STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY
BRANCH 5

ERIC O'KEEFE, and
WISCONSIN CLUB FOR GROWTH, INC.,
Individually and on behalf of others similarly situated,

Plaintiffs,

v. **Case No. 2014CV1139**

WISCONSIN GOVERNMENT ACCOUNTABILITY BOARD, and KEVIN J. KENNEDY, in his official capacity,

Defendants.

DEFENDANTS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

NOW COME the defendants, the Wisconsin Government Accountability Board ("GAB" or "Board") and Kevin J. Kennedy,[1] by their undersigned counsel, and submit this brief in support of their motion for summary judgment.

INTRODUCTION

Plaintiffs initiated this action seeking declaratory and injunctive relief relating to defendants' conduct relative to certain John Doe proceedings. In their First Amended Complaint, the plaintiffs added a third claim, alleging a violation of Wisconsin's public records law. Defendants seek summary judgment dismissing all claims.

[1] Plaintiffs sued defendant Kennedy only in his official capacity as Executive Director and General Counsel for the GAB. Accordingly, references to "GAB" may refer to both Kennedy and the GAB.

STATEMENT OF UNDISPUTED FACTS

As shown by the affidavits filed in support of defendants' motion for summary judgment, there is no genuine factual dispute as to the following:

1. Defendant GAB is a Wisconsin state agency formed in 2007 to administer Wisconsin state laws on elections, ethics, and lobbying. The GAB is composed of six former judges who serve staggered, six-year terms. Amended Complaint, ¶ 9; Answer to Amended Complaint, ¶ 9.

2. Defendant Kennedy was appointed to serve as director and general counsel of the GAB on November 5, 2007 and has served in that capacity continuously since his appointment. Affidavit of Kevin J. Kennedy in Support of Defendants' Motion for Summary Judgment ("Kennedy Aff."), ¶ 1.

3. On August 8, 2012, Jonathan Becker, administrator of the GAB's ethics and accountability division, told Kennedy he had received a phone call from David Robles, a Milwaukee County Assistant District Attorney. Becker told Kennedy he and Robles spoke about the application of coordination principles in relation to Wisconsin's campaign finance law administered and enforced by the GAB. Kennedy Aff., ¶ 4.

4. On August 8, 2012, Robles also emailed Becker a copy of a prosecution memo and a draft affidavit in support of a petition to commence a new John Doe proceeding. Kennedy Aff., ¶ 5 and **GAB Ex. 1**; Affidavit of Jonathan Becker in Support of Defendants' Motion for Summary Judgment ("Becker Aff."), ¶ 2.

5. The prosecution memo described an investigation strategy that included the "[c]ommencement of a new John Doe proceeding to address the use of '501(c)(4)' organizations in conjunction with personal campaign committees." Kennedy Aff., ¶ 5.

6. The call Becker described from Robles was not unusual. District attorneys consult with the GAB seeking advice regarding state election and campaign finance laws. On such occasions, agency practice is to consult with and advise the district attorneys, consistent with Wisconsin Attorney General Opinion OAG 10-08. Kennedy Aff., ¶ 6; Affidavit of Gerald C. Nichol in Support of Defendants' Motion for Summary Judgment ("Nichol Aff."), ¶ 6; Affidavit of Paul W. Schwarzenbart in Support of Defendants' Motion for Summary Judgment ("Schwarzenbart Aff."), ¶¶ 3-4, Response to Requests for Admissions ("RFA Response") No. 1 and **GAB Exs. 2, 3**.

7. On August 10, 2012, the Milwaukee County District Attorney's office filed a petition to commence a John Doe proceeding in the circuit court for Milwaukee County, Case No. 2012-JD-23 ("Milwaukee Doe"). Schwarzenbart Aff., GAB Ex. 2, RFA Response No. 8.

8. On September 5, 2012, the Honorable Barbara Kluka, the judge appointed to preside in the Milwaukee Doe, entered a secrecy order in that proceeding. Id., RFA Response Nos. 11-12 and **GAB Ex. 4**.

9. On September 5, 2012, Judge Kluka entered a first addendum to the secrecy order in the Milwaukee Doe. Id., RFA No. 13 and **GAB Ex. 5**.

10. Pursuant to the first addendum to the secrecy order, GAB Board members and GAB staff were given "access to the record of these proceedings to the extent

necessary for the performance of their duties." Id., GAB Ex. 5:1.

11. In late October 2012, Kennedy first learned the Milwaukee County District Attorney's office had filed the petition to commence the Milwaukee Doe described in the August 8, 2012 prosecution memo and that a Doe proceeding had been opened based on that petition. Kennedy Aff., ¶ 7.

12. At that time, Kennedy also first learned that Board members and GAB staff had been given limited access to the record in the Milwaukee Doe as provided in the first addendum to the secrecy order. Kennedy Aff., ¶ 8.

13. Defendants did not ask the Milwaukee County District Attorney's office to file the Milwaukee Doe. Kennedy Aff., ¶ 9; Becker Aff., ¶ 5; Nichol Aff., ¶ 7.

14. Defendants did not draft or assist in drafting the petition seeking to commence the Milwaukee Doe. Kennedy Aff., ¶ 10; Becker Aff., ¶ 6; Nichol Aff., ¶ 7.

15. Defendants did not request that Board members and GAB staff be given access to the record in the Milwaukee Doe. Kennedy Aff., ¶ 11; Becker Aff. ¶ 7; Nichol Aff., ¶ 7.

16. The first written information provided to the GAB Board members about the Milwaukee Doe was a memorandum presented to the Board for review at a closed session conducted on December 18, 2012. Kennedy Aff., ¶ 12 and **GAB Ex. 6**; Becker Aff. ¶ 8; Nichol Aff., ¶ 4.

17. The Board took no action at its December 18, 2012 meeting relative to the

Milwaukee Doe. Kennedy Aff., ¶ 13 and **GAB Ex. 7**[2]; Becker Aff., ¶ 8; Nichol Aff., ¶ 8.

18. In January 2013, the Milwaukee County District Attorney's Office asked the Wisconsin Attorney General's office for assistance in relation to the Milwaukee Doe. Schwarzenbart Aff., RFA Response No. 21, **GAB Ex. 8**.

19. Defendants did not participate in making the request for assistance to the Wisconsin Attorney General. Kennedy Aff., ¶ 14; Nichol Aff., ¶ 7.

20. While the request for assistance from the Attorney General's Office was pending, complaints filed with the GAB alleging unlawful coordination were put on hold at the request of Milwaukee County District Attorney John Chisholm, because the complaints were intertwined with the focus and subjects of the Milwaukee Doe. Kennedy Aff., ¶ 15; Nichol Aff., ¶ 8.

21. Between August 8, 2012 and May 31, 2013, GAB staff counsel Shane Falk, as directed by defendant Kennedy or Becker, consulted with the Milwaukee County District Attorney's office relative to the Milwaukee Doe in the following ways:

A. Providing input on how the Milwaukee County District Attorney's office could prepare a database to organize evidence;

B. Providing examples of complaints alleging unlawful coordination;

C. Providing background materials regarding state law applicable to unlawful

[2] The block redactions to these minutes, and other minutes submitted in support of this motion for summary judgment, relate to other GAB business that has no bearing on the Doe proceedings and on GAB Investigation No. 2013-02. Kennedy Aff., ¶ 13. Limited, targeted redactions within documents submitted in support of the defendants' motion for summary judgment relate to names of persons under investigation, excepting the plaintiffs, who in filing this lawsuit have publicly asserted they were subjects of the investigation, and names of persons considered but not retained for roles for the GAB in the investigation. The identities of such persons are not relevant to any claim at issue in this case and are not material to summary judgment. See Part I of this brief, discussing "materiality."

coordination, including copies of Wisconsin Coal. for Voter Participation, Inc. v. State Elections Bd. *("Wisconsin Coalition")*, 231 Wis. 2d 670, 605 N.W.2d 654 (Ct. App. 1999), and State Elections Board Opinion El Bd 00-2, reaffirmed by the GAB on March 26, 2008, acting pursuant to 2007 Wisconsin Act 1;

D. Providing background materials regarding unlawful coordination under federal law, as construed by the Federal Elections Commission and federal courts; and

E. Reviewing a draft affidavit prepared by the Milwaukee County District Attorney's Office in support of a request for issuance of search warrants, which was provided to Falk by e-mail the day it was filed.

Kennedy Aff., ¶ 16.

22. By letter dated May 31, 2013, Attorney General J. B. Van Hollen notified Chisholm that his office would not provide assistance with regard to the Milwaukee Doe. Schwarzenbart Aff., Ex. 2, RFA Response No. 24 and **GAB Ex. 8**.

23. On June 4, 2013, Chisholm informed Kennedy that Attorney General Van Hollen had declined to assist the Milwaukee County District Attorney's office with the Milwaukee Doe. Kennedy Aff., ¶¶ 17, 18 and **GAB Ex. 9**.

