
Wisconsin Legislative Council



Anne Sappenfield
Director

TO: REPRESENTATIVE GORDON HINTZ

FROM: Dan Schmidt, Deputy Director

RE: Application of the Public Records Law to the Assembly Office of Special Counsel

DATE: October 1, 2021

This memorandum, prepared at your request, responds to two questions you asked regarding the application of the Public Records Law and the Public Records Retention Law to the Assembly Office of Special Counsel (AOSC). Specifically, your first question is whether the AOSC is generally subject to the Public Records Law as expressed in ss. 19.31 to 19.39, Stats., and your second question is whether the AOSC is subject to Public Records Retention Law requirements under s.16.61, Stats. My response to both of these questions is that the AOSC, as I understand its organization, is generally subject to both the Public Records Law and the public records retention requirements under s. 16.61, Stats. My explanations follow.

BACKGROUND

The AOSC was created by the adoption of a motion by the Assembly Committee on Organization on August 30, 2021. This same motion also appointed the Assembly Special Counsel, who was hired earlier this past summer, to oversee this office. Specifically, the motion provides the following:

It is moved that the Committee on Assembly Organization authorizes the Speaker of the Assembly to designate the legal counsel hired pursuant to the May 28, 2021, ballot adopted by the Committee on Assembly Organization, as special counsel to oversee an Office of Special Counsel. The special counsel shall direct an elections integrity investigation, assist the Elections and Campaign Committee, and hire investigators and other staff to assist in the investigation.

PUBLIC RECORDS LAW AND THE AOSC AND ASSEMBLY SPECIAL COUNSEL AS AUTHORITIES

The definition of “authority,” for the purposes of the Public Records Law, includes the Assembly and any “formally constituted sub-unit” of the Assembly. [s. 19.32 (1), Stats.] As the AOSC was formally constituted by the motion described above, and the Public Records Law applies to authorities as defined under s. 19.32 (1), Stats., the Public Records Law, therefore, generally applies to records created or maintained by the AOSC, or by the Assembly Special Counsel on behalf of the AOSC.

It is important to note that, while the Assembly Special Counsel and the AOSC are generally subject to the Public Records Law, certain records may be excepted from disclosure under certain circumstances as they are for any authority. Such exceptions may include express statutory exceptions, common law exceptions, or exceptions created by an authority under the Public Records Law balancing test analysis. Examples of potential exceptions specific to the AOSC and the Assembly Special Counsel may presumably include those relating to the release of records regarding certain current investigations¹ or records regarding certain confidential informants.²

PUBLIC RECORDS RETENTION LAW AND THE AOSC

Section 16.61, Stats., the Public Records Retention Law, generally requires that state agencies maintain records in accordance with prescribed schedules established by the Public Records Board (PRB). Public records are the property of the State and may not be disposed of without the approval of the PRB. [s. 16.61 (4) (a), Stats.]

Under the Public Records Retention Law, a “state agency” is broadly defined to include “any officer, commission, board, department or bureau of state government.” [s. 16.61 (2) (b), Stats.] For the purposes of records retention under s. 16.61, Stats., “public records” generally includes most items made or received in connection with the transaction of public business, subject to certain specified exceptions, including an exception for “records and correspondence of any member of the legislature.”³

While one may question at first glance whether the Public Records Retention Law’s definition of a state agency was intended to apply to the Legislature or its sub-units, the fact that the “records and correspondence of any *member* of the legislature” are excluded from the definition of “public records,” negates any effect that the retention requirement has on legislative “members”. Similarly, the absence of any specific legislative rules to the contrary regarding the general disposition of legislative records appears to indicate that the legislative intent of this section was to apply the retention requirements to legislative agencies and bodies that are not members of the Legislature or their offices.⁴

As noted above, the Assembly Special Counsel is an officer appointed by the Committee on Assembly Organization to oversee the AOSC and not a member of the Legislature. Therefore, the Special Counsel

¹ See, for example, s. 19.36 (10) (b), Stats., and *Kroepelin v. DNR*, 2006 WI App 227 ¶ 31.

² See, for example, s. 19.36 (8), Stats., and *Mayfair Chrysler-Plymouth, Inc. v. Baldarotta*, 162 Wis. 2d 142, 164-68, 469 N.W.2d 638 (1991).

³ Section 16.61 (2) (b), Stats., specifically defines “public records” as “all books, papers, maps, photographs, films, recordings, optical discs, electronically formatted documents, or other documentary materials, regardless of physical form or characteristics, made or received by any state agency or its officers or employees in connection with the transaction of public business, and documents of any insurer that is liquidated or in the process of liquidation under ch. 645. “Public records” does not include: (1) records and correspondence of any member of the Legislature; (2) any state document received by a state document depository library; (3) duplicate copies of materials the original copies of which are in the custody of the same state agency and which are maintained only for convenience or reference and for no other substantive purpose; (4) materials in the possession of a library or museum made or acquired solely for reference or exhibition purposes; (5) notices or invitations received by a state agency that were not solicited by the agency and that are not related to any official action taken, proposed, or considered by the agency; (6) drafts, notes, preliminary computations and like materials prepared for the originator's personal use or prepared by the originator in the name of a person for whom the originator is working; or (7) routing slips and envelopes.

⁴ Note that this conclusion is further supported by the fact that legislative agencies have long been required to file records disposition agreements with the PRB and that legislative chairpersons are generally required to maintain committee records for deposit with the Secretary of State or transmittal to the legislative library. [See s. 13.16, Stats., and the Senate and Assembly Committee Clerk’s Manuals, respectively.]

and his or her office are generally subject to the Public Records Retention Law requirements under s. 16.61, Stats.

Please let me know if I can provide any further assistance.

DWS:ksm