

December 2, 2021

The Honorable Ralph Ramirez
Waukesha County Circuit Court
515 W. Moreland Blvd.
Waukesha, WI 53188

*Re: Waukesha County Case No. 21GF605
Petition for a Writ of Attachment of the Person*

Dear Judge Ramirez,

I represent the City of Green Bay (the “City”) and its officers and employees, including Mayor Eric Genrich. Yesterday, in testimony before the Wisconsin Assembly Committee on Campaigns and Elections, Special Counsel Michael Gableman revealed that he had filed pleadings in this Court seeking an order to commit Mayor Genrich into custody at the Waukesha County Jail. Neither Mayor Genrich nor his Counsel have been served with any such pleadings, nor has anyone in the Office of Special Counsel notified Mayor Genrich or his counsel of this matter. We have, through the press, obtained a copy of the Special Counsel’s “Petition for a Writ of Attachment of the Person” (the “Petition”), apparently based on a Subpoena Duces Tecum issued on October 4, 2021 (the “Subpoena”). Based on our initial review, the Petition is not only lacking in legal merit and built upon a gross distortion of the relevant facts, but it departs so greatly from legal standards that Mayor Genrich intends to serve the Special Counsel with a motion for sanctions under Wis. Stat. 802.05(3)(a)1. and to file that motion in this Court if the Special Counsel does not timely rescind the Petition.

For the reasons stated below, Mayor Genrich respectfully requests that this Court either: (1) dismiss the Special Counsel’s Petition without further proceedings or, in the alternative, (2) either consolidate this matter with the current litigation pending in Dane County or order a briefing schedule and hearing that will allow the parties to fully address the issues raised in the Petition and any rulings issued in ongoing and overlapping litigation.

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First, Wisconsin law recognizes and defines a “writ of attachment,” but it has nothing to do with this matter and does not authorize the relief sought here. *See* Wis. Stat. ch. 811.¹ A party seeking a writ of attachment must strictly comply with the statute. *Elliot v. Jackson*, 3 Wis. 649 (1854). Writs of attachment are relevant in civil disputes between private parties for money damages, and they cannot be issued until after a summons and complaint have been filed, nor can they be used against a municipality (or a municipal officer in his official capacity). *See* Wis. Stat. §§ 811.01, 811.02. The Special Counsel’s work is none of those things.

Second, the Subpoena upon which the Petition relies does not “lawfully require[]” the testimony that the Petition seeks to enforce. The Subpoena was issued by the Assembly under a statute providing for compulsory attendance of witnesses “before any committee of the legislature.” Wis. Stat. § 13.31. Yet that is not what the Subpoena sought, nor what the Petition demands: the Special Counsel wants to take private testimony in a closed forum—some kind of contemporary Star Chamber; compelling testimony in that manner is not authorized by Wisconsin law governing legislative proceedings. The issue of whether the Special Counsel has any authority to use a legislative subpoena to compel testimony in private is currently being litigated in a case brought by the Attorney General. *Wis. Elections Comm’n, et al. v. Wis. Assembly, et al.*, No. 2021CV2552 (Dane Cnty. Cir. Ct.) (oral argument scheduled for December 23 on validity of Special Counsel’s use of a legislative subpoena to compel testimony at a private office in Waukesha County).

Although he did not disclose it to this Court, the Special Counsel is certainly aware of the pending matter, as he is a party to that action and has filed briefs defending his position. The proceedings in the Dane County litigation will illuminate—and possibly be dispositive of—the issues bearing on the enforceability of the Subpoena that underlie the Petition here.² The Dane County Court has the benefit of adversarial briefing and oral argument. For reasons of judicial economy, to avoid confusion in the law, and to prevent prejudice to the parties, this Court should take no action on the Petition until the Dane County litigation and any subsequent appeals have concluded. *See, e.g., Cawker v. Dreytzer*, 197 Wis. 98, 221 N.W. 401, 411 (1928) (“[T]here is no doubt that a court of concurrent jurisdiction should not take jurisdiction of a matter which is properly involved in a proceeding then pending in another court.”).

Third, the Petition does not belong in this Court, and it asks this Court not only to exceed its own jurisdiction but also to order other public officials to do the same. Section 885.12 permits a court “in the county where the person was obliged to attend” to issue an attachment. The

¹ All references are to the 2019-20 statutes updated through 2021 Wis. Act 86.

² Such issues include whether the Special Counsel has the authority to compel testimony in a private, quasi-deposition; whether similar subpoenas issued to the Wisconsin Elections Commission are in furtherance of a valid legislative purpose; whether the subpoenas violate due process; and whether the subpoenas are unduly broad and burdensome. Mayor Genrich expects to raise all of these issues in response to the Petition.

Subpoena does not oblige Mayor Genrich to give testimony in any location. But, if it did, a valid legislative subpoena under section 13.31 can compel Mayor Genrich to appear only before the Legislature, which meets in Dane County. Because Mayor Genrich has not been lawfully required to testify in Waukesha County, venue is not proper in this Court.

Furthermore, Section 885.12 provides for a court to commit a recalcitrant witness to the county jail and requires the “sheriff of the county” to execute the commitment. Wis. Stat. § 885.12. The Special Counsel would therefore be asking this Court to issue an order to the Waukesha County Sheriff to seize and confine the duly elected Mayor of Green Bay—a *separate municipal corporation organized under the laws of Wisconsin and located several counties away*—in the Waukesha County jail. Such an action would both exceed the authority of the Waukesha County Sheriff and encroach on the authority of Brown County and the City. *See, e.g., State v. Zivic*, 229 Wis. 2d 119, 126, 598 N.W.2d 565 (Ct. App. 1999) (discussing the territorial jurisdiction of a county sheriff).

