Heuer (dkt. 143:24-34). The third subset is three pages of printed emails from Mike Lindell (dkt. 143:35-37). These are similar in every respect to the group described above.

The Court finds no public interest in the secrecy of these documents and no clear statutory reason for secrecy.

3. Court records (dkt. 144:1-20).

The third set of records is court filings which already appear to be public records. Dkt. 144:1-20. This set includes a notice of hearing for Dane County Case No. 21-CV-2552 (dkt. 144:1), a declaration filed in a Georgia federal district court (dkt. 144:2-11), and other, seemingly

[18] Digital security is important to Wisconsin's judiciary. Our robust internal practices prohibit the sharing of passwords like this. A cursory search of other recommended practices show this to be a widely-known. *See e.g.* *www.it.wisc.edu/learn/select-manage-protect-passwords*, last visited Feb. 27, 2022 (The University of Wisconsin Information Technology Department advises: "Don't reveal a password in an email message.")

random court filings.

The Court finds no public interest in the secrecy of these (already public) documents and no clear statutory reason for secrecy.

4. Records requests (dkt. 144:21-39).

The fourth set of records is correspondence relating to the public records law. Dkt. 144:21-39. The first of these is a letter from the WEC, addressed to Wisconsin State Representative Janel Brandtjen. Dkt. 144:21-22. It is not clear why OSC even has this record, let alone why OSC concluded that WEC's response to Ms. Brandtjen was both "responsive" and also contained "strategic information to our investigation."

The remainder of records in this set are from the OSC, addressed to various records requesters. Dkt. 144:23-39. The lone exception is at dkt. 144:32, which is "titled draft for review," and contains a press release related to the OSC's response to open records. Despite its label, the Court does not consider this a "draft" because it does not appear to be for personal use. Furthermore, it appears to already have been published: https://www.yahoo.com/now/wi-special-counsel-responds-open-003800681.html, last visited Feb. 26, 2022.

The Court finds no public interest in the secrecy of these documents and no clear statutory reason for secrecy.

5. Contracts (dkt. 144:40-52).

The fifth set of records is a series of contracts or contract offers relating to OSC. Dkt. 144:40-52.

The Court finds no public interest in the secrecy of these documents and no clear statutory reason for secrecy.

6. Resumes (dkt. 144:53-77).

The sixth set of records is a series of resumes and applications from those seeking employment with OSC. Dkt. 144:53-77.

The Court finds no public interest in the secrecy of these documents and no clear statutory reason for secrecy.

7. In re OSC's Waukesha litigation (dkt. 145).

The seventh set of records relates to OSC's ongoing attempt to subpoena the mayors of several Wisconsin cities. Dkt. 145. The first twenty-five page subset are mundane emails related to the logistics of that case. Dkt. 145:1-25. The second subset is a legal brief submitted in, or prepared for, that litigation. Dkt. 145:26-59. The third subset "Wisconsin 5 Cities Investigation" at dkt. 145:60-92 appears to be an intra-office memorandum discussing that case. At least two different styles of handwriting appear on the document. Dkt. 145:76.

The fourth subset bears some additional explanation. That subset begins with "MJG notes" concerning the draft of a petition. Dkt. 145:93-102. Despite using those labels, these do not fall under the narrow "drafts" or "notes" exception to a "record" because the documents unambiguously were not for personal use. For example, the MJG note uses the plural "we will need to…" Dkt. 145:93.

The fifth subset is a series of subpoenas. Dkt. 145:103-109. The sixth and final subset is a memo from the Wisconsin Legislative Council at dkt. 145:110-113.

The Court finds no public interest in the secrecy of these documents and no clear statutory reason for secrecy.

8. Ker emails (dkt. 146:1-5).

The eighth set of records are a series of five emails between John Ker and OSC. Dkt. 146:1-5. Like the Wait/Heuer/Lindell emails, these have been separated only because of their common

participant, John Ker. Otherwise they are the sort of mundane emails to be expected.

The Court finds no public interest in the secrecy of these documents and no clear statutory reason for secrecy.

9. Election complaints (dkt. 146:6-7).

The ninth set of records is a series of citizen reports relating to problems with elections and ballots. Dkt. 146:6-7. These pages contain fifteen, one-sentence-long election complaints. Presumably, OSC's argument would be that these complainants and their anonymity are somehow strategically important. The Court can discern no reasonable strategy which could possibly be jeopardized by release of this record and its details of issues like "[d]eceased friend received two postcards stating thank you for voting."

