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2023CV002506

BY THE COURT:

DATE SIGNED: November 28, 2023

Electronically signed by Frank D Remington
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT BRANCH 8 DANE COUNTY

STATE ex rel. AMERICAN OVERSIGHT, et al.,

Plaintiffs,

v. Case No. 23-CV-2506

SECRET PANEL, et al.,

Defendants.

DECISION AND ORDER
GRANTING DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

Between August 11 and September 13, 2023, Wisconsin State Representative Robin Vos told journalists that he asked a panel of retired Wisconsin Supreme Court justices to advise him on the possible impeachment of a sitting justice. American Oversight suspected that panel of unnamed justices—the "Secret Panel"—could have met for the purpose of conducting governmental business in violation of Wisconsin's open meetings law. American Oversight asked the Dane County District Attorney to investigate. Five days later, and with no word from the district attorney, American Oversight commenced this action. It raises four claims under the open

meetings law and a fifth claim arising under the public records law.

Vos[1] now moves to dismiss each of the four open meetings law claims. He says American Oversight fails to allege the existence of any governmental body which might be subject to the open meetings law. Alternatively, Vos points to a statutory waiting period in the enforcement provision of the open meetings law which says private citizens can only bring claims "[i]f the district attorney refuses or otherwise fails to commence an action to enforce this subchapter within 20 days after receiving a verified complaint …." Wis. Stat. § 19.97(4). According to American Oversight's complaint, neither of these things happened. Vos therefore concludes the court has no competency to award any relief.

"Upon a motion to dismiss, we accept as true all facts well-pleaded in the complaint and the reasonable inferences therefrom." *Data Key Partners v. Permira Advisers,* 2014 WI 86, ¶18, 356 Wis. 2d 665, 849 N.W.2d 693. The complaint alleges Vos ordered the creation of a panel, then defined the panel's membership and duties. When that panel allegedly convened for the purpose of exercising those duties, it plainly violated the open meetings law. I nevertheless grant Vos' motion to dismiss because Wis. Stat. § 19.97(4) limits private enforcement of the open meetings law. After American Oversight told the district attorney about the Secret Panel, § 19.97(4) required it wait for either (1) the district attorney's refusal to prosecute or (2) twenty days. American Oversight did neither, and as a result, its "failure to comply with a statutory mandate results in a loss of competency that prevents a court from adjudicating the specific case before it." *Fabyan v. Achtenhagen,* 2002 WI App 214, ¶7, 257 Wis. 2d 310, 652 N.W.2d 649.

[1] American Oversight names a "Secret Panel," Robin Vos, and the Hon. David T. Prosser as defendants. Amend. Compl., dkt. 70. Both Vos and Justice Prosser have filed motions to dismiss. Both motions rely on similar arguments. For brevity, I refer to the named defendants, together, as Vos. Where Justice Prosser's motion raises additional points, I address those too.

Accordingly, I grant Vos' motion to dismiss claims one, two, three, and four in the amended complaint. Claim five, arising under the public records law, is not dismissed.

I. BACKGROUND

A. Factual allegations.

American Oversight alleges these facts, which I must accept as true. *Data Key*, 2014 WI 86, ¶18.

American Oversight infers the existence of a secret panel of retired justices primarily from three interviews Vos gave to print and radio journalists in August and September. The first interview was broadcast over the radio on August 11, 2023. Amend. Compl. ¶7. Asked whether he would consider impeaching newly-elected Supreme Court justice Janet Protasiewicz, Vos responded it "could be something we would consider." *Id.* In a second interview reported by the Associated Press on August 31, Vos said "I want to do legal research and see if this [impeachment] is unprecedented … we have to take a look at it." *Id.* ¶9.

The third interview, broadcast over the radio on September 13, contains Vos' only direct characterization of a panel. *Id.* ¶10. Vos said he was "asking a panel of former members of the state supreme court to review and advise … what the criteria are for impeachment …." *Id.* Specifically, Vos explained the purpose of the panel was to "do the legal research and make sure that they come and let me know what are the inherent powers that the legislature has, how would the process [of impeachment] work, and to move forward." *Id.* ¶11 (alteration in original). However, Vos "refused to identify the members of the Secret Panel …." *Id.* ¶12. Vos further stated his expectation that the panel's work would complete in the "next few weeks." *Id.* ¶16.

On September 20, American Oversight filed a verified complaint with the Dane County District Attorney alleging violations of the open meetings law. *Id.* ¶21. Two days later, on

September 22, the district attorney responded by telling American Oversight it would reach out to Vos and Justice Prosser. *Id.* ¶22.