24. On June 6, 2013, Kennedy sent a memorandum to Board members advising them of the Attorney General's decision not to assist with and regarding the status of the Milwaukee Doe. Id., ¶ 18 and GAB Ex. 9.

25. On June 12, 2013, Kennedy and other GAB staff met with Chisholm and

other members of his staff to discuss options for moving forward to investigate the subject matter of the Milwaukee Doe. Kennedy Aff., ¶ 19 and **GAB Ex. 10**; Becker Aff. ¶ 9.

26. On June 13, 2013, Kennedy sent a memorandum to Board members advising them of the June 12 meeting with the Milwaukee County District Attorney's office. Kennedy Aff., ¶ 20 and GAB Ex. 10.

27. Kennedy also supplied Board members with a memorandum prepared by Becker for a meeting to be conducted on June 20, 2013. Included with the memorandum was a draft resolution authorizing Investigation No. 2013-02 for the following purpose:

> … to learn if there is probable cause to believe that [names omitted] and other individuals, organizations, and corporations named in the John Doe materials, specifically those individuals, organizations, or corporations identified in the Affidavit in Support of a Request for Search Warrants and Subpoenas incorporated herein as if stated in full, violated §§11.05, 11.06, 11.10, 11.24, 11.25, 11.26, 11.27, 11.36, and 11.38, Wis. Stats, including criminal violations of Chapter 11.

Kennedy Aff., ¶ 21; Becker Aff., ¶ 10 and **GAB Ex. 11:5**.

28. In a teleconference meeting conducted on June 20, 2013, the Board adopted the draft resolution to open GAB Investigation No. 2013-02. Becker Aff., ¶ 11 and **GAB Ex. 12**; Kennedy Aff., ¶ 22 and **GAB Ex. 13**; Nichol Aff., ¶ 9.

29. At its June 20, 2013 closed session, the Board also adopted a resolution authorizing Board staff to hire special investigators to assist in the investigation and to research the use of a forensic information technology ("IT") company to assist with organizing and coordinating data. Kennedy Aff., ¶ 23 and GAB Ex. 13; Nichol Aff., ¶ 10.

30. GAB Investigation No. 2013-02 was not opened on the basis of a complaint

being presented to the Board. Kennedy Aff., ¶ 24; Nichol Aff., ¶ 11.

31. District Attorney Chisholm appeared at the June 20, 2013 Board meeting. Subjects discussed with the Board at this meeting included the need to open separate John Doe proceedings in counties other than Milwaukee County and seeking the appointment of a special prosecutor for the Doe proceedings. Kennedy Aff., ¶ 25; Nichol Aff., ¶ 12.

32. The Board understood that GAB Investigation No. 2013-02 would be conducted in cooperation with the Milwaukee County District Attorney's office, which commenced the Milwaukee Doe. Kennedy Aff., ¶ 26; Nichol Aff., ¶ 12.

33. Reasons for conducting Investigation No. 2013-02 cooperatively included the desire to mutually enhance efficiency, avoid duplication of effort, and permit the best use of limited investigative and prosecutorial resources on the part of all of the agencies involved, consistent with Wisconsin Attorney General Opinion OAG 10-08. In addition, this allowed the GAB to have access to evidence the Milwaukee County District Attorney's office had gathered in an earlier Doe proceeding, referred to as "John Doe I," as well as evidence obtained up to that point in the Milwaukee Doe, all of which evidence was subject to Secrecy Orders in the Doe proceedings and which the GAB could not use except as authorized by the John Doe judge. Kennedy Aff., ¶¶ 25-28; Nichol Aff., ¶ 12.

34. After the June 20, 2013 meeting, the district attorneys for Iowa, Columbia, Dodge and Dane counties filed petitions to open John Doe proceedings in order to gather evidence material to the unlawful coordination theory which was the subject of the Milwaukee Doe and GAB Investigation No. 2013-02. The Milwaukee County District Attorney's office assisted the district attorneys in these counties in drafting the John Doe

petitions. Kennedy Aff., ¶ 29; Schwarzenbart Aff., GAB Ex. 2, RFA Response No. 35.

35. The petitions to open John Doe proceedings filed in Iowa, Columbia, Dodge and Dane counties were granted in July and August 2013. Together with the Milwaukee Doe, these John Doe proceedings are referred to as "John Doe II," as that term in used in plaintiffs' amended complaint. Kennedy Aff., ¶ 31; Schwarzenbart Aff., GAB Ex. 2, RFA Response No. 34.

36. Judge Kluka was appointed as the John Doe Judge to preside over all the Doe proceedings which comprised John Doe II. Kennedy Aff., ¶ 31; Nichol Aff., ¶ 13.

37. Becker participated for the GAB in the search for an individual to serve in the roles as special prosecutor in John Doe II and special investigator for the GAB. Becker Aff., ¶ 12; Kennedy Aff., ¶ 32.

38. In mid-July Francis Schmitz, who had recently retired from his position as an Assistant United States Attorney for the Eastern District of Wisconsin, accepted an oral offer extended by Becker to serve as the lead special investigator for the GAB in GAB Investigation No. 2013-02. Becker Aff., ¶¶ 12-13; Kennedy Aff., ¶ 33.

39. On August 7, 2013, defendant Kennedy executed a contract providing for Schmitz's retention as special investigator for the GAB. On August 17, 2013, Schmitz executed the contract. Kennedy Aff., ¶ 34 and **GAB Ex. 15**; Affidavit of Francis Schmitz in Support of Defendants' Motion for Summary Judgment ("Schmitz Aff."), ¶ 2.

40. In a closed session of its August 13, 2013 meeting, by a unanimous roll call vote, the Board authorized staff to exceed $10,000 in expenditures in GAB Investigation No. 2013-02. Kennedy Aff., ¶ 35 and **GAB Ex. 16**; Nichol Aff., ¶ 14.

41. In August 2013, DIFS, LLC, a/k/a Digital Intelligence Forensic Services ("DI"), began providing digital data management services to assist in the cooperative investigation pursuant to an agreement with the GAB. The services included loading, hosting, and enabling review of digital data using a web-based system. Kennedy Aff., ¶ 36.

42. On August 23, 2013, Judge Kluka appointed Schmitz to serve as the special prosecutor in John Doe II. Schmitz Aff., ¶ 4.

43. In early September 2013, the GAB retained four people with experience in law enforcement – Dean Nickel, Doug Haag, Thomas Marquardt and William Steckel −to assist as special investigators in GAB Investigation No. 2013-02. Their task, along with members of the Milwaukee County District Attorney's Office, was to review the evidence obtained in John Doe I and John Doe II. The GAB later retained another special investigator, Attorney Elizabeth Blackwood, for the limited purpose of conducting "taint review," that is, screening seized communications for the possible existence of an attorney-client privilege. Kennedy Aff., ¶¶ 37-38.

44. On September 25, 2013, the GAB authorized Nickel to execute an affidavit in support of the request made by Schmitz, as the special prosecutor in John Doe II, to Judge Kluka for the issuance of search warrants. Kennedy Aff., ¶ 39 and **GAB Ex. 17**; Nichol Aff., ¶ 15.

45. On September 30, 2013, Judge Kluka executed and issued the search warrants in John Doe II presented to her by Schmitz acting as the special prosecutor in John Doe II. Schmitz Aff., ¶¶ 5-6 and **GAB Ex. 18**.

46. On October 27, 2013, Judge Kluka recused herself from John Doe II. Judge Gregory Peterson was later appointed to replace Judge Kluka as the John Doe II judge. Schmitz Aff., ¶ 10.

47. Between October 16 and 25, 2013, certain persons and/or entities subjected to search warrants or subpoenas issued in John Doe II filed motions to quash the search warrants and subpoenas. Schmitz Aff., ¶ 9; Kennedy Aff., ¶ 40.

48. GAB staff counsel provided some assistance to Schmitz, as the special prosecutor in John Doe II, in preparing his brief opposing the motions to quash. The assistance focused on campaign finance law. Kennedy Aff., ¶ 41; Schmitz Aff., ¶ 11.

49. On November 14, 2013, plaintiff Wisconsin Club for Growth, Inc., among others, filed a petition for supervisory writs of mandamus and prohibition seeking relief relative to the search warrants and subpoenas. The writ proceedings were designated as Case Nos. 2013AP2504-2508-W. Schwarzenbart Aff., GAB Ex. 2, RFA Response Nos. 48-50; Kennedy Aff., ¶ 42; Schmitz Aff., ¶ 12.

50. GAB staff counsel provided some assistance to Schmitz, as the special prosecutor in John Doe II, in preparing his brief opposing the petition for a supervisory writ. The assistance focused on campaign finance law. Kennedy Aff., ¶ 43; Schmitz Aff., ¶ 13.

