

FILED  
06-28-2022  
CIRCUIT COURT  
DANE COUNTY, WI  
2022CV001583  
Honorable Jacob Frost  
Branch 9

STATE OF WISCONSIN      CIRCUIT COURT      DANE COUNTY

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AMERICAN OVERSIGHT  
1030 15th St. NW, B255  
Washington, DC 20005

*Plaintiff,*

*v.*

OFFICE OF SPECIAL COUNSEL  
155 South Executive Drive  
Brookfield, WI 53005,

*Defendant.*

Case No. \_\_\_\_\_  
30701 Declaratory Judgment  
30952 Petition for Writ of Mandamus

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## SUMMONS

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THE STATE OF WISCONSIN, To each party named above as a Defendant:

You are hereby notified that the Plaintiff named above has filed a lawsuit or other legal action against you. The complaint, which is attached, states the nature and basis of the legal action.

Within 45 days of receiving this summons, you must respond with a written answer, as that term is used in chapter 802 of the Wisconsin Statutes, to the complaint. The court may reject or disregard an answer that does not follow the requirements of the statutes. The answer must be sent or delivered to the court, whose address is Dane County Courthouse, 215 S. Hamilton Street, Madison, WI 53703, and to Pines Bach LLP, 122 W. Washington Avenue, Suite 900, Madison, WI 53703. You may have an attorney help or represent you.

If you do not provide a proper answer within 45 days, the court may grant judgment against you for the award of money or other legal action requested in the complaint, and

you may lose your right to object to anything that may be incorrect in the complaint. A judgment may be enforced as provided by law. A judgment awarding money may become a lien against any real estate you own now or in the future, and may also be enforced by garnishment or seizure of property.

If you require the assistance of Auxiliary Aides or Services because of a disability, call (608) 266-4678 (TDD (608) 266-2138)) and ask for the Court ADA Coordinator.

Respectfully submitted this 28th day of June, 2022.

PINES BACH LLP

*Electronically signed by:  
Tamara B. Packard*

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*Attorneys for American Oversight, Plaintiff*

STATE OF WISCONSIN      CIRCUIT COURT      DANE COUNTY

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## COMPLAINT

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This is a suit to enforce the Wisconsin Open Records law, Wis. Stat. §§ 19.31 *et seq.*, with respect to records in the possession of the Office of Special Counsel (known as the OSC), now and in the future, for a declaration of that Office's duty to comply with the public records management and retention requirements set forth in Wis. Stat. § 16.61, and for enforcement of that duty.

It is the declared public policy of the State of Wisconsin "that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them." Wis. Stat. § 19.31. In accordance with that public policy, Plaintiff American Oversight sought records in Open Records requests made between December 2021 and May 2022 to the Office of Special Counsel, through Special Counsel Michael Gableman. But the OSC failed to comply with its statutory obligations to produce responsive documents. And since then, American Oversight has

learned that the OSC, by its own description, “routinely” deletes public records it deems “irrelevant or useless,” in violation of its statutory obligations to retain them.

American Oversight, through its undersigned attorneys, therefore complains against the OSC as follows:

### **PARTIES**

1. American Oversight is a nonpartisan, nonprofit organization dedicated to ensuring government transparency at all levels. Through research and requests for public records under the federal Freedom of Information Act and state public records laws, American Oversight uses the information it gathers, and its analysis of it, to educate the public about activities and operations of state and federal governments through its reports, published analyses, press releases, and other media. American Oversight can accomplish its mission of ensuring government transparency only if public records are preserved in accordance with applicable law. American Oversight has developed a significant focus on voting rights and election oversight, including in Wisconsin, and seeks to ensure the public has access to government records that enable them to monitor the performance and priorities of their public officials. American Oversight’s mailing address is 1030 15th St. NW, B255, Washington, DC 20005.