The same day the district attorney responded to American Oversight on September 20, the panel met with Vos' chief of staff[2] at a lunch meeting. *Id.* ¶18. The purpose of the meeting, at least in part, was to "seek clarity" on the panel's duties. *Id.* Additionally, one panelist opined during the meeting that impeachment was not warranted. *Id.*

B. Procedural posture.

On September 25, or five days after filing its complaint with the district attorney, American Oversight commenced this action to enforce the open meetings law. Compl., dkt. 2. American Oversight further sought preliminary injunctive relief to bar any future unlawful meetings. *Id.* At this time, American Oversight's original complaint named only the "Secret Panel" as a defendant and made claims only under the open meetings law. *Id.*

On September 29, I granted Vos' motion to intervene, heard oral argument, and then denied American Oversight's motion for an injunction. Tr. of Sep. 29, 2023 Hr'g, dkt. 43. I concluded, in relevant part, that American Oversight was not entitled to injunctive relief because:

> [T]aking into consideration this period of time where the legislature has said and I believe made clear that that period is reserved for an investigation by the elected district attorney charged with representing the interests of the state, it is for District Attorney Ozanne to use that period of time to discharge the authority given to him under the Public Meetings Law.
>
> I also rely on the clear and express language in the Attorney General's Wisconsin Open Meetings Compliance Guide, which says unequivocally that

[2] The amended complaint refers specifically to Vos' chief of staff. Justice Prosser has since clarified the person who met with the panel was instead Vos' counsel. Supp. Prosser Aff., ¶¶3-5, dkt. 113. I further note that Vos denies some of these allegations. *E.g.,* Vos Aff. ¶4, dkt. 130 ("I have never asked [the retired justices] to meet with one another, to discuss any topics, or to conduct any governmental business."). I note these apparent inconsistencies only for clarity, not because it matters to Vos' motion to dismiss. *See Alliance Laundry Sys's, LLC v. Stroh Die Casting Co.,* 2008 WI App 180, ¶¶13-14, 315 Wis. 2d 143, 763 N.W.2d 167 ("The court disposes of a motion to dismiss by examining the complaint ….").

> an individual may not bring a private enforcement action prior to the expiration of the District Attorney's 20-day review period.

Id. at 27-28.

At the September 29 hearing, the district attorney confirmed he had not refused to bring an action under the open meetings law. The district attorney explained his investigation was ongoing, that he was "trying to actually move as best we can with the resources we have," and he further sought information from Justice Prosser. *Id.* at 30-31. When asked, however, Justice Prosser refused to identify other members of the panel or to say whether the panel would meet in the near future. *Id.* at 31.

On October 16, American Oversight amended its complaint to add Vos and Justice Prosser as defendants and also to include a new claim arising under the public records law. Amend. Compl., dkt. 70. Vos and Justice Prosser have since moved to dismiss all of the open meetings claims, but they do not also seek to dismiss the public records claim. Dkt. 125, 127.

II. LEGAL STANDARD

"A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint." *Data Key*, 2014 WI 86, ¶19. "[T]he sufficiency of a complaint depends on substantive law that underlies the claim made because it is the substantive law that drives what facts must be pled. Plaintiffs must allege facts that plausibly suggest they are entitled to relief." *Id.* ¶31. "If proof of the well-pleaded facts in a complaint would satisfy each element of a cause of action, then the complaint has stated a claim upon which relief may be granted." *Cattau v. Nat. Ins. Servs. of Wisconsin, Inc.*, 2019 WI 46, ¶6, 386 Wis. 2d 515, 926 N.W.2d 756 (per curiam).

III. DISCUSSION

Vos seeks to dismiss American Oversight's claims arising under Wisconsin's open

meetings law for two principal reasons. First, he contends that the complaint does not allege the existence of a governmental body because it contains "no suggestion of a collective body with a defined membership …." Vos Br., dkt. 127:14; *see* Prosser Br., dkt. 125:12 (the complaint "makes no mention of collective authority, action or duty."). Vos thus concludes that where no governmental body existed, no violation of the open meetings law could occur. Second, Vos argues the Court has no competency to adjudicate a claim under the open meetings law because American Oversight ignored the district attorney's exclusive enforcement period in § 19.97(4). Vos Br., dkt. 127:5; Prosser Br., dkt. 125:2. I address these two arguments, in sequence.