51. On January 10, 2014, Judge Peterson entered a decision and order granting the motions to quash the subpoenas and search warrants previously filed by, among others, plaintiff Wisconsin Club for Growth, Inc. Kennedy Aff., ¶ 44; Schmitz Aff., ¶ 13.

52. The active part of GAB Investigation No. 2013-02 ended on January 10,

2014, with Judge Peterson's issuance of the decision and order granting the motion to quash. Kennedy Aff., ¶ 45; Schmitz Aff, ¶ 14.

53. On January 30, 2014, the Wisconsin Court of Appeals issued a decision and order in Case Nos. 2013AP2504-2508, denying the petition for supervisory writs. The court of appeals rejected on the merits the petitioners' challenges to the consolidation of the multiple John Does, the appointment of the special prosecutor, and the secrecy orders. Schwarzenbart Aff., GAB Ex. 2, RFA Response No. 53 and **GAB Exhibit 19:1-2**.

54. In February and March 2014, GAB staff counsel were authorized to and did provide assistance to Schmitz, as the special prosecutor in John Doe II, in relation to appellate briefing in the writ proceedings Schmitz initiated, Case Nos. 2014AP417-21, seeking review of Judge Peterson's January 10, 2014 decision, and in an original action commenced on February 7, 2014, in the Wisconsin Supreme Court, Two Unnamed Petitioners v. Gregory A. Peterson, Case No. 2014AP296-OA. The briefing assistance focused on campaign finance law. Kennedy Aff., ¶¶ 46-47; Schmitz Aff., ¶¶ 16-19.

55. The writ proceeding commenced by Schmitz was later consolidated for briefing with the original action (Two Unnamed Petitioners) and the earlier (Three Unnamed Petitioners) writ proceeding commenced in November 2013. Schmitz Aff., ¶¶ 16-18, 20.

56. The assistance afforded to Schmitz in the appellate proceedings included input and suggestions as to the language of briefs insofar as they addressed the applicable law as to coordination. The assistance was authorized because Judge Peterson's decision was at odds with the Wisconsin Coalition decision and Opinion El Bd 00-2. Kennedy

Aff., ¶ 47; Schmitz Aff., ¶ 18.

57. In a closed session at its July 21, 2014 meeting, the Board did not cast the four votes necessary to continue Investigation No. 2013-02, as required by Wis. Stat. § 5.05(2m)(c)5. Therefore, GAB Investigation No. 2013-02 terminated on August 19, 2014. Kennedy Aff., ¶ 48.D; Nichol Aff., ¶ 16.

58. Schmitz did not conclude his investigation or provide a final report before Investigation No. 2013-02 terminated. Wis. Stat. § 5.05(2m)(c)5. Kennedy Aff., ¶ 48.E.

59. Prior to the termination of Investigation No. 2013-02, the administrator of the ethics and accountability division of the GAB (Becker) made no recommendation to the Board whether to find probable cause. Id., ¶ 48.E.; Nichol Aff., ¶ 16.

60. The Board made no probable cause determination under Wis. Stat. § 5.05(2m)(c)6 in Investigation No. 2013-02. Id., ¶ 48.E.

61. The Board issued no preliminary findings and conclusions under Wis. Stat. § 5.05(2m)(c)9 in Investigation No. 2013-02. Id., ¶ 48.E.

62. The Board did not initiate a civil action as a result of Investigation No. 2013-02. Kennedy Aff., ¶ 48.E; Nichol Aff., ¶ 17.

63. The Board issued no notice to anyone of the termination of Investigation No. 2013-02 because the investigation was not opened on the basis of a complaint and no one had been informed of an investigation. There was neither a complainant nor an accused to notify. Kennedy Aff., ¶ 48.F.

64. The defendant Board never referred Investigation No. 2013-02 to a district attorney for criminal prosecution under Wis. Stat. § 5.05(2m)(c)11. Kennedy Aff., ¶

48.H; Nichol Aff., ¶ 18.

65. GAB Investigation No. 2013-02 terminated without the Board making a finding that a complaint did not raise a reasonable suspicion that a violation of the law has occurred. Kennedy Aff., ¶ 48.I; Nichol Aff., ¶ 19.

66. GAB Investigation No. 2013-02 terminated without the Board making a finding that no probable cause exists to believe that a violation of the law has occurred. Kennedy Aff., ¶ 48.J.; Nichol Aff., ¶ 20.

67. Defendant GAB incurred "sum sufficient" expenditures within the meaning of Wis. Stat. § 20.511(1)(be) totaling $169,071.13 relative to GAB Investigation 2013-02. Affidavit of Sharrie Hauge in Support of Defendants' Motion for Summary Judgment ("Hauge Aff."), ¶ 3 and **GAB Ex. 20**.

68. The invoices from the investigators and service providers relative to GAB Investigation 2013-02 were submitted to and paid in full by the Wisconsin Department of Administration. Hauge Aff., ¶ 5.

69. By letter addressed to defendant Kennedy dated May 1, 2014, which did not explicitly reference the public records law, counsel for plaintiffs stated:

> This Firm represents Wisconsin Club for Growth, Inc. (the "Club") and its director, Eric O'Keefe. It is our understanding that the G.A.B. has opened one or more investigations into a purported violation of election and election campaign laws in Wisconsin by the Club and Mr. O'Keefe. As the subjects of your investigation(s), our clients are entitled to obtain copies of documents generated as part of your investigation(s). We write to request copies of those documents generated since January 1, 2010 to the present.

Kennedy Aff., **GAB Ex. 21:1** (emphasis added).

70. The May 1, 2014 letter requested copies of nine categories of documents, as

follows:

> 1) Any documents relating to a referral by the G.A.B. to a district attorney, the Attorney General of Wisconsin, or a special prosecutor for an investigation or prosecution of the Club or Mr. O'Keefe;
>
> 2) Any subpoenas or notices of subpoenas sought, issued, or obtained by the G.A.B. or a special investigator retained by the G.A.B. that relates to the investigation of the Club or Mr. O'Keefe;
>
> 3) Any notices that a complaint from which the investigation arose has been dismissed or is deemed to have been dismissed by the G.A.B.;
>
> 4) Any exculpatory evidence in the possession of the G.A.B. or a special investigator retained by the G.A.B. relating to the Club or Mr. O'Keefe;
>
> 5) Any records distributed or discussed in the course an open meeting or hearing by the G.A.B. regarding its investigation into the Club or Mr. O'Keefe;
>
> 6) Any written contract between the G.A.B. and a special investigator retained by the G.A.B. that relates to an investigation into the Club or Mr. O'Keefe;
>
> 7) Any records of an action by the G.A.B. authorizing the filing of a civil complaint relating to its investigation into the Club or Mr. O'Keefe, whether or not any such civil complaint was or will be actually filed;
>
> 8) Any record containing a finding that a complaint from which the investigation arose does not raise a reasonable suspicion that a violation of the law by the Club or Mr. O'Keefe has occurred; and
>
> 9) Any record containing a finding that no probable cause exists to believe that a violation of the law by the Club or Mr. O'Keefe has occurred.

Id., GAB Ex. 21:1-2.

71. The May 1, 2014 letter also stated:

> The records subject to this request further includes any and all internal and external correspondence, memos, notes, letters, e-mails, records of phone calls, voicemails, electronic documents, meeting minutes and internal analyses held, kept, sent, received, or maintained by any employee or agent of the G.A.B. relating to its investigation of the Club or Mr. O'Keefe.

Id. (emphasis added).

72. On May 5, 2014, plaintiffs' counsel transmitted another letter to follow up with essentially the same request for documents, but this letter explicitly referenced the

Public Records Law. The May 5 letter covered categories 1, 3, 5, 6, 7, 8 and 9 of the May 1 letter (Kennedy Aff., **GAB Ex. 22:1-2**, and stated that:

> The types of records subject to this request include, but are not limited to, any and all internal and external correspondence, memos, notes, letters, e-mails, records of phone calls, voicemails, electronic documents, meeting minutes and internal analyses held, kept, sent, received, or maintained by any employee or agent of the G.A.B relating to its investigation of the Mr. O'Keefe, the Club, or any person or entity you contend or believe is an agent of the Club

Id., GAB Ex. 22:2 (emphasis added).

73. By letters dated May 7, 2014, the GAB responded to the May 1 and May 5 letters and denied the requests. Id., **GAB Ex. 23**; **GAB Ex. 24**.

74. The GAB's responsive letters dated May 7, 2014 are almost identical. Each letter denies the requests "in full," stating:

> Wisconsin statutes specifically exempt all of records you have requested from disclosure and provide for criminal penalties for anyone from the G.A.B. who discloses such information. Wis. Stats. §§5.05(5s) and 12.13(5). While there are exceptions to these confidentiality provisions and some of those exceptions could have applied to your request, we have thoroughly analyzed these exceptions and have determined that none in fact apply at this time. See Wis. Stats. §§5.05(1)(c) and 5.05(5s).