2. The Office of Special Counsel was created on August 30, 2021 by the Assembly Committee on Assembly Organization, following a motion by Wisconsin State Assembly Speaker Robin Vos. The OSC is funded by the Wisconsin State Assembly (known simply as the Assembly) and led by Michael Gableman, whom Speaker Vos appointed as Special Counsel. The OSC has offices at 155 South Executive Drive, Brookfield, Wisconsin; on information and belief, its suite number at that address is 212. The OSC also does

substantial business in Dane County, including conducting investigation activities and reporting to and appearing before Assembly committees. The OSC is an “authority” as defined in Wis. Stat. § 19.32(1) and a “state agency” as defined in Wis. Stat. § 16.61(2)(d).

### **JURISDICTION, VENUE, AND RELATED CASES**

3. This Court has jurisdiction over the subject matter of this dispute pursuant to Article VII, Section 8 of the Wisconsin Constitution and Wis. Stat. §§ 19.37, 753.03, and 806.04.

4. Venue is proper under Wis. Stat. §§ 19.37(1) and 801.50(2) and (3).

5. American Oversight filed an Open Records action against Speaker Vos, Assembly Chief Clerk Edward Blazel, and the Assembly on October 8, 2021, alleging failure to provide contractor records under Wis. Stat. § 19.36(3) in response to American Oversight’s July and August 2021 Open Records requests. *American Oversight v. Robin Vos et al.*, Dane County Case No. 2021-cv-2440.

6. American Oversight filed a second Open Records action against Speaker Vos on October 18, 2021, alleging failure to provide records in his own custody in response to other of American Oversight’s May, July, August, and September 2021 Open Records requests. *American Oversight v. Robin Vos*, Dane County Case No. 2021-cv-2521.

7. American Oversight filed a third Open Records action against Speaker Vos, Chief Clerk Blazel, the Assembly, and the OSC on December 20, 2021, alleging failure to provide records in the OSC’s custody in response to other of American Oversight’s September and October 2021 Open Records requests. *American Oversight v. Assembly Office of Special Counsel et al.*, Dane County Case No. 2021-cv-3007. The Court in this third case

reached a decision on the merits on March 8, 2022, which the OSC has appealed, *see* Case No. 22AP636, although post-judgment proceedings have continued before the circuit court.

8. All three of the above-referenced Open Records actions seek records related to the Assembly's investigation of the 2020 election. In the first Open Records action, the Court ordered Speaker Vos, Chief Clerk Blazel, and the Assembly to "not delete records that are responsive" to American Oversight's Open Records requests, "including all records in the possession of the election investigation contractors for the period of June 1 through August 30, 2021." Order to Preserve Records, Dane County Case No. 2021-cv-2440, Doc. 137, at 1 (May 11, 2022). In the third Open Records action, the Court ordered the OSC "not to delete or destroy any record that is or may be responsive" to American Oversight's Open Records requests until further order of the Court. Temporary Order Prohibiting the Destruction of Records, Dane County Case No. 2021-cv-3007, Doc. 201 (Apr. 21, 2022).

9. In American Oversight's first Open Records action, the Court noted the OSC's deletion of records, but explained that was an issue "for a separate day." *See* Ex. 1, at 72:19–23.<sup>1</sup> In American Oversight's first and third Open Records actions, it also sought broader relief to prevent the destruction of documents, regardless of whether they relate to one of American Oversight's pending requests. *See* Pet.'s Br. in Response to Resp.'s Purge Order Submissions and Support for an Order to Preserve Records, Dane County Case No. 2021-cv-2440, Doc. 123, at 12–14 (Apr. 22, 2022); Pet.'s Br. in Support of Mot. for Inj. Relief, Dane County Case No. 2021-cv-3007, Doc. 197 (Apr. 20, 2022). The OSC argued

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<sup>1</sup> References to "Ex. \_\_\_" refer to attachments to the Affidavit of Sarah Colombo, filed herewith. The affidavit additionally supports the motions for temporary relief, also filed herewith.

that such an injunction should not issue where American Oversight has not pleaded a claim under § 16.61, and the Court did not reach this issue in those cases. American Oversight therefore files the instant lawsuit to ensure that the OSC cannot continue to delete public records in violation of state law.

