



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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October 11, 2021

Mr. Michael Gableman
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200 South Executive Drive, Suite 101
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Re: Subpoenas issued to the Wisconsin Elections Commission

Dear Counsel:

I represent the Wisconsin Elections Commission ("the Commission") and its Administrator Meagan Wolfe in connection with two subpoenas recently issued from your office: one to Administrator Wolfe, served October 1, 2021; the second directed to the Commission, served October 6, 2021. As our office has made clear in recent communications with your office, the Commission and Administrator Wolfe stand ready to comply with lawful and appropriately tailored subpoenas regarding relevant concerns about election administration. To that end, the Commission will be providing numerous documents contemplated by the subpoenas, subject to the significant substantive objections discussed herein.

As a threshold matter, we have significant concerns about the highly unusual manner in which this investigation is unfolding. Over the past two weeks, your office issued numerous subpoenas to officials in five large Wisconsin cities, the Commission, and the Commission's Administrator, purporting to compel testimony on wide-ranging election-related topics, as well as the production of potentially millions of documents. In many instances, media accounts of these subpoenas were hours, if not a full day, ahead of the actual service of the subpoenas. Until late last week, the subpoenas themselves and their cover letters were the only communications we have received from your office.

However, since the subpoenas were served, we learned that your office was effectively withdrawing the subpoenas issued to all municipal officials and instead

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only seeking reproduction of documents previously produced pursuant to public record requests. Having only learned of these changes secondhand and through the media, we sought clarification from your office regarding the scope of the nearly identical subpoenas issued to the Commission and Administrator Wolfe, to determine if and how your office intends to proceed under those subpoenas. While your staff recently confirmed that your office now seeks the same reproduction of previously produced public records, we have not received written confirmation of that modified expectation, despite the return date for one of those subpoenas coming at the end of this week.

As noted, the Commission and Administrator Wolfe will be producing numerous documents based on your office's recent representation about the current scope of what is expected under the subpoenas. Going forward, we ask that your office communicates directly with ours to ensure that this process will proceed lawfully, efficiently, and professionally.

In addition to these process-related problems, the recent subpoenas present a number of substantive issues that will need to be resolved before Administrator Wolfe will appear to testify under oath. These issues are described below.

Some of these are concerns of a constitutional magnitude, including issues of due process related to the breadth of the inquiry and the topics of testimony. Other problems relate to the authority under state statutes and rules to compel testimony in the manner called for in the subpoenas. In addition, the subpoena's document requests include demands that are overly broad, vague, unduly burdensome, and redundant of existing or already concluded investigations or inquiries.

We will await communication from your office regarding a proposal to resolve these deficiencies.

- I. This investigation must comply with constitutional protections, including due process and the separation of powers.
 - A. Due process mandates that any subpoenas clearly and explicitly define the documents and testimony to be compelled.

First, your office's investigation, including all subpoenas, must comply with the United States and Wisconsin Constitutions and with federal and state statutes. At the constitutional level, any investigation and required testimony must comply

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with the requirements of due process and must respect the separation of powers between the three branches of state government. The current investigation and recent subpoenas raise serious concerns as to both protections.

The authority of the Legislature to investigate, “broad as it may be, is not without limit.” *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 545 (1963). The fact that the general scope of an inquiry may be authorized and permissible does not mean that investigators are “free to inquire into or demand all forms of information.” *Id.*

Just like in any other context in which a witness is required to testify under oath and on penalty of perjury or contempt, due process requires that the subject be informed of the subject of questioning “with the same degree of explicitness and clarity that the Due Process clause requires in the expression of any element of a criminal offense.” *Watkins v. United States*, 354 U.S. 178, 209 (1957). To avoid this “vice of vagueness,” the authorizing committee and any authorized agents must make clear the “question under inquiry.” *Id.* (citation omitted). Neither the resolution that authorizes this investigation, nor the recent subpoenas (discussed below), nor the informal communications from your office are sufficiently clear to avoid this “vice of vagueness.”

The authorizing resolution, 2021 Assemb. Res. 15, directs the Assembly Committee on Campaigns and Elections to “investigate the administration of elections in Wisconsin.” This extreme sweep is narrowed only slightly by limiting the inquiry to the past three years. During that time, there have been multiple elections conducted across Wisconsin, including its 72 counties and 1,850 municipalities.