Id., GAB Exs. 23:2, 24:2.

75. In discussing the exceptions to Wis. Stat. §5.05(5s) in its responsive letters dated May 7, 2014, the GAB stated that there were no documents responsive to some of the specific requests. The GAB had not distributed documents in open session; the GAB had not commenced a civil prosecution of the requestor and therefore had not released documents in the course of a prosecution. There were no records of a finding of no reasonable suspicion or no probable cause relating to plaintiffs, because the GAB made no such findings; the GAB had no records of Board subpoenas or notices of subpoenas;

the GAB had no notices of Board complaints that were dismissed; and the GAB had made no finding of probable cause triggering an obligation to provide exculpatory evidence. Id., GAB Exs. 23:4-5; 24:4-5.

76. The GAB's responsive letters dated May 7, 2014 also cite that the secrecy orders entered in John Doe II and the attorney-client privilege applicable to internal agency communications, the former citing George v. Record Custodian, 169 Wis. 2d 573, 582, 485 N.W.2d 460 (Ct. App. 1992), as grounds for the denial of the requests for copies of documents. Id., GAB Exs. 23:5, 24:5.

77. Plaintiffs' counsel responded to the GAB's May 7 letter with a letter dated May 8, 2014. The May 8 letter contested the GAB's assertions saying that "have reason to believe that the G.A.B. has met with and referred its investigation to district attorneys and other prosecutors in Wisconsin"; Dean Nickel "has sought process on behalf of the G.A.B. and that his name appears on subpoena documents"; the "plain language of Wis. Stat. § 5.05(2m)(c)10 does not provide any triggering event or condition precedent to the obligation to share exculpatory evidence"; and the John Doe secrecy orders did not bar disclosure of documents relating to referrals to district attorneys, because such disclosure was authorized by Wis. Stat. § 5.05(5s). Id., **GAB Ex. 25:2**, n.2.

78. By letter dated May 30, the GAB responded to plaintiffs' May 8, 2014 letter and reiterated five general reasons the documents were not subject to disclosure, as follows: (1) Wis. Stats. §§ 5.05(5s) and 12.13(5); (2) the John Doe Secrecy Orders; (3) a preliminary injunction entered by District Judge Rudolph Randa in a federal civil rights

action commenced by the plaintiffs[3]; (4) the Seventh Circuit's stay of Judge Randa's preliminary injunction; and (5) statutory, common law, and Supreme Court Rules prohibiting the disclosure of attorney-client privileged information or records, citing Wis. Stat. § 905.03 and George v. Records Custodian, supra. **GAB Ex. 26:2**

79. Regarding the demand for "documents relating to a referral by the G.A.B. to a district attorney" set forth in plaintiffs' May 8, 2014 letter, the GAB's responsive letter (all letters were signed by Reid Magney, GAB's Public Information Officer) states:

> I should have been more clear and also included language specifically stating that none of the Board's investigation records include a record of an action of the Board referring a matter to a district attorney or other prosecutor for investigation or prosecution, as it may relate to the specific subject matters of your requests, the Club and Mr. O'Keefe.

Id., GAB Ex. 26:4.[4]

80. Regarding the subpoena issue, the GAB's responsive letter states, "Nothing has changed since your May 1, 2014 request for information related to Board subpoenas or notices of subpoenas and I hereby adopt the above in full." Id.

81. Regarding the new request for documents relating to the GAB allegedly having authorized a "'special investigator to request a circuit court to issue a warrant' for a G.A.B. investigation as prescribed by Wis. Stat. § 5.05(2m)(c)4," the GAB stated that "none of the Board's records contain information related to your clients with regard to Board authorization for a 'special investigator to request a circuit court to issue a warrant'

[3] This order was entered at the plaintiffs' request in their federal civil rights action. The Seventh Circuit vacated the injunction and reversed Judge Randa's decision. O'Keefe v. Chisholm, 769 F.3d 936 (7th Cir. 2014), cert. denied, ___ U.S. ___, 135 S. Ct. 2311 (2015).

[4] Or, stated more bluntly, "there are no such documents."

for and in any G.A.B. investigation."[5] Id.

82. Regarding the demand for exculpatory evidence, the GAB set forth its analysis of Wis. Stat. § 5.05(2m) supporting its conclusion that a probable cause finding was a necessary triggering event to require disgorging of exculpatory evidence. Id., GAB Ex. 26:5.[6]

83. Judge Peterson's decision and order in John Doe II was affirmed by the Wisconsin Supreme Court on July 16, 2015. Schmitz Aff., ¶ 19; State of Wisconsin ex rel. Two Unnamed Petitioners, et al. v. The Honorable Gregory A. Peterson, et al., 2015 WI 85 ("Two Unnamed Petitioners"), ¶¶ 10-12.

84. The decision of the Wisconsin Court of Appeals in the writ proceeding initiated by, among others, the plaintiffs, in 2013AP2504-2508, was also affirmed in Two Unnamed Petitioners. Id., ¶ 13.

ARGUMENT

I. SUMMARY JUDGMENT METHODOLOGY.

Summary judgment is the appropriate tool for resolving legal questions when there are no material facts in dispute. See Smith v. State Farm Fire & Cas. Co., 127 Wis. 2d 298, 301, 380 N.W.2d 372 (Ct.App. 1985) ("when the facts are not in dispute and the legal issues are capable of resolution, summary judgment is mandatory"). Where the non-moving party bears the burden of proof at trial on a dispositive issue, the non-moving

[5] Again, stated more bluntly, "there are no such documents."

[6] The issue of disclosing exculpatory evidence is academic. In discovery responses in this lawsuit, subject to objection and the protective order entered in this case, defendants indicated that there was no exculpatory evidence. Kennedy Aff., ¶ 48.G.. Once again, bluntly, there are no such documents.

party also bears the burden, on summary judgment, of showing a genuine material factual issue for trial. See Transportation Ins. Co. v. Hunzinger Const. Co., 179 Wis. 2d 281, 292-93 n.5, 507 N.W.2d 136 (Ct.App. 1993) (following Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986) as "consistent with Wisconsin law, which ... places on the party with the burden of proof at trial the burden of showing that trial is necessary"). A "material fact" for purposes of summary judgment methodology is "one that is 'of consequence to the merits of the litigation'." Schmidt v. N. States Power Co., 2007 WI 136, ¶ 24, 305 Wis. 2d 538, 742 N.W.2d 294 (quoting In re Michael R.B., 175 Wis. 2d 713, 724, 499 N.W.2d 641 (1993)). See also Clay v. Horton Mfg. Co., 172 Wis. 2d 349, 354, 493 N.W.2d 379 (Ct. App. 1992) (to be a material factual dispute, the dispute "must concern a fact that affects the resolution of the controversy, and the evidence must be such that a reasonable jury could return a verdict for the nonmoving party").

Unless plaintiffs satisfy their burden of showing a genuine dispute as to a material fact, the legal issues in this matter are appropriately resolved on summary judgment.

II. DEFENDANTS' CONDUCT RELATIVE TO THE JOHN DOE FALLS WITHIN THE SCOPE OF AUTHORITY DELEGATED TO THE GAB BY THE WISCONSIN LEGISLATURE.

In Count One of the amended complaint, plaintiffs seek declaratory and injunctive relief based on allegations that defendant GAB "has made and continues to make illegal expenditures associated with its participation" in John Doe II. Amended Complaint, ¶¶ 5, 147-148. As the Wisconsin Supreme Court has stated, "[a]n administrative agency has only those powers that are expressly conferred or necessarily implied from the statutory provisions under which it operates." Conway v. Bd. of Police & Fire Comm'rs of City of

Madison, 2003 WI 53, ¶ 28, 262 Wis. 2d 1, 662 N.W.2d 335 (citation omitted). Determining the scope of an agency's authority "requires the interpretation of relevant statutes, which presents a question of law." Lake Beulah Mgmt. Dist. v. State Dep't of Natural Res., 2011 WI 54, ¶ 23, 335 Wis. 2d 47, 799 N.W.2d 73, 81 (citing Andersen v. Dep't of Natural Res., 2011 WI 19, ¶ 25, 332 Wis. 2d 41, 796 N.W.2d 1).

A. The Wisconsin Legislature Expressly Delegated Investigative Authority Authorizing the Board to Make Expenditures For Investigations.