### RELEVANT LEGAL AUTHORITY

10. Wisconsin Statutes §§ 19.31 *et seq.*, known as the Open Records law, controls public access to government records and mandates that the public be afforded access “to the greatest possible information regarding the affairs of government.”

11. “Except as otherwise provided by law, any requester has a right to inspect any record.” Wis. Stat. § 19.35(1)(a).

12. “Each authority, upon request for any record, shall, as soon as practicable and without delay, either fill the request or notify the requester of the authority’s determination to deny the request in whole or in part and the reasons therefor.” *Id.* § 19.35(4)(a).

13. “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.” *Id.* § 19.36(3).

14. The Open Records law also provides that “[n]o authority may destroy any record at any time after the receipt of a request for inspection or copying of the record under [this provision] until after the request is granted or until at least 60 days after the date that the request is denied.” *Id.* § 19.35(5).

15. Wis. Stat. § 16.61 imposes additional requirements on state actors for preserving public records.

16. Pursuant to Wis. Stat. § 16.61(4)(a), “[a]ll public records made or received by or in the custody of a state agency shall be and remain the property of the state. Those public records may not be disposed of without the written approval of the [public records] board.”

17. That provision defines “public records” as “all books, papers, maps, photographs, films, recordings, optical discs, electronically formatted documents, or other documentary materials, regardless of physical form or characteristics, made or received by any state agency or its officers or employees in connection with the transaction of public business,” with certain exceptions. *Id.* § 16.61(2)(b).

18. That section further defines “state agency” as “any officer, commission, board, department or bureau of state government.” *Id.* § 16.61(2)(d).

19. State agencies are required to submit “records retention schedules for all public records series in their custody to the [public records] board for its approval.” *Id.* § 16.61(4)(b). “The [public records] board may not authorize the destruction of any public records during the period specified in [§] 19.35(5),” the provision of the Wisconsin Open Records law that prohibits authorities from deleting records that are subject to an Open Records request. *Id.*

## FACTS

### Background

20. Wisconsin held a general election on November 3, 2020. Over 3.2 million Wisconsinites cast ballots in that election. President Biden won Wisconsin with a margin of over 20,500 votes.

21. In the weeks following the election, and prior to certification on November 30, the results were scrutinized at multiple levels. Among other things, municipal, county, and state-level canvasses each reviewed and confirmed the results. In addition, over six days in November, county and municipal clerks directed the audit of more than 145,000 ballots.

22. Following a request from then-President Trump's campaign on November 18, all ballots cast in Dane and Milwaukee Counties were recounted, resulting in a net gain of 87 votes for President Biden.

23. Before and after the recount and certification process, multiple cases were filed challenging the results of the presidential election in Wisconsin. The Wisconsin Supreme Court rejected each of the challenges that reached that court, *e.g.*, *Trump v. Biden*, 2020 WI 91, 394 Wis. 2d 629, 951 N.W.2d 568, *cert. denied*, 141 S. Ct. 1387 (2021); *Wis. Voters Alliance v. Wis. Elections Comm'n*, No. 2020AP1930-OA (Wis. Dec. 3, 2020); *Trump v. Evers*, No. 2020AP1971-OA (Wis. Dec. 3, 2020); *Mueller v. Jacobs*, No. 2020AP1958-OA (Wis. Dec. 3, 2020), and confirmed that former President Trump's campaign could not "succeed in its effort to strike votes and alter the certified winner of the 2020 presidential election," *Trump v. Biden*, 394 Wis. 2d 629, ¶ 32.

24. Additional challenges to Wisconsin's election results failed in federal court. *See, e.g.*, *Trump v. Wis. Elections Comm'n*, 506 F. Supp. 3d 620 (E.D. Wis. 2020), *aff'd*, 983

F.3d 919 (7th Cir. 2020), *cert. denied*, 141 S. Ct. 1516 (2021); *Feehan v. Wis. Elections Comm'n*, 506 F. Supp. 3d 596 (E.D. Wis. 2020), *appeal dismissed*, Nos. 20-3396 & 20-3448, 2020 WL 9936901 (7th Cir. Dec. 21, 2020), *pet. for writ of mandamus denied*, No. 20-859 (U.S. Mar. 1, 2021).