A. The complaint contains factual allegations that plausibly suggest the Secret Panel violated the open meetings law.

1. The open meetings law applies only to "governmental body" that holds a "meeting."

Because "the substantive law drives what facts must be pled," I begin with the law under which American Oversight's claims arise. Wisconsin's "legislature has made the policy choice that, despite the efficiency advantages of secret government, a transparent process is favored." *State ex rel. Citizens for Responsible Dev. v. City of Milton*, 2007 WI App 114, ¶6, 300 Wis. 2d 649, 731 N.W.2d 640; *see* Wis. Stat. § 19.81(1). Our supreme court repeatedly recognizes this commitment to transparency:

> If Wisconsin were not known as the Dairy State it could be known, and rightfully so, as the Sunshine State. All branches of Wisconsin government have, over many years, kept a strong commitment to transparent government.
>
> Open records and open meetings laws, that is, "Sunshine Laws," are first and foremost a powerful tool for everyday people to keep track of what their government is up to. The right of the people to monitor the people's business is one of the core principles of democracy.

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

(ellipsis, some quotation marks, and note omitted); *see, e.g.*, *Democratic Party of Wisconsin v. DOJ,* 2016 WI 100, ¶10, 372 Wis. 2d 460, 888 N.W.2d 584 ("Wisconsin is firmly committed to open and transparent government …."); *see also Citizens United v. FEC,* 558 U.S. 310, 371 (2010) ("transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.").

The open meetings law is part of this commitment to transparent government. It requires that "[e]very meeting of a governmental body shall be preceded by public notice … and shall be held in open session." Wis. Stat. § 19.83(1). And, because of Wisconsin's policy of openness, the open meetings law "shall be liberally construed …." Wis. Stat. § 19.81(4). To summarize, a complaint states a claim under the open meetings law when it plausibly suggests that (1) a governmental body (2) held a meeting (3) in private.

By its plain terms, the open meetings law applies only to a "governmental body." That term "means a state or local agency, board, commission, committee, council, department or public body corporate and politic created by constitution, statute, ordinance, rule or order." Wis. Stat. § 19.82(1). Thus, a governmental body has two features: first, a "defined membership" in whom "responsibilities, authority, power, or duties must be delegated …" *State ex rel. Krueger v. Appleton Area Sch. Dist. Bd. of Educ.,* 2017 WI 70, ¶24, 376 Wis. 2d 239, 898 N.W.2d 35, and second, "there must be a constitutional provision, statute, ordinance, rule, or order that caused a governmental body to exist where none existed before." *Id.* (emphasis added).

The open meetings law also requires that a governmental body holds a "meeting." "'Meeting' means the convening of members of a governmental body for the purpose of exercising the responsibilities … vested in the body." Wis. Stat. § 19.82(2). To determine whether a "meeting" has taken place, "the trigger is twofold": first, there must be "a purpose to engage in

governmental business …" and second, "the number of members present must be sufficient to determine the parent body's course of action regarding the proposal discussed." *State ex rel. Newspapers, Inc. v. Showers,* 135 Wis. 2d 77, 102, 398 N.W.2d 154 (1987).

2. The complaint alleges the Secret Panel was a governmental body.

I turn next to American Oversight's complaint[3] to see whether it alleges a governmental body held a meeting. Vos says the complaint fails to allege the existence of a governmental body based on his characterization of the Secret Panel as "three separate individuals" who Vos asked "for their individual assessments." Vos Br., dkt. 127:2. To reach this conclusion, Vos does not cite factual allegations consistent with his characterization of the panel. He instead relies principally on four authorities: *Krueger,* a June 8, 2005, advisory letter authored by the attorney general, the district attorney's letter declining to intervene in this matter, and the attorney general's thorough open meetings compliance guide. Before turning to those authorities, I note that the attorney general's writings bear special importance because "[t]he legislature has expressly charged the state attorney general with interpreting the open meetings and public records statutes …." *State v. Beaver Dam Area Dev. Corp.*, 2008 WI 90, ¶37, 312 Wis. 2d 84, 752 N.W.2d 295.