Wisconsin Stat. § 5.05(1) sets out the general delegation of authority to the GAB and states that the "board shall have the responsibility for the administration of chs. 5 to 12, other laws relating to elections and election campaigns, subch. III of ch. 13, and subch. III of ch. 19." Regarding the GAB's authority to conduct investigations, Wis. Stat. § 5.05(2m)(a) states that:

> The board shall investigate violations of laws administered by the board and may prosecute alleged civil violations of those laws, directly or through its agents under this subsection, pursuant to all statutes granting or assigning that authority or responsibility to the board. …

(Emphasis added.) Wisconsin Stat. § 5.05(2m)(c)4. provides that "[i]f the board believes that there is reasonable suspicion that a violation under subd. 2. has occurred or is occurring, the board may by resolution authorize the commencement of an investigation." The GAB's duty to investigate has been described as "mandatory." See OAG 07-09, WL 3856716 at 12, n. 4 (Wis. A.G. Nov. 16, 2009)[7] ("Unlike the GAB, law enforcement is not under a mandatory duty to investigate any set of facts giving rise to 'reasonable suspicion' that a violation of the law has occurred."). With regard to expenditures for

[7] A copy of this attorney general opinion is supplied to the court. Kennedy Aff., GAB Ex. 28.

investigations, Wis. Stat. § 20.511(1)(be) provides that "[t]here is appropriated from the general fund, except where otherwise indicated, to the government accountability board for the following programs … [a] sum sufficient for the purpose of financing the costs of investigations authorized by the board of potential violations of chs. 5 to 12, subch. III of ch. 13, and subch. III of ch. 19."

Here, it is undisputed that on June 20, 2013, the Board authorized the opening of GAB Investigation No. 2013-02 for the purpose of determining if there was "probable cause to believe that [names omitted] violated §§11.05, 11.06, 11.10, 11.24, 11.25, 11.26, 11.27, 11.36, and 11.38, Wis. Stats, including criminal violations of Chapter 11." See Defendants' Statement of Undisputed Facts ("SUF"), ¶ 27, supra. The expenditures were submitted to the Wisconsin Department of Revenue and were paid in full. SUF, ¶¶ 67-68. Under the Celotex methodology accepted in Transportation Ins., supra., the burden shifts to plaintiffs to show why these investigative expenditures, authorized by Board resolution and paid by the Wisconsin Department of Administration, were unlawful.

B. The GAB Did Not Exceed Its Authority By Assisting In John Doe II And By Sharing the Evidentiary Fruits Of The Investigation.

There is no genuine material dispute of fact regarding the GAB's involvement in John Doe II. Summary judgment is appropriate because the GAB expended resources in a duly authorized investigation that involved campaign finance laws which the GAB has a statutory obligation to administer and enforce.

1. GAB's involvement in the Doe before June 2013.

The GAB did not initiate a John Doe proceeding,[8] nor did the GAB ask the Milwaukee County District Attorney to do so. In August 2012, the GAB was contacted by the Milwaukee County District Attorney's Office and was given a copy of a "prosecution memo" that outlined an investigation strategy that involved commencing a new Doe. SUF, ¶¶ 3-5, 13. Months later Kennedy learned the Milwaukee County District Attorney's office had commenced a new Doe (Id., ¶ 11) and that an addendum to the Secrecy Order in the Doe provided Board members and staff access to the record "to the extent necessary for the performance of their duties" (Id., ¶ 10). Board members were notified of the new Doe in December 2012, but the Board took no affirmative action regarding it at that time (Id., ¶¶ 16-17), although it honored a request of District Attorney Chisholm to defer investigating complaints involving facts intertwined with the Doe (Id., ¶ 20).[9] Up to May 31, 2013, when the Attorney General rejected Chisholm's request for assistance, the GAB's actions relative to the Doe consisted of limited input from GAB staff counsel Shane Falk focusing on unlawful coordination. SUF, ¶¶ 21, 22.

2. Authorization of GAB Investigation No. 2013-02.

The process of opening GAB Investigation No. 2013-02 began when Kennedy advised the Board of Attorney General Van Hollen's decision to decline the Milwaukee

[8] The GAB does not have authority to initiate a John Doe proceeding. See Wis. Stat. § 968.26 ("If a district attorney requests a judge to convene a proceeding to determine whether a crime has been committed in the court's jurisdiction, the judge shall convene" such a proceeding.).

[9] That GAB staff "learned" of the Milwaukee County District Attorney's Office commencing the new Doe and that the GAB deferred action on complaints at the request of Milwaukee County District Attorney Chisholm were discussed in Becker's memorandum to the Board for its June 20, 2013 special meeting. Becker Aff., ¶ 10 and GAB Ex. 11:2.

County District Attorney's Office's request for assistance with the Doe. In a June 6, 2013 memo to the Board, Kennedy stated that "[i]t is clear the DA wants to proceed" and that, based on discussions at a Board meeting and with the Chair, the GAB "is willing to assist in formulating strategy, reviewing evidence and offering limited amount of staff support to move the investigation to prosecution." Kennedy Aff., ¶ 18 and GAB Ex. 9:2. On June 13, 2013, Kennedy provided Board members a memo prepared by Becker for a June 20, 2013 closed session. Becker's memo notes that in declining assistance to Chisholm, citing conflicts of interest, Attorney General Van Hollen "stated that the Government Accountability Board has state-wide investigative jurisdiction and would be the appropriate agency to assist." Becker Aff., ¶ 10 and GAB Ex. 11:2.[10] Becker's memo to the Board "envision[ed] the proposed GAB investigation as follows:

> … we anticipate that it will continue under the auspices of the current John Doe, although there is a possibility that other Doe proceedings would be started in other counties. The Board would provide resources through the hiring of investigators and bearing the costs of any forensic work connected with obtaining emails and reviewing them for possible attorney-client privileged information and then sorting for relevant evidence of coordination. Our investigators, together with Board staff, would assist in reviewing documents and providing assistance in the questioning of witnesses.

Id., GAB Ex. 11:2. Becker further stated that:

> The Board's focus will be on the those actors subject to Chapter 11; that is, the committees and organizations making contributions or disbursements as well as candidates and candidate committees. The D.A. will also continue to pursue individuals involved in the enterprise for potential criminal charges.

Id., GAB Ex. 11:2.

[10] Attorney General Van Hollen's letter cites conflict of interest as his first reason for declining assistance. Schwarzenbart Aff., GAB Ex. 8:1-2. Attorney General Van Hollen also states that "[t]he Government Accountability Board has statewide jurisdiction to investigate campaign finance violations, which may be civil or criminal in nature." Id., GAB Ex. 8:2.

In its June 20, 2013, closed session, the Board unanimously adopted the proposed resolution to open Investigation No. 2013-02. SUF, ¶ 28, GAB Exs. 12 and 13:4. By a unanimous roll call vote, the Board also authorized staff to hire special investigators and to research the use of a forensic IT company to assist in organizing and coordinating data. SUF, ¶ 29 and GAB Ex. 13:5-6.[11]

3. Conduct of cooperative investigation.

The investigation proceeded as "envisioned" in Becker's memorandum. District attorneys from four other counties were contacted and, with assistance of the Milwaukee County District Attorney's office, filed John Doe proceedings in their counties. SUF, ¶¶ 34-35. Becker participated for the GAB in the search for a person to serve in the roles of special prosecutor in the John Doe and special investigator for the GAB. Attorney Francis Schmitz was hired to serve as special investigator for the GAB and separately appointed by Judge Kluka to serve as the special prosecutor in the five John Does which together comprised "John Doe II." SUF, ¶¶ 36-39, 42. The GAB retained four other special investigators to assist in reviewing evidence and, as Becker anticipated, one other person for the purpose of reviewing seized evidence for attorney-client communications. SUF, ¶ 43. And again, as Becker had anticipated, the GAB retained a company (DI) to provide digital data management services. SUF, ¶ 41. The GAB investigators and the Milwaukee County District Attorney's office shared the labor of reviewing evidence that ultimately could be used in civil enforcement actions, if brought by the GAB, or in criminal actions,

[11] The minutes reflect that Judge Cane was not present for the June 20, 2013 meeting and that Judge Deininger left the teleconference prior to the vote on authorizing the retention of special investigators and the potential hiring of an IT firm. The Board had a quorum for the formal votes.

if sought by the special prosecutor and approved by the John Doe judge. SUF, ¶ 43.

4. The GAB's investigative expenditures were consistent with its statutory duties and authority as construed by the Wisconsin Attorney General.

The GAB has express authority to investigate and prosecute violations of the laws it administers. See Wis. Stat. § 5.05(2m)(a) ("The board shall investigate violations of laws administered by the board and may prosecute alleged civil violations of those laws ..."). See also OAG-7-09, supra, WL 3856716 at 12, n. 4 (GAB Ex. 27) (characterizing GAB's duty to investigate as mandatory). The statute does not purport to micromanage how the GAB conducts investigations.