The Court finds no public interest in the secrecy of this document and no clear statutory reason for secrecy.

10. Policies (dkt. 146:8-13).

The tenth set of records is a series of OSC office policies. Dkt. 146:8-13.The first subset is a "media contact policy." Dkt. 146:8-9. It is labeled "draft document" but it is addressed to "Staff, Special Counsel," that is, the entirety of the OSC.[19] Despite its label, this document was circulated to the OSC as a communication about their media contact policy, not as an invitation to prepare a document in the name of one individual's personal use. Indeed, a revised copy of the "media contact policy" appears to have incorporated the handwritten suggestions from the first policy. Dkt. 146:12.

The second subset is two policies labeled "open records policy." Dkt. 146:10-11. The

[19] The policy is also labeled, presumably in error, "Inter office memorandum."

opening paragraphs of that policy appear are later reproduced in a large-font format. Dkt. 146:13.

The Court finds no public interest in the secrecy of these documents and no clear statutory reason for secrecy.

11. Public relations (dkt. 146:14-40).

The eleventh set of records relate to OSC's public relations. Dkt. 146:14-40. The first subset are a written version of Michael Gableman's December 1, 2021, remarks to the Wisconsin Assembly Committee on Elections and Campaigns. Dkt. 146:14-18. A form of these remarks appear, presumably, in undated and unspecific writings at dkt. 146:21-36.

The second subset of remarks is a "video script #2" of Michael Gableman's October 1, 2021 remarks and an undated "video script #3." Dkt. 146:19-20, 37.

The third subset are not written versions of oral remarks. Instead, they are a letter from Michael Gableman to "Mr. Cotton," presumably the Ben Cotton identified in American Oversight's record request, and an article titled "rebutting Marley," a one-page essay purporting to be a "first draft" but also seeking a "contributor." Dkt. 146:38-40.

The Court finds no public interest in the secrecy of these documents and no clear statutory reason for secrecy.

12. The interim report (dkt. 146:41-62).

The twelfth set of records relates to an "interim report" released by OSC. Dkt. 146:41-62. These records include a "one-pager" summarizing the interim report, dkt. 146:41-42, an introductory statement, dkt. 146:43-44, and a copy of the interim report itself, which has already been released to the public. Dkt. 146:45-62.

The Court finds no public interest in the secrecy of these documents and no clear statutory reason for secrecy.

13. Jay Stone emails (dkt. 147:1-7).

The thirteenth set of records are emails to and from Jay Stone. Dkt. 147:1-7. More specifically, they are emails originally between Mr. Stone and the WEC, which have been forwarded to OSC, and they also serve to introduce attached documents, none of which appear relevant to OSC's purposes.

The Court finds no public interest in the secrecy of these documents and no clear statutory reason for secrecy.

14. In re the assembly and OSC (dkt. 147:8-11)

The fourteenth set of records are copies of already-public laws. These include assembly motions to create the OSC and the 2021 Assembly Resolution 15 discussed above. Dkt. 147:8-11.

The Court finds no public interest in the secrecy of these (already public) documents and no clear statutory reason for secrecy.

15. In re WEC and the CARES program (dkt. 147:12-26).

The fifteenth set of records relates to the "Coronavirus Aid, Relief and Economic Security Act," or "CARES." Dkt. 147:12-16. The first record is a memo from Meagan Wolfe, administrator of the Wisconsin Elections Commission ("WEC") addressed to Wisconsin's clerks. Dkt. 147:12-14. The next records appears to be from the cities of Milwaukee and Madison, respectively, in which the cities resolve to distribute funds to the WEC. Dkt. 147:15-18.

The next subset is titled "draft document for discussion purposes…" discussing WEC's role in elections. Dkt. 147:19-26. A draft distributed to others for discussion ceases to be a draft under Wis. Stat. § 19.32(2). *Voice of Wisconsin Rapids,* 2015 WI App 53, ¶21.

The Court finds no public interest in the secrecy of these documents and no clear statutory reason for secrecy.