### **The Assembly's investigation and the role of the OSC**

25. Notwithstanding the recount and numerous failed election challenges, on May 26, 2021, Speaker Vos announced the Assembly planned to hire three former law enforcement officers and a supervising attorney to investigate the November 2020 election.

26. In June 2021, the Assembly retained Michael Gableman as coordinating attorney to supervise the investigation, including by receiving investigative reports and keeping a weekly report of investigative findings. The Assembly agreed to pay Gableman \$11,000 per month, with a term starting July 1, 2021. *See* Ex. 2 at A-000172–75 (fully executed Coordinating Attorney Independent Contractor Agreement signed by Speaker Vos and Gableman).

27. At the end of July 2021, Speaker Vos announced an expanded investigation and empowered Gableman to hire additional investigators. Speaker Vos has on several occasions indicated that Gableman makes key decisions regarding the investigation, including over hiring of consultants and private investigators, and whether to issue subpoenas and to whom.

28. On August 27, 2021, Speaker Vos sent a mail ballot to the Committee on Assembly Organization. It authorized “the Speaker of the Assembly to designate the legal counsel hired pursuant to the May 28, 2021, ballot adopted by the Committee on Assembly Organization, as special counsel to oversee an Office of Special Counsel. The special

counsel shall direct an elections integrity investigation, assist the Elections and Campaign Committee, and hire investigators and other staff to assist in the investigation.” Ex. 3, at 2.

29. The Committee on Assembly Organization adopted Speaker Vos’s mail ballot and a budget for the OSC on August 30, 2021.

30. The Assembly has continued to pay Gableman on a monthly basis since the creation of the OSC. The Assembly also has paid directly to Gableman the funds allocated for hiring of additional investigators and staff. As of the date of this filing, the Assembly pays Gableman a salary of \$5,500 monthly. *See* Ex. 4.

31. Among Gableman’s duties as Special Counsel is to “act as the Custodian of Records with regard to the investigation” into the 2020 elections. *See* Ex. 5, at 1.

#### **American Oversight’s Open Records requests**

32. Since Speaker Vos first announced the election investigation in May 2021, American Oversight has submitted numerous Open Records requests to Speaker Vos, Chief Clerk Blazel, the Assembly, and later to the OSC itself, regarding the role and activities of the OSC. American Oversight’s records requests seek, among other things: contracts, invoices, plans, scopes of work, and other documents related to the organization and structure of, and payment for, the election investigation; interim or final reports, analyses, or work product prepared by Gableman or other contractors in the course of conducting the investigation; and various communications by Gableman and the other individuals working on the election investigation, along with their calendars.

33. Even before the constitution of the OSC, American Oversight submitted seven requests for contractor records to Speaker Vos and Chief Clerk Blazel (the “July and August Requests”). Those requests, dated July 20 and August 12, 2021, are the subject of

the first lawsuit filed by American Oversight, *see supra* ¶ 5, pending in the Dane County Circuit Court. *See American Oversight v. Robin Vos et al.*, Dane County Case No. 2021-cv-2440. In that case, the Court ordered Speaker Vos, Chief Clerk Blazel, and the Assembly to release contractor records through August 30, 2021, the date the OSC was formally constituted, and stated with respect to records from after that date: “[T]hat’s a separate issue that will be addressed in a different matter.” *See* Ex. 6, at 35.

34. In September and October 2021, American Oversight submitted seven new records requests to Speaker Vos and Chief Clerk Blazel, requesting the same substantive information as the July and August requests, but for more recent time periods. American Oversight also submitted substantively similar requests through Gableman, seeking records directly from the OSC. On December 20, 2021, American Oversight filed the third lawsuit against the OSC, Speaker Vos, Chief Clerk Blazel, and the Assembly, *see supra* ¶ 7, for failure to produce these requested documents in compliance with the Open Records requirements. *See* Dane County Case 2021-cv-3007.