The statute delegating investigative authority to the GAB does not proscribe its being "admitted" to a John Doe in order to consult with a district attorney or special prosecutor appointed by a John Doe judge. In fact, the GAB's conduct, in consulting and cooperating with other law enforcement authorities, accords with the analysis of the Wisconsin Attorney General's Office in OAG 10-08 (GAB Ex. 3), in which Attorney General Van Hollen responded to several questions posed by the district attorney for Wood County. In addressing whether a district attorney had authority to enforce provisions of the statutes as to which the GAB had enforcement authority, Attorney General Van Hollen opined that "unless otherwise stated in a specific statutory provision, criminal provisions and civil forfeiture provisions of the election laws, lobby laws, and ethics laws can be enforced by a district attorney independently of the Board." Schwarzenbart Aff., GAB Ex. 3, OAG 10-08 at 2. And as to the division of authority to enforce election laws, according to the Attorney General:

> … the Board and district attorneys possess joint and co-equal authority to investigate possible violations of those statutory provisions and to prosecute civil forfeiture actions under those statutory provisions. Unless otherwise stated in a specific statutory provision, the district attorney possesses the authority to prosecute criminal proceedings under those statutory provisions. The Board has no statutory authority to prosecute criminal proceedings under those provisions except as stated in Wis. Stat. § 5.05(2m)(i).

OAG 10-08 at 8 (emphasis added). Attorney General Van Hollen further stated that:

> To the extent statutorily possible the Board, district attorneys, the Attorney General, and law enforcement authorities should endeavor to cooperate and timely communicate with each other. Doing so will enhance efficiency, avoid duplication of effort, and permit the best use of limited investigative and prosecutorial resources on the part of all of the agencies involved.

Id. (emphasis added).

As the Wisconsin Supreme Court has oft-times stated, although opinions of the attorney general are not binding as precedent, they may be persuasive as to the meaning of statutes. State v. Beaver Dam Area Dev. Corp., 2008 WI 90, ¶ 37, 312 Wis. 2d 84, 752 N.W.2d 295 (citing State v. Wachsmuth, 73 Wis.2d 318, 323, 243 N.W.2d 410 (1976)). The GAB's conduct in this matter was in accord with the common sense opinion of OAG 10-08. From August 2012 to June 20, 2013, the GAB provided limited assistance with the Doe. It responded to questions of the Milwaukee County District Attorney's Office about the applicable campaign finance law, provided copies of the Wisconsin Coalition case and El Bd 00-2, which reflected the Board's existing interpretation of the law governing coordination, and deferred opening investigations that posed a threat of interfering with the Milwaukee Doe. The GAB's role expanded only after the Attorney General declined to provide assistance on conflict of interest grounds and suggested that District Attorney Chisholm look to the GAB. The cooperation which continued thereafter involved both

agencies absorbing part of the investigative costs and both agencies sharing the potential fruits of the investigation.

The GAB's direct "sum sufficient" expenditures in GAB Investigation No 2013-02 essentially ended on January 10, 2014,[12] when Judge Peterson concluded, in quashing the search warrants, that "coordinated issue advocacy," the legal theory supporting GAB Investigation No. 2013-02, was not subject to regulation under Wisconsin law. SUF, 51-52, 67-68 and GAB Ex. 20. Thereafter, the GAB provided some assistance to Schmitz as the special prosecutor in briefing the legal issues presented in the appellate proceedings, because the issues on the appeals bore directly on the interpretation of the Wisconsin campaign finance law, which the GAB is responsible for administering and enforcing.

There was nothing improper, much less sinister, about the GAB cooperating with and sharing investigative resources with prosecutors who had already initiated a John Doe investigation. While plaintiffs colorfully depict the GAB's conduct in cooperating and assisting the prosecutors as creating a Frankenstein Monster, it was nothing of the sort. While the costs of an investigation of this magnitude were unusual, in other respects this was garden-variety cooperation between sister law enforcement agencies possessing "joint and co-equal authority to investigate possible violations" of chapters 5-12 of the Wisconsin statutes. See OAG 10-08, supra at 8. Cooperating and sharing the fruits of investigations enhanced efficiency and avoided duplication of effort," as contemplated by the Wisconsin Attorney General. Id. The cooperation between the two agencies avoided

[12] The only outside costs incurred after that date related to the costs of maintaining digital data on the database as facilitated by Digital Intelligence. Kennedy Aff., ¶ 45.

two separate law enforcement agencies incurring duplicate costs to gather and review the same evidence, much of which was already gathered in John Doe I and in the Milwaukee Doe. Having the same person, Schmitz, fill the roles of both special prosecutor in the Doe and the GAB's special investigator eliminated at least some duplicative costs taxpayers otherwise would have incurred if another person had to fill one of those roles. And there was certainly nothing sinister in having staff counsel provide some assistance to Schmitz, as special prosecutor in the Doe, in briefing the merits of Judge Peterson's decision, which appeared to be at odds with existing precedent in the Wisconsin Coalition case and the long-standing GAB opinion reflected in El Bd 00-2.[13]

The GAB's cooperation with and assistance provided to the special prosecutor and the district attorney was consistent with OAG 10-08, as well as common sense.

5. The Board's actions were consistent Wisconsin Supreme Court precedent regarding the authority of administrative agencies.

Turning to Wisconsin Supreme Court precedent, in Conway, supra, the court stated that in determining whether an agency's action was within the scope of authority delegated by the legislature, the court begins by identifying the elements of the enabling statute and matching the agency action against those elements. Conway, 2003 WI 53, ¶ 31 (quoting Wisconsin Hosp. Ass'n v. Natural Res. Bd., 156 Wis. 2d 688, 706, 457 N.W.2d 879 (Ct.App. 1990)). The Conway Court added that an enabling statute "need not

[13] See Kennedy Aff., ¶¶ 16, 45-47. The three appellate proceedings all arose out of the Doe, where the subject of the investigation was "coordinated issue advocacy," a matter addressed in the Wisconsin Coalition case prosecuted by its predecessor agency, the State Elections Board ("SEB"), and SEB Opinion El Bd 00-2, which the Board had adopted. No one can seriously contend that the issues in the Doe did not fall squarely within the GAB's statutory bailiwick, to administer and enforce, among other things, Wisconsin's campaign finance law.

spell out every detail of a rule in order to expressly authorize it; if it did, no rule would be necessary." Id. (citing Wisconsin Hosp. Ass'n, 156 Wis. 2d at 705-06). Therefore, "whether the exact words used in an administrative rule appear in the statute is neither dispositive nor controlling." Id. (citing Wisconsin Hosp. Ass'n, 156 Wis. 2d at 706).

The Attorney General's common sense opinion and the Board's common sense exercise of its authority is consistent with the result in Conway, where a public employee union challenged the validity of a rule adopted by the Madison Board of Police and Fire Commissioners ("PFC") providing that the PFC "may engage a Hearing Examiner to conduct the Initial Hearing and the continuing evidentiary hearings" as to disciplinary charges brought under Wis. Stat. § 62.13(5). 2003 WI 53, ¶ 8. In Conway, the union asserted that "because Wis. Stat. § 62.13 does not authorize the use of hearing examiners in a city with a population of more than 4000 persons, Rule 7.20 was in excess of the board's statutory authority."Id., ¶ 9. Rejecting that argument, the court held that Wis. Stat. § 62.13(5)(g) expressly authorized the rule despite making no mention of hearing officers, because the legislature had empowered the PFC to promulgate rules "for the administration of this subsection" and the rule was "consistent with the overall purpose of the statutes." 2003 WI 53, ¶ 37. In reaching this conclusion, the court relied on the dictionary definition of administration as "'the principles, practices, and rationalized techniques employed in achieving the objectives or aims of an organization'." Id., ¶ 36 (quoting Webster's Third New Int'l Dict. 28 (unabr. 1993)).

Here, the Wisconsin Legislature charged the GAB with the responsibility, indeed the duty, to administer and enforce, among other things, Wisconsin's campaign finance

laws. Given that extraordinarily broad delegation of authority, it would be absurd to conclude that the GAB overstepped its authority by initially responding to inquiries from the Milwaukee County District Attorney, and later supporting and cooperating with the district attorneys and the special prosecutor conducting a John Doe investigation that involved conduct over which the agencies possessed "joint and co-equal authority." OAG 10-08 at 8. Cooperating with the district attorneys and special prosecutor in John Doe II enhanced efficiency, avoided duplication of effort, and permitted the best use of limited investigative and prosecutorial resources on the part of the agencies involved – all hallmarks of sound, rational public administration, as recognized by the Wisconsin Attorney General in OAG 10-08, and consistent with the test employed in Conway and other cases. Defendants did not act in excess of the investigative authority delegated to the GAB by making expenditures in GAB Investigation No. 2013-02, conducted in cooperation with the district attorneys and the special prosecutor in John Doe II.

