
Wisconsin Legislative Council



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Director

TO: REPRESENTATIVE MARK SPREITZER

FROM: Peggy Hurley, Staff Attorney

RE: Subpoena Powers and Investigative Authority of a Legislative Committee

DATE: June 10, 2021

You asked whether the investigators whose hiring was authorized by the Committee on Assembly Organization Ballot 21-03 may subpoena witnesses and, if they may, whether the subpoenaed witnesses must appear before the Assembly Committee on Campaigns and Elections. State law and case law establish that a witness may be compelled to appear before a legislative committee charged with investigatory authority. 2021 Assembly Resolution 15, which the Assembly adopted earlier this year, directed the Assembly Committee on Campaigns and Elections to investigate the administration of elections in Wisconsin, focusing in particular on elections conducted after January 1, 2019; the ballot authorizes the investigators to assist the Assembly Committee on Campaigns and Elections. Under the relevant statutes and case law, this authorization is sufficient to compel the attendance, before the committee, of any witness subpoenaed.

LEGISLATIVE OVERSIGHT AND GENERAL INVESTIGATION AUTHORITY

A committee of the Legislature has inherent authority to investigate and oversee state agency activity. In a 1909 case, the Wisconsin Supreme Court explained that:

The legislature has very broad discretionary power to investigate any subject respecting which it may desire information in aid of the proper discharge of its function to make or unmake written laws, or perform any other act delegated to it by the fundamental law, state or national, and to proceed, with that end in view, by a duly authorized committee of one or both branches of the legislature and to incur reasonably necessary expenses, payable out of the public funds. [*State ex rel. Rosenhein v. Frear*, 138 Wis. 173, 176-77 (1909).]

The U.S. Supreme Court has similarly stated that the power to investigate is inherent in the power to make laws because “a legislative body cannot legislate wisely or effectively in the absence of information respecting conditions which the legislation is intended to affect or change.” [*McGrain v. Daugherty*, 263 U.S. 135, 175 (1927).]

The Legislature’s authority to investigate is not absolute, however, and is generally viewed as limited to obtaining information on matters that fall within the proper field of legislative action, such as the administration of existing laws or need for new laws. Likewise, a committee’s authority to investigate is

generally viewed as limited to obtaining information on matters that customarily fall within the committee's jurisdiction.

Primary examples of ways in which a legislative committee may exercise its inherent authority to oversee and investigate state agency activities include: (1) holding committee meetings and informational hearings; (2) appointing subcommittees to perform studies and investigations by subcommittees; (3) submitting information requests under s. 13.45 (7), Stats.;¹ (4) conducting studies and investigations under Joint Rule 84 (3);² or (5) issuing a subpoena under s. 13.31, Stats. [See Assembly Rules 11 (2) and 14 (1).]

PARTICULAR AUTHORITY TO INVESTIGATE

State law provides that the attendance of witnesses before any committee of the Legislature may be procured by subpoena only if the committee is authorized and "appointed to investigate" the particular subject matter. [s. 13.31, Stats.] State statutes do not specify the means by which such an authorization is provided. In the past, such authorization has been given by resolution or joint resolution. However, with little practical and judicial precedent in Wisconsin on the method of authorization, it is possible that other methods could suffice, such as a motion passed by the organizing committee of the body or an investigation initiated under Joint Rule 84 (3). [*Goldman v. Olson*, 286 F. Supp. 35 (W.D. Wis. 1968).]

The appointment and authorization to investigate a matter should precisely define the area of investigation. In *Goldman v. Olson*, a legislative subpoena issued by a Wisconsin Senate resolution to anti-war demonstrators in the 1960s was challenged under the First Amendment and Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

The federal district court held that a resolution authorizing an investigation must satisfy the following requirements to be constitutionally valid:

- Define the subject matter of an investigation with sufficient explicitness and clarity to afford the witness a reasonable basis for judgment as to whether a particular question is pertinent to the subject matter under investigation.
- If the investigation impinges First Amendment freedoms, establish the state's interest in making such an investigation by showing a substantial relationship between the information sought and a comprehensive, compelling state interest or concern.

[*Goldman*, 286 F. Supp. at 43.]

¹ In addition to an information request that may be submitted by a committee, any legislator or chairperson of a committee may submit a public records request to a state agency. [ss. 19.31 to 19.39, Stats.]

² Recognizing committees' inherent authority to investigate, Joint Rule 84 (3) provides that standing committees may conduct studies, investigations, and reviews that are "within the subject matter area customarily within the purview of the respective committee, regarding any matter that may then be appropriate to legislative inquiry." This may be done on instruction by the appropriate house or on motion of the chairperson with majority vote approval by the committee. In the case of duplication or overlapping areas of original inquiry, the subject matter area assigned to each committee and scope of each committee's inquiry is defined and delimited as follows: (a) in the case of a Senate committee, by the Committee on Senate Organization; (b) in the case of an Assembly committee, by the Assembly Speaker; and (c) in the case of a joint committee, by the Joint Committee on Legislative Organization.

However, the *Goldman* court recognized that it would be impossible for an authorizing resolution to perfectly define its parameters from the outset. The court said “It is not reasonable to require the legislature, even before its investigatory function has been commenced, to define the subject or subjects of investigation with that degree of specificity and clarity which must mark its ultimate articulation of a criminal prohibition.” The court added that “in its investigative function, the Legislature must enjoy more leeway.” [*Goldman*, 286 F. Supp. at 48-49.] The precise boundaries of the “leeway” in identifying the subject matter for investigation have not been reexamined.

The powers to issue a subpoena are subject to the requirements articulated in *Goldman* before the Assembly may enforce compliance with a subpoena and find a subpoenaed witness in contempt for refusing to attend or testify. [s. 13.31, Stats.; and *Goldman*, 286 F. Supp. at 43.] It appears that the *Goldman* requirements were met when the Assembly passed 2021 Assembly Resolution 15.

ISSUANCE OF A SUBPOENA TO APPEAR BEFORE THE COMMITTEE

A subpoena may be used to compel testimony or produce records and documents desired by a committee engaged in an authorized investigation. Under the statutes, only the Speaker has the authority both to issue a subpoena for the attendance of witnesses before any Assembly committee, and to issue summary process for the arrest of any witness disobeying the subpoena. Therefore, while the Assembly committee and the investigators hired are authorized to investigate elections, only the Speaker may issue a subpoena.

A subpoena must:

- Refer to the authorization of the committee to investigate.
- State the nature of the investigation.
- State where, when, and before whom the witness is required to appear and, if applicable, produce records and documents.
- Be signed by the Speaker and the Chief Clerk of the Assembly.

[ss. 13.31 to 13.33, Stats.; and Assembly Rules 3 (1) (o) and 5 (1) (j).]

As discussed above, state law provides that the attendance of witnesses before any committee of the Legislature may be procured by subpoena only if *the committee* is authorized and “appointed to investigate” the particular subject matter. Presuming that Assembly Resolution 15 creates a proper appointment for the Assembly Committee on Campaigns and Elections to investigate the recent administration of elections in the state, the resolution allows the Speaker to issue a subpoena for the attendance of witnesses before the committee.

The ballot approved by the Committee on Assembly Organization authorized investigators to assist with the Assembly Committee on Campaigns and Elections investigation. A subpoena issued pursuant to the resolution may compel a witness to appear before the Assembly Committee on Campaign and Elections. However, because current law permits investigations only by committees, a subpoena issued pursuant to the resolution may not compel testimony except to the Assembly Committee on Campaigns and Elections.

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

PH:ksm