35. American Oversight has continued to renew its records requests to account for still more recent time periods, and to submit additional requests as more information becomes available. On December 8, 2021, American Oversight submitted three records requests to the OSC (through Gableman). *See* Exs. 7, 8, 9. American Oversight submitted an additional request to the OSC on January 18, 2022, *see* Ex. 10; as well as three on February 1, 2022, *see* Exs. 11, 12, 13; four on March 3, 2022, *see* Exs. 14, 15, 16, 17; one on March 21, 2022, *see* Ex. 18; two on April 18, 2022, *see* Exs. 19, 20; one on May 9, 2022, *see* Ex. 21; three on May 11, 2022, *see* Exs. 22, 23, 24; and one on May 13, 2022, *see* Ex. 25.

36. Among other items, American Oversight requested “[a]ll electronic communications (including emails, email attachments, text messages, or messages on messaging platforms, such as Slack, GChat or Google Hangouts, Lync, Skype, or WhatsApp) between (i) Michael Gableman or anyone communicating on his or the Office of Special Counsel’s behalf; and (ii) any other contractor or agent of the Wisconsin Assembly charged with investigating the November 2020 election, including but not limited to, investigators or attorneys directly employed by the Wisconsin Assembly, or subcontractors, assistants, consultants, counsel, formal or informal advisors, temporary workers, unpaid volunteers, or external funders.” *See* Ex. 9; *see also* Exs. 10, 13, 14, 17, 18, 21, 24, 25.

37. Each of the December 2021 to May 2022 requests to the OSC—none of which were at issue in the third lawsuit—made clear that its requests included “all responsive records regardless of format, medium, or physical characteristics.” American Oversight made clear that “[n]o category of material should be omitted from search, collection, and production.” *See* Ex. 9, at 4 (emphasis in original); *see also* Exs. 7, 8, 10–25. These requests therefore clearly encompassed records contained in text messages.

38. These requests also made clear that the OSC should “search all locations and systems likely to have responsive records regarding official business. **[The OSC] may not exclude searches of files or emails in the personal custody of your officials, such as personal email accounts.** Emails conducting government business sent or received on the personal account of the authority’s officer or employee constitutes a record for purposes of Wisconsin’s public records law.” *See, e.g.*, Ex. 9, at 4 (emphasis in original). These requests

therefore clearly encompassed records in all email accounts within the custody of Gableman and the OSC staff.

39. American Oversight has periodically submitted updated records requests in order to obtain responsive records that had been created or received by the OSC since the date of American Oversight's previous requests. All told, American Oversight has submitted over 25 records requests to the OSC itself, on top of dozens of requests it has made to other authorities about the election investigation.

**The OSC's improper denial and inadequate responses**

40. Initially, the OSC claimed that many of these requests sought "investigative files," and thus the records were not subject to production. *See, e.g.*, Ex. 26, at 4. Eventually, however, following a court ruling rejecting that theory, *see* Decision and Order, Dane County Case No. 2021-cv-3007, Doc. 165 (Mar. 2, 2022), the OSC did release some documents responsive to American Oversight's requests. *See, e.g.*, Exs. 27, 28. In response to certain requests for the same kinds of materials with later dates, the OSC responded that the office did not have any documents responsive to the requests for electronic communications. *See, e.g.*, Exs. 29, 30. With respect to some aspects of American Oversight's requests, the OSC has referred American Oversight to its website for its response. *See, e.g.*, Ex. 27, at 3; Ex. 28, at 2.

41. Within the OSC's records releases in response to American Oversight's December 2021–May 2022 requests, American Oversight has not identified a single substantive text message (other than one text sent to an email and a screenshot that appears to be a text of a phone number). This is surprising, given that the OSC previously released e-mails mentioning text messages among OSC staff. *See, e.g.*, Ex. 31, at 43, 58. For instance,

one email states: “Here is the doc I texted Clint & Andrew yesterday.” *Id.* at 43. But, to the best of American Oversight’s understanding, that text message was never released. Another email attaches a draft, noting that “Mike” had “texted [the email recipient] a photo that has a paragraph with a star.” *Id.* at 58. But that text, too, was never released. OSC’s chief of staff, Zakory Niemierowicz, also testified on June 6, 2022, that Gableman and OSC staff use text messages and other messaging applications. Ex. 32, at 140:14–18, 141:8–22; *see also* Ex. 33, at 36–38 (production from Assembly Speaker Vos attaching screenshot of text message appearing to be from Gableman).