Krueger dealt with a governmental body called the Appleton Area School District Communication Arts 1 Materials Review Committee, or "CAMRC." 2017 WI 70, ¶1. The details of CAMRC's creation are not material to its status as a governmental body and are far more

[3] In a footnote in its response brief, American Oversight asserts that its complaint "incorporated" various other litigation materials, including two other motions, a brief, and an affidavit. AO Resp. Br., dkt. 131:11 fn.4 (citing *Bank of New York Mellon v. Klomsten*, 2018 WI App 25, ¶¶23, 26, 381 Wis. 2d 218, 911 N.W.2d 364). The cited *Bank of New York Mellon* does not say a plaintiff may incorporate an entire library of past filings into his or her complaint. *See Soderlund v. Zibolski*, 2016 WI App 6, ¶38, 366 Wis. 2d 579, 874 N.W.2d 561 (discussing the incorporation by reference doctrine). Under Wisconsin law, a complaint is a "short and plain statement of the claim …." Wis. Stat. § 802.02(1)(a). I decline to consider these other documents when determining the sufficiency of American Oversight's complaint.

complex than the present case, *see id.* ¶¶4-7, but to summarize, a school board created CAMRC through its promulgation of a handbook. In explaining why that body was subject to the open meetings law, our supreme court relied on an opinion of the attorney general that explained "[l]oosely organized, ad hoc gatherings of government employees, without more, do not constitute governmental bodies." *Id.* ¶26 (citing 57 Wis. Op. Atty. Gen. 213, 216 (1968)). The court continued to adopt the attorney general's conclusion that a governmental body must possess "power to take collective action that the members could not take individually." *Id.* (citing 57 Wis. Op. Atty. Gen. at 218). Applying those principles, CAMRC was a governmental body because its all-volunteer membership was not "loosely-defined," *id.* ¶29, and because the group had authority to recommend a curriculum its individual members did not have, *id.* ¶30. As for CAMRC's creation by a "rule," *Krueger* explains that phrase "includes any authoritative, prescribed direction for conduct …." *Id.* ¶33.

Vos thinks that, in contrast to CAMRC, the Secret Panel was not created by rule so it cannot be a governmental body. This is not a useful comparison, however, because a governmental body is "created by constitution, statute, ordinance, rule or order." Wis. Stat. § 19.82(1) (emphasis added). I must give the word "order" its common meaning. *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. One common meaning of order is an "authoritative direction or instruction." www.dictionary.com/browse/order (last visited Nov. 21, 2023). The attorney general has used this same common meaning of "order" to conclude the informal appointment of a "citizens' advisory group" constituted an "order" under the open meetings law. Atty. Gen. La Follette Letter to Nicholas Funkhouser (Mar. 17, 1983), available online at https://www.doj.state.wi.us/sites/default/files/dls/ompr/19830317-funkhouser.pdf. In this case, Vos' request for legal advice plausibly suggests an "authoritative direction." On a motion

to dismiss, I must accept these allegations as true and conclude the Secret Panel was created by an "order." To the extent *Krueger* serves as a useful comparison, the complaint also plausibly suggests that the Secret Panel's authority to recommend impeachment was just like CAMRC's authority to recommend a curriculum.

The second authority on which Vos principally relies is a letter from the attorney general to a citizen seeking advice on the applicability of the open meetings law to an ad hoc "Management Team" of school administrators. The letter provided no details except to say the Management Team was comprised of administrative staff that met at roughly bi-weekly intervals. Assistant Atty. Gen. Thomas Bellavia letter to Joe Tylka, (June 8, 2005), available online at https://www.doj.state.wi.us/sites/default/files/dls/ompr/20050608-tylka.pdf. Based on the limited facts available, the attorney general concluded the Management Team "does not ordinarily take collective action … and operates on a consensus basis, with no quorum requirements and no voting or other formal mechanism of collective decision making." *Id.* at 3. In the absence of this collective action, the attorney general opined the Management Team was not a governmental body. *Id.*

Like his comparison to *Krueger*, comparison to a Management Team that took no collective action does not help Vos. The complaint alleges Vos sought asked a *panel*, not any individual justices, for legal advice. Amend. Compl. ¶10. In doing so, the complaint plausibly suggests Vos ordered a collective response.

Vos next points to the district attorney's letter declining to intervene in this matter. Vos Br., dkt. 127:16. On October 25, the district attorney filed a letter stating: "it does not appear to me that the no-longer 'Secret Panel' was a governmental body …." District Attorney Ozanne Letter to the Court (Oct. 25, 2023), dkt. 122. In a brief explanation of his reasoning, the district attorney appears to have concluded that the panel "was convened at the request of [Vos] …" but

the district attorney also concluded that "no rule created the panel …." *Id.* The district attorney did not discuss the definition of a "rule" or the possibility that Vos "ordered" the creation of a panel. In any event, the letter cites no authority and provides no meaningful analysis to support this part of district attorney's reasoning,[4] so, respectfully, I discuss it no further.