16. Miscellaneous records (dkt. 147:27-38)

The sixteenth set of records defy categorization. This set includes: a partial copy of some kind of memo discussing Maricopa (presumably, Arizona) voters, dkt. 147:27, a series of one-page documents that appear to show fragments of voter data, plus a sort of checklist for "databases and lists" to obtain, dkt. 147:28-33, a complete copy of Chapter 811 of the Wisconsin Statutes, dkt. 147:34-37, and one-half of a printed email of indeterminate origin and content. Dkt. 147:38.

The Court finds no public interest in the secrecy of these documents and no clear statutory reason for secrecy.

17. Internally duplicate records (dkt. 147:39-79).

The seventeenth set of records are duplicates of records discussed above. Dkt. 147:39-79.

The Court finds no public interest in the secrecy of these documents and no clear statutory reason for secrecy.

18. Other entities' unrelated reports (dkt. 149, 161-164).

The eighteenth set of records are an extended grouping of reports created by entities other than OSC. By page length and complexity, this set is the largest and most interesting by far. However, these reports were created by various nongovernmental organizations, generally predating OSC's existence. Therefore, as a group, these three-hundred-plus pages may be analyzed quite easily. The public has no interest in keeping the work of private analysts secret, nor do any statutes prohibit the release of a private analysis. Nevertheless, the Court addresses them in turn:

The report at dkt. 149 is a series of photographs with labels purporting to identify voter fraud in, for example, student housing. Even if this was evidence of an investigation, neither voter registration data nor the appearance of the outsides of buildings are themselves secret. Combined, they could not possibly be part of any secret strategy.

The reports in dkt. 161 are a series of reports prepared by a nongovernmental agency called the Thomas More society, dkt. 161:1-62, plus a poll prepared by the center for excellence in polling regarding the preferences of Racine, WI, residents, dkt. 161:63-64.

The reports in dkt. 162 are a report prepared by a nongovernmental agency called the Wisconsin Institute for Law & Liberty, dkt. 162:1-16, a printed version of a PowerPoint presentation, dkt. 162:17-49, an article printed from a website called "www.thedailybeast.com" concerning a Georgia lawsuit, dkt. 162:50-59, and yet another report from the Thomas More society, dkt. 162:60-67.

The reports in dkt. 163 are not actually reports. These records describe Jay Stone and what appears to be a jeremiad against, to name a few, the Wisconsin Elections Commission, Mark Zuckerberg, and the star of the 1987 film *Predator,* Arnold Schwarzenegger. This continues into dkt. 164 with Mr. Stone's complaint against former First Lady of the United States Michelle Obama, film actor Tom Hanks, and twenty-one other individuals. Dkt. 164:1-59.

The Court finds no public interest in the secrecy of these documents and no clear statutory reason for secrecy.

19. LRB memos (dkt. 164:60-72).

The nineteenth and penultimate set of records are two memos drafted by Wisconsin's Legislative Reference Bureau. Dkt. 164:60-72.

The Court finds no public interest in the secrecy of these documents and no clear statutory reason for secrecy.

20. *Wisconsin Interest* article (dkt. 164:73-78).

The twentieth and final record produced by OSC is an article from the 2004 edition of *Wisconsin Interest.* Dkt. 164:73-78.

The Court finds no public interest in the secrecy of this documents and no clear statutory reason for secrecy.

V. DAMAGES

Finally, the Court addresses the remedies available under Wisconsin's public records law. The Court proceeds by setting forth the legal standard for punitive damages, and then, in light of that standard, discusses each of the Respondents' conduct in turn, and why punitive damages are necessary to ensure the public's right to access.

A. Legal standard for damages in a public records case.

The parties do not discuss damages, except that American Oversight requests they be awarded. Pet., dkt. 5:24. There are two sources of damages in a public records case. The first remedy is for attorneys' fees and costs.

Wis. Stat. § 19.37(2) provides:

> [T]he court shall award reasonable attorney fees, damages of not less than $100, and other actual costs to the requester if the requester prevails in whole or in substantial part in any action filed under sub. (1) relating to access to a record or part of a record under s. 19.35 (1) (a).

Thus, to recover fees and actual costs, the requester must (1) "prevail … in substantial part" in an action (2) "relating to access to a record." A party prevails if it "succeeds on any significant issue in litigation which achieves some of the benefit sought in bringing suit." *Kitsemble v. DHSS,* 143 Wis. 2d 863, 867, 422 N.W.2d 896 (Ct. App. 1988) (citations omitted).

The second remedy is for punitive damages:

> If 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.