Such “[b]roadly drafted and loosely worded” resolutions give investigators an impermissible amount of discretion, inviting actions that are either not in accordance with the authorizing committee’s intention, or not even sufficiently related to lawful exercises of the legislative power. *Watkins*, 354 U.S. at 201. It is therefore imperative, both for potential witnesses as well as any court that might review the matter, that the scope of the inquiry be properly defined. *See id.*; *see also Gibson*, 372 U.S. at 545.

Like the authorizing resolution, the recently issued subpoenas also provide nothing close to the “explicitness and clarity” necessary to compel testimony under oath. Although the recent subpoenas, unlike the resolution, seek evidence related only to the November 2020 general election, each subpoena nonetheless lists as possible topics of inquiry “potential irregularities and/or illegalities *related to the*

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Election.” (Emphasis added.) Even when limited to November 2020, that includes nearly 2,000 separately administered elections throughout the state. Not only that, the subpoenas purport to demand testimony “including, *but not limited to*” this already sweeping topic.

Recent communications from your office also have not meaningfully narrowed the otherwise overbroad requests. Indeed, until we receive written confirmation about your office’s updated expectations, we can only rely on the written subpoenas that your office has issued.

The “sweeping and uncertain scope” of the resolution and subpoenas casts great doubt on whether they could “withstand an attack on the ground of vagueness.” *Watkins*, 354 U.S. at 209. These concerns must be addressed before Administrator Wolfe can appear to testify under oath.

- B. The constitutional separation of powers prohibits the Legislature from conducting law enforcement investigations.

In addition to these due process concerns, the current investigation and recent subpoenas also raise concerns related to whether your office is appropriately exercising the investigative power of the legislative branch of state government. Because the powers of investigation and subpoena by the Legislature are justified solely as a necessary corollary to the lawmaking process, those powers are subject to several limits. Most notable here, a subpoena from the Legislature, one of its committees, or any authorized agent “is valid only if it is ‘related to, and in furtherance of, a legitimate [legislative] task.’” *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2031–32 (2020) (quoting *Watkins*, 354 U.S. at 187). This means that a legislative subpoena cannot issue “for the purpose of ‘law enforcement,’ because ‘those powers are assigned under our Constitution to the Executive and the Judiciary.’” *Id.* at 2032 (quoting *Quinn v. United States*, 349 U.S. 155, 161 (1955)).

This is just as true under the Wisconsin Constitution as it is under our federal Constitution. Under the state Constitution, the legislative power includes the powers “to declare whether or not there shall be a law; to determine the general purpose or policy to be achieved by the law; [and] to fix the limits within which the law shall operate.” *Koschkee v. Taylor*, 2019 WI 76, ¶ 11, 387 Wis. 2d 552, 929 N.W.2d 600 (alteration in original) (quoting *Schmidt v. Dep’t of Res. Dev.*, 39 Wis. 2d 46, 59, 158 N.W.2d 306 (1968)). The Legislature thus has “the authority

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to make laws, but not to enforce them.” *Id.* (quoting *Schuette v. Van De Hey*, 205 Wis. 2d 475, 480–81, 556 N.W.2d 127 (Ct. App. 1996)).

Contrary to these limits, the resolution that authorized this investigation, 2021 Assemb. Res. 15, appears pointedly focused on law enforcement, not lawmaking. The resolution asserts that action is needed because “the integrity of our electoral process has been jeopardized by election officials who, either through willful disregard or reckless neglect, have failed to adhere to our election laws by, at various times, ignoring, violating, and encouraging noncompliance with bright-line rules established by the statutes and regulations governing the administration of elections in Wisconsin.” Setting to one side the fact that similar allegations concerning the 2020 election have been repeatedly and unanimously rejected as baseless by both state and federal courts, the plain language of the resolution is focused not on supplying the Legislature with information pertinent to future legislative efforts to *improve* Wisconsin’s election statutes, but rather on enforcing compliance with *existing* “bright-line rules.” The language of the resolution thus is plainly directed at the executive function of law enforcement, not at facilitating future legislative activity.