Finally, Justice Prosser cites the attorney general's open meetings law compliance guide for the proposition that American Oversight was required to allege "the three former justices were directed by Speaker Vos to make a collective report or recommendation on the question he presented …." Prosser Br., dkt. 125:11 (citing Wisconsin Dep't of Justice, Wisconsin Open Meetings Law Compliance Guide (May 2019) at 8, https://www.doj.state.wi.us/sites/default/files/office-open-government/Resources/OML-GUIDE.pdf (last visited Nov. 20, 2023). I do not understand Justice Prosser's citation here because, no matter how else one characterizes the complaint, it repeatedly alleges Vos sought action from a "panel." Amend. Compl. ¶¶2, 10-12. To repeat, one reasonable inference from these allegations is that Vos did seek collective action from that panel.

In sum, I do not agree any of Vos' cited authorities demonstrate the Secret Panel—as described by the factual allegations in the complaint—was not a governmental body. The complaint plausibly suggests that panel was a governmental body because, accepting its well-pleaded factual allegations and all reasonable inferences therefrom as true:

(a) The Hon. David Prosser, the Hon. Patience Roggensack, and the Hon. Jon Wilcox were members of the panel. Amend. Compl. ¶2. This satisfies the requirement that a governmental body have a "defined membership."

(b) The purpose of the panel was to "review and advise" Vos on impeachment. *Id.* ¶10. This

[4] I emphasize that the purpose of the district attorney's letter was to advise the court on whether he would intervene, not to undertake a thorough analysis of the sufficiency of the allegations concerning the Secret Panel. Indeed, the district attorney's letter continues to discuss well-reasoned practical considerations that have nothing to do with the applicability of the open meetings law.

satisfies requirement that a governmental body has delegated responsibilities.

(c) Vos asked the panel—the *panel*, not the individual justices—to advise him, *id.* ¶10, on discharging what he believed was constitutional duty to consider impeachment, *id.* ¶15. Vos further believed that the panel's work would conclude within a "few weeks," *id.* ¶16, and dispatched his staff to supervise the panel's September 22 lunch meeting, *id.* ¶18. These allegations satisfy the requirement that a body was created by an order.

Accordingly, I conclude the complaint alleges the existence of a governmental body.

3. The complaint plausibly alleges the Secret Panel held a meeting.

The next element of a claim under the open meetings law is that the governmental body held a "meeting." Vos says American Oversight fails to satisfy this element because a meeting must be "for the purpose of exercising the responsibilities … delegated to or vested in the body." Wis. Stat. § 19.82(2). As I understand Vos' argument, he thinks no governmental body existed, and because non-existent bodies have no responsibilities, no "meeting" could have possibly taken place. Vos Br., dkt. 127:15.

This argument is not persuasive because I have already explained how the complaint alleges the Secret Panel was a governmental body. The complaint further alleges all of that body's members met. Amend. Compl. ¶18. The alleged purpose of that meeting was to discuss the process the panel should follow, *id.*, so these allegations satisfy the "twofold trigger" for a meeting: (1) "a purpose to engage in governmental business …" and (2) a sufficient number of members. *Showers*, 135 Wis. 2d at 102.

Accordingly, I also conclude the complaint alleges a governmental body held a meeting. Nobody disputes that the meeting was held in secret, so I must also conclude the complaint alleges a violation of the open meetings law.

B. American Oversight deprived the Court of competency to award any relief when it usurped the district attorney's exclusive enforcement period.

Vos next argues that, even if the Secret Panel violated the open meetings law, American Oversight's claims in this matter still must be dismissed for lack of competency. To unpack Vos' argument, I first explain why courts may lose competency to award relief when a party disobeys a statutory mandate. I then turn to the statutorily-defined waiting period Vos thinks American Oversight disobeyed. Because I conclude that waiting period is central to the open meetings law, I must also conclude American Oversight's failure to wait has deprived the court of competency. And, as a result, this requires dismissing American Oversight's claims under the open meetings law.

1. Courts may lose competency to award any relief when a party fails to obey an important statutory mandate.

"A court's 'competency' … is defined as the power of a court to exercise its subject matter jurisdiction in a particular case." *City of Eau Claire v. Booth,* 2016 WI 65, ¶7, 370 Wis. 2d 595, 882 N.W.2d 738 (citations and quotation marks omitted). "[A] circuit court may lose competency to enter judgment in a particular case if statutory requirements are not met." *Id.* ¶21. However, not all failures to abide a statutory mandate matter—a court loses competency "only when the failure to abide by a statutory mandate is central to the statutory scheme of which it is a part." *Id.* This analysis "depends upon an evaluation of the effect of noncompliance on the court's power to proceed in the particular case before the court." *Vill. of Trempealeau v. Mikrut,* 2004 WI 79, ¶10, 273 Wis. 2d 76, 681 N.W.2d 190 (citation omitted). Simply put, "failure to comply with a statutory mandate results in a loss of competency that prevents a court from adjudicating the specific case before it." *Fabyan,* 2002 WI App 214, ¶7.