42. Similarly, based on American Oversight’s careful review, the OSC’s records releases in response to American Oversight’s December 2021–May 2022 requests fail to include communications from e-mail addresses that appear to be used for official OSC business, such as [wijustice@protonmail.com](mailto:wijustice@protonmail.com) and [johnwispecialcounsel@protonmail.com](mailto:johnwispecialcounsel@protonmail.com). For example, an email that was released (presumably because it came from the [Coms@wispecialcounsel.org](mailto:Coms@wispecialcounsel.org) email address) shows, earlier in the chain, a series of communications with “Michael Gableman ([wijustice@protonmail.com](mailto:wijustice@protonmail.com)).” *See* Ex. 34, at 32–33; *see also* Ex. 35, at 42 (similar). Another e-mail from the [Coms@wispecialcounsel.org](mailto:Coms@wispecialcounsel.org) e-mail address shows a chain with [johnwispecialcounsel@protonmail.com](mailto:johnwispecialcounsel@protonmail.com). Ex. 36, at 37.

43. The OSC has therefore improperly withheld and delayed access to its records. The OSC’s indefinite withholding constitutes a denial, and is unjustified under Wisconsin law.

### **The OSC's unlawful deletion and destruction of public records**

44. During the course of litigating the third Open Records case, Dane County Case No. 2021-cv-3007, American Oversight learned that the OSC has been routinely deleting records that would be responsive to American Oversight's Open Records requests.

45. For example, the OSC's counsel alarmingly stated by letter on April 8, 2022 that the OSC "routinely deletes" records it deems "irrelevant or useless to [its] investigation." Ex. 37, at 5. In the OSC's opinion, "irrelevant or useless" documents include those "that the OSC is not intending to further investigate, and is not intending to rely upon for its recommendations or reports." *Id.* The OSC further stated that it "retain[s] only those documents whose retention is necessary for office administration and oversight." *Id.*

46. The OSC's purely subjective distinction between "necessary" and "useless" documents is particularly concerning, as it seems to permit the OSC to dispose of any documents it wishes, rendering an independent analysis by the public of the evidence and of the OSC's conclusions functionally impossible.

47. On May 13, 2022, the OSC reaffirmed its refusal to abide by Wisconsin Stat. § 16.61 in a court filing. *See* Ex. 38. The OSC again stated that it "retain[s] only those documents whose retention is necessary for office administration and oversight," and that if a document is deemed "irrelevant" or not "of use to the investigation," "the OSC deletes that document." *Id.* at 5. The OSC confirmed again that it "routinely deletes documents and text messages that are not of use to the investigation." *Id.*

48. On June 6, 2022, OSC's chief of staff, Zakory Niemierowicz, confirmed in sworn deposition testimony that OSC staff's text messages had been deleted, including the message referred to on page 58 of Exhibit 31. *See* Ex. 32, at 142:2-3, 157:12-21.

49. Niemierowicz also testified that he, Gableman, and a “majority” of OSC employees and contractors use or have used Signal to communicate about OSC matters, and that Niemierowicz configured his Signal account to “automatically delete.” *See id.* 142:2–3.

50. And Niemierowicz estimated that only “a minority of [his] electronic communications would have been produced because of [the OSC’s] routine procedure of clearing out electronic documents.” *Id.* 172:24–173:1. In other words, the OSC’s deletion practices are not affecting a small number of documents—but possibly the majority of all electronic communications.