Wis. Stat. § 19.37(3). Punitive damages under this section may not exceed $1,000. Wis. Stat. §

19.37(4).

"A decision is arbitrary and capricious if it lacks a rational basis or results from an unconsidered, willful and irrational choice of conduct." *Eau Claire Press Co. v. Gordon*, 176 Wis. 2d 154, 163, 499 N.W.2d 918 (Ct. App. 1993). "The purpose of punitive damages is to punish a wrongdoer or deter the wrongdoer and others from engaging in similar conduct in the future." WIS JI-CIVIL 1707.1; *See Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 302-303, 294 N.W.2d 437 (1980).

B. The writ is quashed with respect to Edward Blazel, against whom American Oversight has not prevailed.

For the reasons stated, the writ of alternative mandamus is quashed with respect to Edward Blazel. The petition does not allege facts which, if proven, would show Edward Blazel wrongfully withheld records. Accordingly, no damages may be awarded.

C. The assembly arbitrarily and capriciously denied access to its contractors' records.

American Oversight has prevailed against the assembly, which the Court has ordered in the alternative writ of mandamus to produce any records responsive to American Oversight's requests.

Further, the assembly had no rational basis to withhold its contractors' records and ignore Wis. Stat. § 19.36(3), which makes an authority responsible for those records. The assembly's argument about "practical realities" substitutes an invented standard of practicality for the legislature's unambiguous command to provide the "greatest possible information." Wis. Stat. § 19.31.

To be clear, OSC is itself an authority, and the assembly has no responsibility to provide access to OSC's records. Wis. Stat. § 19.36(3). However, the records of the assembly's non-

authority contractors remain the assembly's responsibility. For all of the reasons explained above, the assembly's refusal to search those records was arbitrary and capricious.

D. American Oversight has prevailed against Robin Vos, who arbitrarily and capriciously delayed his response to three requests for records.

American Oversight has prevailed against Robin Vos, who the Court has ordered to respond to American Oversight's requests. Robin Vos explains that the basis for his refusal to respond as follows:

> The substance of the requests in this case are duplicative of the requests American Oversight made in Case 21CV2440. The only difference is that the dates of the requests move out sequentially from July to August, then to September and then to October.

Robin Vos Resp. Letter, dkt. 138:1. Robin Vos does not explain any "duplicative" requests further in his letter. The legislative respondents do not explain the reasons for this delay/denial in their briefing, either.

To be clear, the "substance of the requests" are not duplicative because the two sets of requests at issue, and the two sets of requests at issue in Dane County Case No. 21-CV-2440, each seek records for different time periods. Robin Vos can no more shrug off this sort of request than the Wisconsin Elections Commission could shrug off a "duplicative" request for each years' election data. Responding to this sort of routine request may itself become a frustrating routine response for a high-level government servant. However, the public records law specifically realizes that responding to records requests is an "integral part of the routine duties…" of our government. Wis. Stat. § 19.31 (emphasis added). That duty must be fulfilled "as soon as practicable and without delay…" Wis. Stat. § 19.35(4).

Accordingly, the Court finds that Robin Vos arbitrarily and capriciously "delayed response to a request" by choosing not to respond until ordered to do so.

E. OSC arbitrarily and capriciously denied access.

American Oversight has prevailed against OSC, which the Court has ordered in the alternative writ of mandamus, and this decision, to release responsive records.

Further, OSC had no rational basis to withhold records. Courts look to an authority's conduct "when it refused disclosure." *Eau Claire Press*, 176 Wis. 2d at 163. OSC's conduct was a summary rejection based on unspecified "strategic information." Even assuming that OSC's decision at the time of denial was, as it now argues, based on a sort of broad investigatory immunity, such a decision would still have been an "unconsidered, willful and irrational choice of conduct." *Id.*

To summarize why OSC's decision would not have been rational even if based on its current legal arguments, the Court retreads those arguments: first, OSC argued that the Wisconsin constitution gave it the right to keep documents secret through a contractual confidentiality clause. But OSC cannot show that it has *any agreement* with the assembly, let alone one which contemplates this extraordinary transfer of power. Next, OSC argued that two statutes prohibited disclosure. One of these statutory arguments ignores the attorney general's thorough explanation of why OSC was wrong, and the other statutory argument simply misquotes the statute on which it relies. Finally, OSC argued that both a common law investigatory exemption and a public policy balancing test would require secrecy. As the Court's findings of facts show, the public has no interest in the secrecy of these records, none of which have the "nature" of the investigatory files contemplated by *Foust.*