2. The open meetings law allows private enforcement only after a district attorney's exclusive enforcement period.

Enforcement of the open meetings law "shall be enforced in the name and on behalf of the

state by the attorney general or, upon the verified complaint of any person, by the district attorney of any county wherein a violation may occur." Wis. Stat. § 19.97(1). As an exception to this rule, the public may enforce the open meetings law "[i]f the district attorney refuses or otherwise fails to commence an action … within 20 days after receiving a verified complaint …." Wis. Stat. § 19.97(4). In this way, the open meetings law creates only two alternatives for a party who wants to commence their own private enforcement action: after filing a verified complaint with the district attorney, (1) the district attorney must either refuse to commence an action, or (2) the private party must wait twenty days.

3. American Oversight's amended pleading is not material to the question of whether the court lost competency by a premature filing.

As at threshold matter, American Oversight contends that competency plays no role here because it amended its complaint more than twenty days after it complained to the district attorney. AO Resp. Br., dkt. 131:4-6. American Oversight cites no authority that would allow a plaintiff to circumvent important statutory deadlines by creative use of amended pleadings.

I do not understand the parties' dispute on this point because the applicable waiting period in § 19.97(4) limits when a person may "bring an action." Neither party explains what they think it means to "bring an action." Giving that phrase its ordinary meaning, it means: "To sue; institute legal proceedings." *Black's Law Dictionary* (11th ed. 2019). In Wisconsin, the institution of legal proceedings takes place when an action is "commenced," which occurs "when a summons and a complaint … are filed with the court." Wis. Stat. § 801.02(1). The amendment of a pleading does not change the date on which it was previously filed, so I do not understand why American Oversight thinks its amended complaint matters to the question of whether disobedience of § 19.97(4) deprives the court of competency.

But in any event, I reject American Oversight's unsupported argument that it can evade a statutory time limit by amending its pleading. In other contexts, courts have refused to allow a party to escape the consequences for violating statutory requirements through amendment because "[t]o conclude otherwise would furnish a complainant with a loophole in which the consequences of failing to follow the strictures for commencing an action are removed." *Bartels v. Rural Mut. Ins. Co.*, 2004 WI App 166, ¶17, 275 Wis. 2d 730, 687 N.W.2d 84. Put differently, amendment cannot be a panacea for the violation of a statute or else every limiting statute would be "rendered inconsequential by merely following the procedure for amending a pleading." *Id.* So regardless of whether § 19.97(4)'s waiting period is central to the open meetings law, I decline to furnish American Oversight with a loophole for its amended pleadings.

4. American Oversight deprived the Court of competency to award it any relief when it failed to wait for the district attorney.

Finally, I address the effects of American Oversight's non-compliance with § 19.97(4). American Oversight commenced this action only five days after complaining to a district attorney who has never "refused" to prosecute. In doing so, American Oversight plainly violated Wis. Stat. § 19.97(4). If that statute is central to the open meetings law, then American Oversight's violation will have deprived the court of competency and the matter must be dismissed. If not, I must deny Vos' motion to dismiss.

In other words, all that remains to decide is whether the waiting period in § 19.97(4) is central to the open meetings law. No appellate court has addressed this question. The attorney general, though not framed as a direct response to the question of competency, has concluded that "an individual may not bring a private enforcement action prior to the expiration of the district attorney's twenty-day review period …." Wisconsin Dep't of Justice, *supra*, at 31. The parties

offer competing analyses of the time limit in § 19.97(4) and how it fits within the structure of the open meetings statutes.

Vos says the waiting period is central. He first relies on *Vill. of Elm Grove v. Brefka*, 2013 WI 54, ¶7, 348 Wis. 2d 282, 832 N.W.2d 121, in which a drunk driver violated a ten-day statutory limit within which to challenge the revocation of his driver's license. Although Vos cites this case as an example of a different court finding a different statute central, Vos does not examine *Brefka's* reasoning[5] except to state the well-accepted rules for competency. Vos Br., dkt. 127:6. I will not abandon my neutral role to develop arguments for either party: "it is up to them to make their case." *Serv. Emps. Int'l Union. Loc. 1 v. Vos*, 2020 WI 67, ¶24, 393 Wis. 2d 38, 946 N.W.2d 35.