51. On June 10, 2022, the OSC confirmed its position that, absent a pending Open Records request, it had no obligation to retain all documents. *See News Conference: Gableman on Assembly Office of Special Counsel Ruling*, WisEye, at 8:36–10:20, <https://wiseye.org/2022/06/10/news-conference-gableman-on-assembly-office-of-special-counsel-ruling/> (last accessed June 14, 2022). At the same press conference, which immediately followed a court hearing, Gableman agreed that the OSC has been deleting emails and text messages. *Id.*

52. As recently as June 23, 2022, Gableman testified in a court hearing that if a document is not “going to be useful to [his] report”—that is, if it is not a document on which he plans to follow up, and it was not covered by an existing open records request—he would “probably delete it.” Ex. 1, at 47:19–25. For example, Gableman testified that he probably took notes at a seminar he attended, at which he expected to find evidence of Chinese interference with election machines. But because Gableman “was very disappointed by the lack of substance to back up those claims,” he “didn’t find anything that [he] could use during that seminar.” Gableman explained that when he “came to the

determination there was nothing there,” he “would not have kept” the notes indicating that finding. *Id.* at 27:13–28:12. Gableman also admitted that he has deleted emails from his protonmail.com email account, and that the OSC has deleted a Yahoo email account he used in connection with his work on the election investigation. *Id.* at 38:9–11, 61:13–62:5.

53. The OSC’s records releases themselves further confirm that it has deleted public records relevant to its investigation. As discussed above, *see* ¶¶ 41–42, *supra*, the OSC has failed to release text messages, as well as e-mails from the protonmail.com domain. With respect to any given missing record, either the OSC has failed to conduct the required search of existing records—in which case it has violated the Open Records law—or the OSC has conducted the required search, but come up empty-handed because the OSC had already deleted those texts or e-mails—in which case it has violated the Public Records Retention Law.

54. At a June 10, 2022 hearing in Dane County Case No. 2021-cv-3007, the Court granted American Oversight’s motion to hold the OSC in contempt for intentional non-compliance with the Court’s January 25 order to produce “records, documents, and things” responsive to American Oversight’s September and October 2021 requests at issue in that case. In its written opinion following that hearing, the Court noted the “OSC’s admission that it routinely destroys documents and evidence.” *See* Ex. 39, at 12 n.5.

55. Many, if not all, of the records the OSC has admitted it routinely deletes would constitute “public records” under Wis. Stat. § 16.61(2)(b). But the OSC stated in its April 8 letter that it believes that statute does not apply to the OSC.

56. The OSC, however, is a “state agency” as that term is defined in Wis. Stat. § 16.61(2)(d). Indeed, the OSC described itself as “an authorized agency of the State of

Wisconsin.” *See* Ex. 40, at 7; *see also* Ex. 41, at 6, 16, 21 (referring to itself as “an agency of the Wisconsin state government”). The OSC is therefore required to preserve the public’s records in accordance with the requirements set forth in that statute.

57. On October 1, 2021, the Wisconsin Legislative Council independently concluded that the OSC is a “state agency” under Wis. Stat. § 16.61, that Gableman is an “officer” under § 16.61, and that “the Special Counsel and his or her office are generally subject to the Public Records Retention Law requirements” under that statute. *See* Ex. 42. On information and belief, OSC was aware of this conclusion.

58. The OSC’s unlawful deletion and destruction of public records hinders American Oversight’s mission of ensuring the public’s ability to oversee the Assembly’s investigation of the 2020 election.

## CAUSES OF ACTION

### COUNT 1

#### ***Declaration Under Wis. Stat. § 806.04 — Improper Deletion and Destruction of Public Records in Violation of the Wisconsin Public Records Retention Law, Wis. Stat. § 16.61***

59. American Oversight restates and re-alleges paragraphs 1 through 58 above as if fully set forth herein.

60. American Oversight seeks a declaration that the OSC is obligated to retain public records under Wis. Stat. § 16.61, and that it is violating that statute by destroying public records as described herein.

61. Wisconsin law states that “[a]ll public records made or received by or in the custody of a state agency shall be and remain the property of the state.” Wis. Stat.

§ 16.61(4)(a). In keeping with that public policy, Wis. Stat. § 16.61(4)(a) prohibits the disposition of public records “without the written approval of the [public records] board.”

62. Wis. Stat. § 16.61(4) therefore requires states agencies to preserve public records in accordance with approved records retention schedules.