A useful comparison case is *Eau Claire Press*, in which an authority wrongfully withheld records based on its mistaken belief that it was required by a settlement agreement to do so. *Id.* at 161-62. The court of appeals reversed a grant of punitive damages, explaining that "the city in this

instance was in a no-win situation … the city's conduct was based on a rational basis, its opinion that it must honor the … confidentiality agreement." *Id.* at 163. At first blush, *Eau Claire Press* militates against punitive damages here - OSC would likely argue that the same "no-win" situation of a breach on the one hand and a violation of the public records law on the other made its decision to withhold rational.

However, the Court does not read *Eau Claire Press* to create a blanket rule. Instead, courts "analyze the [authority's] conduct not when it made the promise but, rather, when it refused disclosure." *Id.* Looking to OSC's conduct on December 4, 2021, when it sent its email denying access, there are several key differences between OSC and the authority in *Eau Claire Press*:

First, the authority in *Eau Claire Press* told the requester about the confidentiality agreement, and further explained it had balanced the harm to the public interest which would result from a breach of that agreement. *Id.* at 157. Perhaps if OSC had told American Oversight that, in addition to "strategic information," it had "contractual obligations" which OSC had carefully evaluated in light of the public's strong interest, OSC's reason for denial would have been less capricious.

Second, one of the parties to the agreement in *Eau Claire Press* interceded and "demanded that the city honor the confidentiality agreement." *Id.* at 158. In this case, there is no evidence that the assembly cared about confidentiality, or indeed any of OSC's contractual obligations, if they even had an enforceable contract. Thus, unlike the authority in *Eau Claire Press*, OSC had no reason to believe itself to be in a "no-win" situation, and its summary rejection email was all the more arbitrary.

In sum, OSC's decision at the time of its denial of access was to send a three-sentence, misspelled, summary rejection email. This is the sort of "unconsidered and irrational conduct"

deserving of punitive damages.

ORDER

Based on the foregoing, the Court enters the following orders:

1. American Oversight's motion to strike portions of OSC's reply brief is GRANTED IN PART. Pages 11-21 of OSC's reply brief are stricken as overlong pursuant to Dane County Local Rule 115 and/or redundant pursuant to Wis. Stat. § 802.06(6).

2. American Oversight's motion to strike matters from OSC's responsive pleading is DENIED.

3. OSC's motion to stay proceedings to submit ex parte briefing is DENIED pursuant to the Court's discretion to conduct its in camera review.

4. OSC's motion to stay proceedings pending appeal is HELD IN ABEYANCE until the conclusion of March 8, 2022, oral arguments.

5. OSC's motion to quash the alternative writ of mandamus is DENIED for the reasons stated.

6. The legislative respondents' motion to quash the alternative writ of mandamus is GRANTED IN PART. American Oversight fails to show any wrongful withholding of records by Edward Blazel, with respect to whom the writ is quashed. The motion is otherwise DENIED.

7. The legislative respondents' alternative motion to strike part of the petition is DENIED.

8. American Oversight has prevailed in substantial part against OSC, Robin Vos, and the assembly. American Oversight shall be entitled to reasonable attorney's fees, damages, and costs under Wis. Stat. § 19.37(2). American Oversight shall submit a bill of costs which excludes any costs incurred with respect to Edward Blazel, against whom it fails to prevail in substantial part.

9. OSC, Robin Vos, and the assembly each arbitrarily and capriciously denied or delayed access to records.

10. OSC shall pay punitive damages in the amount of $1,000, which amount is the minimum necessary to punish OSC for its arbitrary denial of access, and to deter this sort of conduct in the future.

11. The assembly shall pay punitive damages in the amount of $1,000, which amount is the minimum necessary to punish the assembly for its arbitrary denial of access, and to deter this sort of conduct in the future.

12. Robin Vos shall pay punitive damages in the amount of $1,000, which amount is the minimum necessary to punish Robin Vos for his arbitrarily delayed response to a request, and to deter this sort of conduct in the future.

12. These orders are **ALL STAYED** pending the Court's order addressing OSC's motion to stay pending appeal. That motion will be addressed on March 8, 2022.

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