Vos next cites *Fabyan*, which he thinks is "case law holding that a lack of compliance with Wis. Stat. § 19.97 deprives the court of competency to proceed." Vos Br., dkt. 127:9. *Fabyan* dealt with a open meetings claimant's "failure to bring this action on behalf of the State …." *Fabyan*, 2002 WI App 214, ¶1. The case says nothing about the waiting period in § 19.97(4) and does not discuss the open meetings law's statutory scheme. Actually, *Fabyan* says little useful to the competency analysis because as the court of appeals explains in a footnote, Fabyan apparently "does not raise the issue." *Id.* ¶8 n.3.

Justice Prosser additionally relies on *J. Times v. Police & Fire Comm'rs Bd.,* 2015 WI 56, 362 Wis. 2d 577, 866 N.W.2d 563. In a footnote inserted into a discussion of whether the parties had "prevailed in substantial part" such that attorneys fees might be awarded, the supreme court

[5] *Brefka* continues to explain two reasons why the statute holding drivers to a ten day limit was central to the revocation process: first, because it serves the purpose of the underlying revocation legislation to "get drunk drivers off the road as expeditiously as possible and with as little possible disruption of the court's calendar." *Brefka*, 2013 WI 54, ¶42 (alteration omitted, quoting *State v. Brooks*, 113 Wis. 2d 347, 359, 335 N.W.2d 354 (1983)), and second, because if the ten day limit was not mandatory, it would "change the precise penalty structure set forth in the implied consent law … contrary to its legislative purposes." *Id.* ¶43.

said that to "pursue[] an action under the open meetings law, [the newspaper] would have been required to file a complaint with a district attorney and then wait 20 days for a response from the district attorney before filing suit. *See* Wis. Stat. § 19.97(1), (4)." *J. Times,* 2015 WI 56, ¶86 n.28. Although this is consistent with the attorney general's opinion and the plain text of § 19.97(4), nothing in this case addresses the centrality of the waiting period.

American Oversight offers a competing vision of § 19.97. It says the waiting period cannot be a central part of the open meetings law because such an interpretation would displace the strong policy of openness. As an example of the policy triumphing over a statutory waiting period, American Oversight points to *State ex rel. Auchinleck v. Town of LaGrange,* in which our supreme court refused to apply a 120-day notice of claim statute to the open meetings law because "requiring a citizen to wait up to 120 days … frustrates the purpose of that law. During this delay, the municipality could take significant action without public input or scrutiny of the process." 200 Wis. 2d 585, 595, 547 N.W.2d 587 (1996).

American Oversight then applies the analysis courts use when determining the mandatory or directory nature of a statute. Those factors include "the objectives sought to be accomplished by the statute, its history, the consequences which would follow from the alternative interpretations, and whether a penalty is imposed for its violation." *Eby v. Kozarek,* 153 Wis. 2d 75, 80, 450 N.W.2d 249 (1990) (quoting *State v. Rosen,* 72 Wis. 2d 200, 207, 240 N.W.2d 168 (1976)). *Eby* used this analysis to determine that a fifteen-day limitation period in which to demand mediation after the commencement of an action was directory, not mandatory, although it reached this conclusion primarily because it found a related statute that explained the effects of a failure to seek mediation. *Id.* at 81. Applying these same factors, American Oversight concludes "[f]inding that the twenty-day provision is mandatory would incentivize governmental bodies to operate

quickly behind closed doors to prevent a fruitful investigation ….” AO Resp. Br., dkt. 131:11.

I conclude that the time limit in § 19.97(4) is central to the purpose of the open meetings law. Principally, this is because I share the attorney general’s common sense belief that district attorneys have an important role to play in upholding Wisconsin’s commitment to open government. Here is the attorney general’s explanation for why district attorneys may very well be the *most important* part of the open meetings law’s enforcement process:

> Both the Attorney General and the district attorneys have authority to enforce the open meetings law. In most cases, enforcement at the local level has the greatest chance of success due to the need for intensive factual investigation, the district attorneys’ familiarity with the local rules of procedure, and the need to assemble witnesses and material evidence.