63. The OSC is a “state agency” as that term is used in Wis. Stat. § 16.61. Furthermore, Gableman is an “officer” as that term is used in Wis. Stat. § 16.61.

64. Nevertheless, the OSC has flouted its responsibility to preserve the public’s records in accordance with the Public Records Retention Law.

65. The OSC has not, on information and belief, obtained the public records board’s written approval to delete its public records, nor established a retention schedule for the public records in its custody.

66. Instead, the OSC has unlawfully deleted or destroyed public records in violation of the limitations on the disposition of records imposed by Wis. Stat. § 16.61, and has given every indication that it will continue to do so. The OSC has thus acted outside of its authority by acting in violation of Wis. Stat. § 16.61.

67. The OSC’s actions have caused and will continue to cause injury to American Oversight by depriving it and the public of their rights to safeguard public records, “the property of the state,” Wis. Stat. § 16.61(4)(a), from destruction. The OSC’s actions have also caused and will continue to cause injury to American Oversight by depriving it and the public of their rights to access public records pursuant to the Open Records law.

## COUNT 2

### *Improper Denial and Withholding in Violation of the Wisconsin Open Records Law*

68. American Oversight restates and re-alleges paragraphs 1 through 67 above as if fully set forth herein.

69. It is the declared public policy of the State of Wisconsin “that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them.” Wis. Stat. § 19.31. In keeping with that public policy, Wis. Stat. § 19.31 requires that the Open Records law “shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business.” Further, “[t]he denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.” *Id.*

70. The Open Records law provides that “any requester has a right to inspect any record,” Wis. Stat. § 19.35(1)(a), subject to narrow and limited exceptions.

71. American Oversight is a “requester” as defined by the Open Records law. *See* Wis. Stat. § 19.32(3).

72. American Oversight’s Open Records requests seek “records” as defined by the Open Records law. *See* Wis. Stat. § 19.32(2).

73. The OSC is an “authority” and “custodian” with respect to its own records as those terms are used in Wis. Stat. §§ 19.32(1) and 19.33.

74. The OSC has flouted the Open Records law and its “presumption of complete public access.”

75. The OSC has improperly withheld records responsive to American Oversight's requests attached hereto as Exhibits 7 through 25, by failing to produce text messages and e-mails that fall within the records requests.

76. The OSC also has failed to "as soon as practicable and without delay, either fill [American Oversight's] request[s] or notify [American Oversight] of [its] determination[s] to deny the request[s] in whole or in part and the reasons therefor," and has delayed providing access to records. Wis. Stat. § 19.35(4).

77. The Court should order the records to be produced immediately.

78. The OSC's actions have caused and will continue to cause injury to American Oversight by depriving it and the public of their rights under the Open Records law.

WHEREFORE, for the foregoing reasons, Plaintiff American Oversight respectfully requests this Court grant the following relief pursuant to Wis. Stat. § 19.31 *et seq.* and Wis. Stat. § 16.61:

- A. A declaration that the OSC is subject to and has violated Wis. Stat. § 16.61;
- B. A temporary and permanent injunction requiring the OSC to cease deleting and destroying public records and instead to preserve public records in compliance with Wis. Stat. § 16.61, pursuant to Wis. Stat. § 781.02 and as supplemental relief under Wis. Stat. § 806.04(8);
- C. An order declaring the OSC violated Wisconsin's Open Records law, Wis. Stat. §§ 19.31 *et seq.*;
- D. A mandamus order under Wis. Stat. § 19.37(1)(a) compelling the OSC to immediately produce to American Oversight copies of the requested records without further delay and improper withholdings;
- E. An award to American Oversight for its reasonable attorneys' fees, damages of not less than \$100, and American Oversight's other actual costs under § 19.37(2);

- F. An order finding the OSC has acted arbitrarily and capriciously and awarding punitive damages under Wis. Stat. § 19.37(3); and
- G. Any other relief as the Court deems just and equitable.

Respectfully submitted this 28th day of June, 2022.

PINES BACH LLP

*Electronically signed by:  
Tamara B. Packard*

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*\*Pro Hac Vice application pending*

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