III. DEFENDANTS DID NOT DEPRIVE PLAINTIFFS OF ANY RIGHTS.

In Count II of the complaint, plaintiffs allege that defendants deprived them of what they describe as "their statutory rights and the procedural safeguards of the GAB's enabling statute." Amended Complaint, ¶ 154. The allegations, however, fail to state a viable claim, for two reasons. First, they are grounded upon a faulty factual foundation. Even assuming the statutes confer "rights" upon parties subject to a GAB investigation, the undisputed facts show that Investigation No. 2013-02 never reached the stage which would trigger the rights and safeguards to which plaintiffs claim entitlement. Second, in any event, the statutes confer no rights, so the GAB's conduct effected no deprivation.

A. The Purported Deprivations.

Plaintiffs allege the GAB deprived them of rights and procedural safeguards including "notice and disclosure requirements, as well as mandatory voting, reporting, and appointment requirements." Amended Complaint, ¶¶ 125-26 (citing Wis. Stat. §§ 5.05(1), 5.05(2m)(c)4-10). Plaintiffs allege the following "deprivations":

- GAB did not give plaintiffs notice of the issuance of a subpoena, as required by Wis. Stat. § 5.05(1)(b). Id., ¶ 129.
- GAB did not give plaintiffs "immediate written notice of the termination of the investigation," as required by Wis. Stat. § 5.05(2m)(c)9. Id., ¶ 130.
- GAB did not provide plaintiffs with "exculpatory evidence in its possession," as required by Wis. Stat. § 5.05(2m)(c)10. Id., ¶ 130.
- GAB refused to provide documents to plaintiffs despite their formal request under Wis. Stat. §§ 5.05(1)-(2m) and the Wisconsin Public Records Law …." Id., ¶ 131.

Plaintiffs assert that the GAB's participation in the John Doe II "does not and cannot override the express procedural mandates of its Enabling statute." Id., ¶ 132.

B. No Deprivation Occurred Because The Events Necessary To Trigger Any Alleged "Rights" Never Occurred.

Even assuming that Wis. Stat. § 5.05(2m) confers "rights" upon targets of a GAB investigation−which it does not (see argument in subsec. III.C.)−plaintiffs suffered no deprivation, because GAB Investigation No. 2013-02 never reached the stage where the alleged "rights" to which plaintiffs claim entitlement would have been triggered.

1. <u>The GAB did not issue subpoenas; therefore it was not required to give notice of the issuance of subpoenas.</u>

There is no dispute that search warrants executed in October 2013 were authorized by Judge Kluka in John Doe II and executed under the authority of Francis Schmitz as

special prosecutor in the Does. SUF, ¶ 45. While Wis. Stat. § 5.05(1)(b) requires notice of the issuance of subpoenas in a GAB investigation, no such requirement attaches in a John Doe proceeding. That Nickel, a GAB employee working with Schmitz as special prosecutor in the Doe, signed a request for issuance of search warrants does not transform "John Doe search warrants" into "GAB subpoenas" subject to Wis. Stat. § 5.05(1)(b).

So even assuming that the GAB's obligation under Wis. Stat. § 5.05(1)(b) gives rise to a corresponding "right" of the person or entity subject to the subpoena, no such right was triggered by the issuance of search warrants in the Doe.

2. The GAB was not required to give notice of the "termination" of its investigation because it was not initiated by a complaint.

According to plaintiffs, Wis. Stat. § 5.05(2m)(c)9 required the GAB to give them notice when Investigation No. 2013-02 terminated. Plaintiffs apparently rely on that part of the statute which provides that "[w]henever the board dismisses a complaint or a complaint is deemed to be dismissed under subd. 5., the board shall immediately send written notice of the dismissal to the accused and to the party who made the complaint." (Emphasis added.)

Here, Investigation No. 2013-02 was terminated under Wis. Stat. § 5.05(2m)(c)5, effective August 19, 2014, based on the Board's failed vote to continue the investigation at its July 21, 2014 meeting. SUF, ¶ 57. But Investigation No. 2013-02 was not initiated on the basis of a complaint. SUF, ¶ 30. See Wis. Stat. § 5.05(2m)(c)2.a ("Any person may file a complaint with the board alleging a violation of chs. 5 to 12, subch. III of ch. 13, or subch. III of ch. 19."). The notice requirement plainly contemplates the filing of a

complaint, as the statute states that notice of a dismissal must be sent both "to the accused and to the party who made the complaint." Wis. Stat. § 5.05(2m)(c)9. Here, there was neither a complainant nor an accused to notify; the GAB initiated the investigation on its own without a complaint having been filed. Accordingly, any requirement to give notice of termination plainly was not triggered and did not apply, because the Board had neither a complainant nor an accused to notify.

3. The GAB was not required to provide plaintiffs with "exculpatory evidence," which does not exist in any event.

Plaintiffs complain that the GAB failed to provide them with "exculpatory evidence in its possession," as required by Wis. Stat. § 5.05(2m)(c)10. There is a simple answer. Even assuming defendants were required to provide plaintiffs with "exculpatory evidence in its possession," defendants are in possession of no such evidence. Kennedy Aff., ¶ 48.G. Therefore, whether the GAB was required to provide such evidence is an abstract issue that presents no justiciable controversy. See Miller Brands-Milwaukee, Inc. v. Case, 162 Wis. 2d 684, 694, 470 N.W.2d 290 (1991) ("the fourth component of justiciability, ripeness, requires that the facts be sufficiently developed to avoid courts entangling themselves in abstract disagreements").

If the court nevertheless addresses the issue whether Wis. Stat. § 5.05(2m)(c)10 requires disclosure of exculpatory evidence, construing the statute as urged by plaintiffs makes no logical sense. Given the context in which subpart 10 of Wis. Stat. § 5.05(2m) appears, and given the underlying purpose behind requirements to disclose exculpatory evidence, it would be absurd to construe the statute to require the GAB to disclose such

evidence absent a finding of probable cause.

In construing a statute, the Wisconsin Supreme Court has stated that:

> Context is important to meaning. So, too, is the structure of the statute in which the operative language appears. Therefore, statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results.

State ex rel. Kalal v. Circuit Court for Dane Cnty., 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110. Here, while Wis. Stat. § 5.05(2m)(c)10 states, "The board shall inform the accused or his or her counsel of exculpatory evidence in its possession," the context in which this subpart appears within the "whole" of Wis. Stat. § 5.05(2m)(c) is essential to determining legislative intent.

Wisconsin Stat. § 5.05(2m)(c)(5) states unless an investigation is terminated, at its conclusion the ethics and accountability division administrator shall make one of three recommendations to the Board, (1) to make a finding that probable cause exists to believe that a violation or violations has (or have) occurred along with a course of action; (2) for further investigation; or (3) to terminate the investigation due to lack of sufficient evidence to indicate that a violation has occurred or is occurring. Subpart 6 provides that if the Board makes a probable cause finding under subpart 5(a) it may retain "special counsel" to file a civil complaint. Subpart 9 requires the Board, at the conclusion of an investigation, to prepare preliminary written findings of fact and conclusions making a determination whether or not there is probable cause to believe that a violation of laws has occurred or is occurring. Only after all these steps does one arrive at subpart 10, addressing the requirement to provide "exculpatory evidence."

Taken in context, the requirement that the Board disclose exculpatory evidence makes sense only if the Board has determined there is probable cause that a violation has occurred, that is, the Board has decided there is sufficient evidence to support finding a violation. In criminal matters, the Due Process Clause of the United States Constitution imposes a duty on a prosecutor to disclose evidence favorable to the accused. See State v. Harris, 2004 WI 64, ¶ 12, 272 Wis. 2d 80, 680 N.W.2d 737 (discussing Brady v. Maryland, 373 U.S. 83 (1963)). But even this constitutional guarantee does not require immediate disclosure; by statute in Wisconsin the disclosure must be made "within a reasonable time before trial." Harris, ¶ 35.

Here, GAB Investigation No. 2013-02 was not "concluded", it "terminated." See Wis. Stat. § 5.05(2m)(c)5. As a result, the Board made no probable cause determination, one way or the other. See SUF, ¶¶ 57-61, 65-66. The words used in the statutes must be construed in context and to avoid absurd or unreasonable results. See Kalal, supra. It would be absurd to require disclosure of "exculpatory evidence" when an investigation is terminated without a finding of probable cause and there is no prospect of a criminal or civil prosecution. Where there is no trial and no determination to prosecute, it follows logically that there is no disclosure obligation.

4. <u>The GAB did not violate plaintiffs' rights by its responses to their public records requests.</u>

Lastly, plaintiffs claim a procedural deprivation insofar as defendants refused to provide documents despite formal requests under Wis. Stat. §§ 5.05(1)-(2m) and the Wisconsin Public Records Law …." Amended Complaint, ¶ 131. The amended

complaint does not specify what parts of Wis. Stat. §§ 5.05(1)-(2m) allegedly required defendants to provide them documents, nor does it specify the kinds of documents should have been provided under any part of Wis. Stat. ch. 5 material to the investigation. To the extent plaintiffs rely on the public records law, defendants address that issue in Part IV of this brief.

