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## MEMORANDUM

**TO:** Speaker Robin Vos  
**FROM:** Michael Gallagher, senior coordinating attorney  
**DATE:** July 7, 2021  
**SUBJECT:** Legislative subpoenas

On March 23, 2021, the Wisconsin Assembly directed the Assembly Committee on Campaigns and Elections (Elections Committee) to investigate the administration of recent elections in this state.<sup>1</sup> Then, on May 21, 2021, the Committee on Assembly Organization passed a motion authorizing the speaker to hire legal counsel and employ investigators to assist the Elections Committee in its investigation.

You have asked for a summary of how legislative subpoenas compelling witness testimony or the production of documents may be issued in connection with the Election Committee's investigation and how immunity from liability is obtained for witnesses compelled to testify or produce documents in the course of the investigation.

### **Inherent legislative authority to conduct investigations and issue subpoenas**

The legislature has inherent and "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."<sup>2</sup> Such an investigation may be carried out "by a joint committee, or by a committee of either or both houses acting independently, or . . . in any other manner which to [the legislature] might seem most convenient and proper."<sup>3</sup>

<sup>1</sup> See 2021 Wis. AR 15, as shown by 2021 Wis. ASA 2.

<sup>2</sup> *Goldman v. Olson*, 286 F. Supp. 35, 43 (W.D. Wis. 1968) (quoting *State ex rel. Rosenhein v. Frear*, 138 Wis. 173, 176-77, 119 N.W. 894, 895 (1909)). See also *In re Falvey*, 7 Wis. 630, 638 (1858) ("I have no doubt of the [constitutional] power of the legislature to investigate the matters named in the joint resolutions."); *Mason's Manual of Legislative Procedure* (Denver, CO: NCSL, 2020), Sec. 795 (1) ("[The] right of a legislative body to make investigations in order to assist it in the preparation of wise and timely laws must exist as an indispensable incident and auxiliary to the proper exercise of legislative power.") *Mason's Manual* is the primary authority on legislative parliamentary procedures in the states.

<sup>3</sup> *In re Falvey*, 7 Wis. at 638.

The legislature's inherent investigative power "carries with it the power in proper cases to compel the attendance of witnesses and the production of books and papers by means of legal process."<sup>4</sup>

### Rules governing the issuance of legislative subpoenas in Wisconsin

In Wisconsin, the rules governing legislative subpoenas are largely established by statute.<sup>5</sup> Any subpoena issued in connection with a legislative investigation must be signed by the presiding officer and the chief clerk of the house, in this case, the assembly.<sup>6</sup> The "presiding officer" is the representative who opens and presides over the daily sessions of the assembly.<sup>7</sup> The presiding officer in the assembly is almost always the speaker or the speaker pro tempore, but the presiding officer may also be the majority leader or his or her designee, for example, if the speaker and speaker pro tempore are temporarily absent.<sup>8</sup>

A legislative subpoena may be issued to compel the testimony of any witness or the production of documents and other records.<sup>9</sup> Additionally, a legislative subpoena "may require such attendance forthwith or on a future day," may be served by any person, and must be returned to the chief clerk in the same manner as subpoenas from the circuit court are served and returned.<sup>10</sup>

The subpoena itself must state "when and where, and before whom, the witness is required to appear" and may designate the "books, records, documents and papers" that must be produced. Finally, subpoenaed witnesses appearing before a committee receive as compensation "\$2 for each day's attendance and 10 cents per mile, one way, for travel to attend as such witness."<sup>11</sup>

### Witness immunity

Wis. Stat. § 13.35 provides use immunity to any person compelled to testify or produce documents before a house or committee of the legislature. Specifically, no testimony the person gives nor document or other record the person produces "shall be competent testimony or be used in any trial or criminal proceeding against such person in any court."<sup>12</sup> Wis. Stat. § 13.35 also on its face provides immunity from prosecution "for any fact or act touching which the person is required to testify,"<sup>13</sup> but Wis. Stat. § 972.085 limits immunity from liability under

<sup>4</sup> *Mason's Manual*, *supra* note 2, Sec. 795 (5). See also *In re Falvey*, 7 Wis. at 641-42 (upholding confinement for failure to appear pursuant to a legislative subpoena). With respect to the enforcement of legislative subpoenas, see Wis. Stat. §§ 13.32 to 13.34, as well as Wis. Stat. §§ 13.26 (1) (c) (contempt for refusal to testify or produce documents) and 13.27 (punishment for contempt).

<sup>5</sup> See Wis. Stat. §§ 13.31 to 13.36.

<sup>6</sup> Wis. Stat. § 13.31.

<sup>7</sup> Assembly Rules 3m (1) (a) and 95 (57m).

<sup>8</sup> Assembly Rule 4. Assembly Rule 4 provides a complete line of succession in the event of temporary absences of officers and certain members.

<sup>9</sup> Wis. Stat. § 13.31.

<sup>10</sup> *Id.* See also Wis. Stat. § 885.03 ("Any subpoena may be served by any person by exhibiting and reading it to the witness, or by giving the witness a copy thereof, or by leaving such copy at the witness's abode.").

<sup>11</sup> Wis. Stat. § 13.36.

<sup>12</sup> Wis. Stat. § 13.35 (1).

<sup>13</sup> *Id.*

Wis. Stat. § 13.35, as well as under numerous other statutes, to “immunity only from the use of the compelled testimony or evidence in subsequent criminal or forfeiture proceedings, as well as immunity from the use of evidence derived from that compelled testimony or evidence.”

Nevertheless, a person compelled to testify before a house or committee of the legislature may be prosecuted for committing perjury in giving such testimony and may not refuse to testify or produce subpoenaed documents on the grounds that the testimony or documents “may tend to disgrace the person or otherwise render the person infamous.”<sup>14</sup>

### **Conclusion**

The legislature has inherent power to conduct investigations in connection with its lawmaking function and to undertake certain actions in carrying out those investigations, including issuing subpoenas to compel testimony and the production of documents. Additionally, the Wisconsin Statutes establish rules governing legislative subpoenas in Wisconsin and provide use immunity to witnesses who are compelled to testify or produce documents in a legislative investigation, such as the Election Committee’s investigation into the conduct of recent elections in this state.

I hope this information is helpful. Please let me know if the LRB can provide any additional assistance.

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<sup>14</sup> In the absence of immunity from prosecution, the Fifth Amendment right against self-incrimination very likely still applies to witnesses subpoenaed to testify before a committee or house of the legislature.