Wisconsin Dep’t of Justice, *supra*, at 31. That the district attorney should play so important a role should come as little surprise—the district attorney is “a minister of justice and not simply that of an advocate.” SCR 20:3.8 cmt. 1; *see also O’Neill v. State,* 189 Wis. 259, 207 N.W. 280, 281 (1926) (“The district attorney is not a mere legal attorney. ‘He is a sworn minister of justice.’”) (quoting *State v. Russell,* 83 Wis. 330, 338, 53 N.W. 441 (1892)). Unsurprisingly, district attorneys bring many such enforcement actions. *E.g., Ozanne v. Fitzgerald,* 2011 WI 43, ¶1, 334 Wis. 2d 70, 798 N.W.2d 436.

Consistent with his or her role in this process, § 19.97(4) also offers district attorneys the option to immediately trigger a private right of enforcement by “refusing” to commence an action. This means that a district attorney confronted with allegations of a unlawful, secret, and immediately-scheduled government meeting retains the option to defer to private enforcement if he or she so chooses. To the extent a district attorney neglects or abuses their authority to prosecute emergency violations of the open meetings law, the remedy lies in the democratic process, not a creative re-writing of the open meetings statutes.

This conclusion may seem at odds with the legislature's declared policy of liberally construing the open meetings law in favor of openness. But I cannot "change the wording of a statute by liberal construction to mean something that the legislature did not intend, or that the plain language of the statute will not support." *Progressive Northern Ins. Co. v. Romanshek*, 2005 WI 67, ¶25, 281 Wis. 2d 300, 697 N.W.2d 417 (quoting *Hayne v. Progressive Northern Ins. Co.*, 115 Wis. 2d 68, 85 n.11, 339 N.W.2d 588 (1983)). A plain reading of § 19.97(4) shows that the legislature gave district attorneys a specific role in the enforcement process. The attorney general thinks that role gives enforcement actions "the greatest chance of success." As a result I cannot conclude, as our supreme court did when examining a much longer waiting period in *Auchinleck*, that § 19.97(4) "frustrates the purpose" of the open meetings law.

In concluding the waiting period is central to the statutory scheme for enforcement of the open meetings law, I do not overlook the fact that § 19.97(4) contains no explicit penalty for noncompliance with the waiting period. However, the plain statutory text, the attorney general's opinion on the importance of district attorneys, and the option to defer to private enforcement, all weigh in favor of a mandatory construction and, together, outweigh the absence of a penalty clause. Furthermore, for the same reasons that American Oversight could not evade § 19.97(4) by amending its complaint, interpreting the waiting period as an option would write it out of existence. That is, American Oversight's proposed reading of § 19.97(4) "would furnish a complainant with a loophole in which the consequences of failing to follow the strictures for commencing an action are removed." *Bartels*, 2004 WI App 166, ¶17.

Ultimately, I do not share American Oversight's fear that bad actors may use a mandatory construction of the waiting period in § 19.97(4) to conceal government affairs in secret, short-term meetings. Rather, the waiting period expresses the legislature's preference for enforcement by

district attorneys. Because that preference is central to Wisconsin's statutory scheme for open government, American Oversight's failure to either wait for the district attorney to refuse or for twenty days has deprived the Court of competency to award it any relief.

C. Conclusion.

"Under our constitutional order, government derives its power solely from the people." *SEIU v. Vos,* 2020 WI 67, ¶1, 393 Wis. 2d 38, 946 N.W.2d 35. The people of Wisconsin have chosen a transparent system of government. Secret panels serve no purpose in that system. To borrow from two commentators:

> Transparency in government is not a liberal or conservative issue, it is a good government issue. Taxpayers deserve access to government records, so they can keep politicians all across this great state honest and accountable.

Brett Healy and Rick Esenberg, *Joint Statement of the John K. MacIver Institute for Public Policy and the Wisconsin Institute for Law & Liberty* (July 3, 2015), https://www.maciverinstitute.com/2015/07/maciver-and-will-issue-statement-on-open-record-changes/.

The procedural posture of this case requires me to accept all of the allegations in the complaint as true. Accepting those allegations as true—that is, assuming the Secret Panel was organized and charged as Vos allegedly said it was in the press—the public indisputably would have the right to know the identity and the mission of that panel. Nothing in this opinion should be construed to discourage elected officials from consulting learned men and women in matters of state government. Indeed, new evidence that goes beyond the four corners of the pleadings suggests that Justice Prosser and Justice Wilcox advised Vos, as independent experts, on a correct interpretation of the law.

For the reasons stated above, I dismiss American Oversight's claims under the open

meetings law. Its remaining claim under the public records law shall continue. Robin Vos' and the Hon. David T. Prosser's motions to dismiss claims one, two, three, and four in the amended complaint are granted.

This is NOT a final order for purpose of appeal.