C. There Is No Justiciable Controversy Arising Out Of Disagreements Regarding Procedures Set Out in Wis. Stat. § 5.05(2m).

Even if the GAB did not strictly conform to procedural requirements of Wis. Stat. § 5.05 (2m), it does not follow that plaintiffs are entitled to relief. In order to obtain relief under Wis. Stat. § 806.04, Wisconsin's Declaratory Judgment statute:

> There must exist a justiciable controversy—that is to say:
> (1) A controversy in which a claim of right is asserted against one who has an interest in contesting it.
> (2) The controversy must be between persons whose interests are adverse.
> (3) The party seeking declaratory relief must have a legal interest in the controversy—that is to say, a legally protectible [sic.] interest.
> (4) The issue involved in the controversy must be ripe for judicial determination.

Loy v. Bunderson, 107 Wis. 2d 400, 409, 320 N.W.2d 175 (1982) (quoting State ex. rel. La Follette v. Dammann, 220 Wis. 17, 22, 264 N.W. 627 (1936) (internal quotation marks omitted)). Under Wisconsin law, a statute whose purpose is primarily "procedural" is "not intended to confer a new substantive right." Candee v. Egan, 84 Wis. 2d 348, 357, 267 N.W.2d 890 (1978). Compare Grube v. Daun, 210 Wis. 2d 681, 689, 563 N.W.2d 523 (1997) ("a private right of action is only created when (1) the language or the form of the statute evinces the legislature's intent to create a private right of action, and (2) the statute establishes private civil liability rather than merely providing for protection of the

public").

Here, there is no "legally protected interest" at stake that is "ripe" for a judicial determination. The statutes provide no remedy for the alleged procedural violations, i.e., the alleged failures (a) to give notice of the issuance of the subpoenas, (b) to give notice of the termination of the investigation; or (c) to disclose exculpatory evidence. As to the subpoenas and the exculpatory evidence issues, if there is a remedy, logically it would arise in the context of enforcement proceedings, which were not and never will be commenced.[14] As for the failure to give notice when the investigation was terminated, it is difficult to conceive how courts could fashion a remedy for such a "failure."

Nor is there a "ripe" controversy. As the Wisconsin Supreme Court has stated, "[t]he basic rationale of the 'ripeness' doctrine is to prevent courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative or, in this case, legislative policies." Lister v. Bd. of Regents of Univ. Wisconsin Sys., 72 Wis. 2d 282, 309, 240 N.W.2d 610 (1976). Here, the parties' disagreements have become academic. No enforcement action is pending or possible. If there was a controversy regarding the procedural issues, the controversy is now moot. A moot controversy is the opposite of one which is ripe for a judicial determination. See State ex rel. Olson v. Litscher, 2000 WI App. 61, ¶ 3, 233 Wis. 2d 685, 608 N.W.2d 425 ("a moot question is one which circumstances have rendered purely academic").

[14] Apart from being barred by the Wisconsin Supreme Court's holding in Two Unnamed Petitioners that coordinated issue advocacy is constitutionally protected, the three year statute of limitations for civil claims that could have arisen for conduct under investigation has now expired. Wis. Stat. § 893.90(2).

IV. THE RECORDS REQUESTED BY PLAINTIFFS WERE NOT SUBJECT TO DISCLOSURE UNDER THE WISCONSIN PUBLIC RECORDS LAW.

The details regarding plaintiffs' public records requests made in May 2014, prior to the initiation of this action, are set out in the Statement of Undisputed Facts and are not repeated here. In summary, plaintiffs requested that the GAB provide them copies of documents related to GAB investigations concerning them. The requests included requests for certain specific types of documents. The GAB denied the requests, on a variety of bases, and in some cases indicated there were no documents responsive to the specific requests.

A. With Limited Exceptions, GAB Investigative Records Are Not Subject to the Public Records Law And Disclosure Is Subject to Criminal Sanction.

The law applicable to plaintiffs' public records requests begins with Wis. Stat. § 5.05(5s), which provides that subject to certain exceptions, "[r]ecords obtained or prepared by the board in connection with an investigation … are not subject to the right of inspection and copying under s. 19.35 (1). The statute includes a list of exceptions, but plainly none of them applies here.[15]

Wisconsin Stat. § 5.05(5s) is not merely a suggestion to the GAB's records custodian; it is a mandate affecting all persons connected to the Board. Under Wis. Stat. §

[15] Subsection (e) provides that records of board action authorizing the filing of a civil complaint, of referring a matter to a district attorney or other prosecutor for investigation or prosecution, containing a finding that a complaint does not raise a reasonable suspicion that a violation of law has occurred, or a finding, following an investigation, that no probable cause exists to believe that a violation of the law has occurred are open to the public. Because such events did not occur, there are no such records. SUF, ¶¶ 57-66. Other subsections of the statute plainly have no bearing. No claim is made that the GAB withheld records distributed or discussed in open session. Wis. Stat. § 5.05(5s)(a). No prosecution was initiated. Wis. Stat. § 5.05(5s)(b)(d). This matter does not involve a request by the department of children and families or a county child support agency Wis. Stat. § 5.05(5s)(c). Subsection (bm), relating to the legislative audit bureau, was adopted by 2015 Wisconsin Act 2 and became effective March 18, 2015, long after the requests, and has no bearing here.

12.13(5):

> Except as specifically authorized by law and except as provided in par. (b), no investigator, prosecutor, employee of an investigator or prosecutor, or member or employee of the board may disclose information related to an investigation or prosecution under chs. 5 to 12, subch. III of ch. 13, or subch. III of ch. 19 or any other law specified in s. 978.05 (1) or (2) or provide access to any record of the investigator, prosecutor, or the board that is not subject to access under s. 5.05 (5s) to any person other than an employee or agent of the prosecutor or investigator or a member, employee, or agent of the board prior to presentation of the information or record in a court of law.

(Emphasis added.) Violating the mandate has serious consequences. Wisconsin Stat. § 12.60(1)(bm) provides that "[w]hoever violates s. 12.13 (5) may be fined not more than $10,000 or imprisoned for not more than 9 months or both." As the Wisconsin Attorney General has stated:

> By imposing criminal penalties for a violation of Wis. Stat. § 12.13(5), the legislature emphasized the confidentiality of GAB's investigative records even more than in most other statutes addressing confidentiality. It is hard to imagine a more powerful way of saying "and we really mean what we say about confidentiality" than imposing criminal penalties for improper disclosure.

OAG-03-14, 2014 WL 3398103 at 3 (Wis. A.G. July 10, 2014).[16] Accordingly, upon pain of criminal prosecution, the records plaintiffs sought are not subject to disclosure under the public records law.

B. The GAB Complied With Its Legal Obligations By Refusing To Supply The Records Requested By Plaintiffs.

In its responses to the requests, the GAB first noted that none of the exceptions to Wis. Stat. § 5.05(5s) applied. SUF, ¶ 73. The Board had not authorized the filing of a civil complaint; the Board had not referred the matter to a district attorney or other prosecutor for investigation or prosecution; the Board had not made a finding that a

[16] Kennedy Aff., **GAB Ex. 27**.

complaint it received did not raise a reasonable suspicion that a violation of the law had occurred; and the Board had made no finding, following an investigation, that no probable cause existed to believe that a violation of the law occurred. SUF, ¶¶ 57-66. Because the Board took no such action and the Board made no such findings, as the GAB told plaintiffs' counsel, there were no such documents. In addition, the Board cited both the John Doe secrecy order and George v. Record Custodian, 169 Wis. 2d 573, 582, 485 N.W.2d 460 (Ct. App. 1992), for the proposition that the requested documents either could not or need not be released.

Plaintiffs' May 8, 2014 challenge to the GAB's initial responses did not change any of the controlling legal principles. Again, the GAB responded by reiterating five reasons that the requested documents were not subject to disclosure. SUF, ¶ 76. The GAB essentially repeated its earlier responses: under Wis. Stat. § 5.05(5s), the records sought were not subject to the public records law; and as to the exceptions, there was no record of a referral to a district attorney or other prosecutor for investigation or prosecution; there were no Board subpoenas; there was no record of a special investigator requesting a circuit court to issue a warrant for a G.A.B. investigation as prescribed by Wis. Stat. § 5.05(2m)(c)4; and the requirement to provide exculpatory evidence had not been triggered. SUF, ¶¶ 77-80.

Plaintiffs requested records relating to a GAB investigation of them. Under Wis. Stat. § 5.05(5s), such investigative records "are not subject to the right of inspection and copying" under the public records law. Undisputed facts establish there are no records falling within any of the exceptions to Wis. Stat. § 5.05(5s). Defendants did not violate

the public records law by refusing to supply copies of the requested records.

CONCLUSIONS

For the reasons stated above, defendants respectfully request that the court grant summary judgment dismissing all claims in this matter.

Dated this 16th day of October 2015.

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