Recent public comments from your office about the purportedly legislative nature of this investigation do little to remedy the problems inherent in the authorizing resolution. For one, as noted previously, the process by which this investigation is being administered (namely, via social media and press accounts) is problem enough. More to the point, these informal changes cannot transform the investigation into something other than what the authorizing resolution directed. The people of Wisconsin (to say nothing of the witnesses whose testimony your office has purportedly compelled) are entitled to be shown the lawful, legislative purpose for this investigation.

The Commission and Administrator Wolfe will of course comply with any lawful and appropriately tailored subpoenas in furtherance of a valid legislative purpose. We therefore await further communication from your office regarding how you propose ensuring that the investigation will adhere to these limitations.

- II. This investigation must comply with Wisconsin Statutes defining the lawful scope of any legislative investigation.

Second, separate from the problems of vagueness and the scope of this legislative inquiry, it is at best questionable whether your office has authority under

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the relevant state statutes and rules to compel sworn testimony as currently demanded. The recent subpoenas direct government officials, on penalty of contempt, to testify at a private location outside the context of a hearing of the Assembly Committee on Campaigns and Elections, under whose name the subpoenas were issued. Both subpoenas rely on Wis. Stat. § 13.31 as the sole basis to compel testimony, and point to Wis. Stat. § 13.26(1)(c) as the basis for a charge of contempt for failure to comply. Neither of the cited statutes authorize the current demand for sworn testimony.

Wisconsin Stat. § 13.31 authorizes subpoenas compelling testimony “before any committee of the legislature, or of either house thereof.” Wisconsin Stat. § 13.26(1)(c) then authorizes punishment for contempt where a witness refuses to provide testimony ordered to occur “before the *house or a committee*, or before any person authorized to take testimony *in legislative proceedings*.”

Nothing on the face of the recent subpoenas or any publicly available documents demonstrates that the subpoenas comply with the terms of either statute. The subpoenas call for testimony “before the Special Counsel or his designee . . . at 200 South Executive Drive, Suite 101, Brookfield, WI 53005.” We have seen nothing to indicate that any testimony at the listed address would be “before the house or a committee,” or that either “the Special Counsel or his designee” is “authorized to take testimony in legislative proceedings.” See Wis. Stat. § 13.26(1)(c). Thus, we have seen nothing to suggest that any testimony at the listed location would occur under the circumstances required under Wis. Stat. §§ 13.26(1)(c) or 13.31.

The Legislature’s own rules make clear that the subpoenaed testimony could not be deemed to occur before a committee, as the statutes require. Joint Rule 84(1) provides that a committee may meet in the capitol on the call of the committee chair. It further provides, in part, that a committee may meet at locations other than the capitol, with the prior consent of all of the officers required by assembly rule, but that each committee meeting “shall be given due public notice,” and that no committee “may schedule an executive session outside the capitol unless the executive session is held in conjunction with a public meeting of the committee.”

In short, based on currently available information about your office’s investigation, the subpoenas’ calls for sworn testimony at an office in Brookfield are not lawful under the controlling statutes and legislative rules. If your office intends to compel testimony from Administrator Wolfe, any subpoena must comply with these controlling statutes and rules.

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Related to the questionable authority for conducting hearings in a private, closed forum is the issue of “use immunity” that your office recently raised in a media report, stating that your office will grant immunity to anyone who provides testimony. The source and scope of this purported immunity is at best unclear.

The immunity authorized under Wis. Stat. § 13.35 applies to a person who testifies before either house or before a committee. *See* Wis. Stat. § 13.35(1). As noted above, your office’s subpoenas to the Commission and to Administrator Wolfe, served October 1 and 6, call for non-public depositions in a private office, unconnected to any meeting of any house or committee of the Legislature. Wisconsin Stat. § 13.35 does not give immunity to a person who testifies in such a deposition. In addition to the lack of immunity under the statute, there appears no basis for your office (a non-statutory position) to grant immunity to a witness.

III. The subpoena’s specific demands are overbroad, vague, irrelevant, and unduly burdensome.

Third, the subpoena’s specific demands for documents or testimony are also objectionable on multiple grounds. The following, while not intended to be an exhaustive list of substantive objections, provides a summary of the most serious problems with the demands.

As noted above, both subpoenas demand documents and testimony “including, *but not limited to*, potential irregularities and/or illegalities related to the [2020 General] Election.” The use of “*but not limited to*” makes this already broad demand unlimited in scope. For this reason, the demand is objectionable as vague, overly broad, and potentially irrelevant to any valid legislative purpose. The request is also objectionable because it imposes an undue burden for Administrator Wolfe in preparing to present effective, useful testimony, since the subpoena provides absolutely no guidance about the possible matters on which she might be questioned.

These problems are hardly ameliorated by excising the “*but not limited to*” proviso. The same goes for recent oral communications with your staff—until we receive written communication confirming your office’s updated expectations, the vague and overbroad subpoenas provide the only reliable indication of your office’s expectations. Accordingly, before Administrator Wolfe can provide testimony either in her capacity as Administrator or as the person most knowledgeable for the Commission, the topics for testimony will need to be further narrowed and defined.

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Equally problematic, for all the same reasons, is the demand in the subpoena to the Commission, served October 6, 2021, for testimony on the remarkably overbroad topic of "The 2020 Election in Wisconsin." This overbroad inquiry is barely improved in subsequent individual demands, including demands for testimony on the following wide-ranging topics:

- "In-person voting in the 2020 election in . . . Green Bay, Madison, Racine, Kenosha and Milwaukee as compared to statewide."
- "Absentee voting processes in the 2020 election in . . . Green Bay, Madison, Racine, Kenosha and Milwaukee as compared to statewide."
- "Voter education programs in the 2020 election in . . . Green Bay, Madison, Racine, Kenosha and Milwaukee as compared to statewide."

Uniquely objectionable is the October 6 subpoena's demand for all "communications between the Wisconsin Election Commission and its officials or employees, and with the officials or employees of the Cities of Racine, Kenosha, Madison, Green Bay and Milwaukee *and/or any other employee, representative agent or other person affiliated with them*, regarding or in any way related to the Election in Wisconsin." (Emphasis added.) For one, the italicized clause is vague as to whom it is referring, particularly as to "them." Moreover, the demand for all communications "regarding or in any way related to the Election in Wisconsin" would sweep in potentially tens of thousands of documents, many of which are simply automatically created based on registration processes.

These objectionable demands must be narrowed before Administrator Wolfe and the Commission can reasonably be expected to respond.

Finally, putting aside all the objections related to the overly broad scope, vagueness, and irrelevance, the subpoenas appear to demand documents and information that Administrator Wolfe already provided to the Assembly Committee on Campaigns and Elections on March 24, 2021. Since it appears your investigation is being conducted under that Committee, your office should already have many, if not all, of the documents demanded from Administrator Wolfe and the Commission.

Despite the redundancy of these requests, we will re-produce those documents as a show of Administrator Wolfe's good-faith effort to comply with your investigation to the greatest extent reasonably possible. This also seems to correspond with recent

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oral communications from your office about the scope of documents expected under the subpoenas.

To be clear, given the problems related to the scope of the subpoenas' requests, Administrator Wolfe and the Commission are construing the subpoena's demands as seeking communications between the Commission and its staff and the Center for Technology and Civic Life and any of its staff, officers, or agents; communications between the Commission and its staff and the five relevant counties related to the Center for Technology and Civic Life or similar entities; as well as documents previously produced pursuant to public record requests related to the November 2020 election. We trust that your office will inform us, through a properly tailored document request or other written communication, if additional documents are required.

As stated at the outset, Administrator Wolfe stands ready to provide testimony and documents to the Committee in response to a lawful and appropriately tailored subpoena. The recent subpoenas to the Commission and Administrator Wolfe, however, suffer multiple shortcomings that must be resolved before any representative of the Commission can testify or provide additional documents. We appreciate your office's recent communications seeking to address some of these issues, and we respectfully urge you or your staff to continue working with our office so we can resolve the remaining concerns without need for the Commission and Administrator Wolfe to take further steps to protect themselves.

Sincerely,



Gabe Johnson-Karp
Assistant Attorney General

GJK:ajw

cc: Office of Special Counsel (via email)
Representative Robin Vos (via U.S. mail and email)