Fourth, the Special Counsel lacks standing to bring the Petition. Section 885.12 applies to testimony “lawfully required before *any arbitrator, coroner, medical examiner, board, commission, commissioner, examiner, committee, or other officer or person authorized to take testimony.*” (emphasis added) The Special Counsel does not fall within any of the listed categories. The Special Counsel is not a committee of the legislature, and he cannot use the Legislature’s authority to compel testimony outside the presence of a legislative committee. The Subpoena did not direct Mayor Genrich to appear before any committee of the legislature or any other person or entity described in Section 885.12. The Petition does not claim that Mayor Genrich failed to appear before the Committee, nor did the Special Counsel indicate under what separate authority he would be a person “authorized to take testimony.” Because the statute does not apply, the Special Counsel cannot obtain the relief he seeks in the Petition.

Fifth, even setting aside the Petition’s fatal flaws identified above, the Petition fails because Mayor Genrich has at all relevant times acted reasonably. *See* Wis. Stat. § 885.12 (authorizing relief only where the witness acted “without reasonable excuse”). Upon receipt of the Subpoena and several others issued to the City of Green Bay and its officials, undersigned counsel spoke with Andrew Kloster, an attorney in the Special Counsel’s office. The City agreed to voluntarily produce nearly 20,000 pages of documents, and, in response, the Office of Special Counsel agreed that none of the legislative subpoenas would be enforced. This agreement was memorialized in my letter accompanying the City’s document production made on October 14:

Per our discussions, Green Bay understands that neither further document production nor witness attendance is necessary at this time in response to the Special Counsel’s inquiries of September 30 and October 6. In the event that the Special Counsel at a later date seeks any additional documents from Green Bay or any witness testimony on behalf of Green Bay or any of its officials, such a request should include information regarding specific topics on which

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information is sought, the timeframe to be covered in any testimony, and the venue and timing in which any testimony is requested.

The City of Green Bay and its officials reserve all potential objections related to further requests for testimony or documents as well as all potential objections related to the Special Counsel's authority under governing law.

Neither the City nor its attorneys received any response to this letter. However, the next day, the Special Counsel publicly confirmed that the City had complied.³ Based on public statements from the Special Counsel, as well as their representations in the Dane County case, the Mayor had every reason to believe that the Special Counsel was not currently seeking testimony pursuant to the Subpoena.⁴

To rebut these facts (which the Special Counsel does not even mention, much less explain away), the Petition (based on the partial copy we have seen thus far) appears to rely on an email from the Special Counsel to Vanessa Chavez, the former Green Bay City Attorney and an employee of the City. This is both problematic and disingenuous. For one thing, on at least three separate occasions between October 6 and December 1, the City and its attorneys expressly advised the office of Special Counsel that all communication regarding the Special Counsel's investigation should be directed to the City's outside counsel.⁵ Nonetheless, on October 21, 2022,⁶ the Special Counsel emailed the City directly; the Special Counsel did not send this email, or a copy of it, to the City's outside counsel.

³ Matt Smith, *GOP Election Attorney Signals Eventual Testimony, Possible Subpoenas For Voting Machines*, wisn.com, October 15, 2021, available at <https://www.wisn.com/article/gableman-signals-eventual-testimony-possible-subpoenas-for-election-machines-in-12-news-interview/37973875#> (last visited December 2, 2021) (the Special Counsel is quoted as follows: "We are grateful that all the cities so far, the Wisconsin Elections Commission and Josh Kaul have all voluntarily complied with our subpoenas as we have worked closely with each of them to try to make this as efficient and convenient as possible for everyone concerned.")

⁴ See e.g. Emilee Fannon, *State and City Election Officials Will No Longer Testify With Gableman*, cbs.58.com, October 14, 2021, available at <https://www.cbs58.com/news/wisconsin-elections-commission-will-not-testify-with-gableman-friday> (last visited December 2, 2021) ("Gableman, a former Supreme Court justice, confirmed in a new video he's backing off his request for testimony and tens of thousands of pages of election documents."); A.J. Bayatpour, *Gableman Backs Off Request For Testimony From City Officials*, wkow.com, October 7, 2021, available at https://www.wkow.com/news/gableman-backs-off-request-for-testimony-from-city-officials/article_e249c854-27ba-11ec-82c5-7b5f2c67ef13.html (last visited December 2, 2021).

⁵ See also SCR 20:4.2 ("In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter.")

⁶ The Petition identifies the Subpoena as being dated October 22, 2021. It was not. It was served on October 4. And the email to City Attorney Chavez was dated October 21, 2021.

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In sending this improper email, the Special Counsel used an outdated email address. The email was captured by the City's spam filter and was not delivered to Ms. Chavez's inbox. The City's outside counsel informed the Special Counsel of this fact by letter on November 23, 2021⁷—nearly a week before the Special Counsel filed the Petition—without response. At no time did the Special Counsel follow up on this email with outside counsel or otherwise indicate that he expected Mayor Genrich to appear on November 17, nor did he make attempt to reschedule prior to filing the Petition.

Even if the Special Counsel's email had been properly sent to counsel and not a represented party, it neither mentions Mayor Genrich by name nor specifies a location for the testimony sought.⁸ It refers to “the person most knowledgeable” and to Ms. Chavez's “client.” It also merely states that the Special Counsel is “continuing the return date,” without specifying whether that applies to the document requests or testimony or even which of the three separate legislative subpoenas the Special Counsel had served upon the City and its officers is implicated. This is plainly insufficient notice to suggest, much less establish, that Mayor Genrich acted “without reasonable excuse.” Wis. Stat. § 885.12.

The Special Counsel has not, and cannot, show that Mayor Genrich at any time acted without reasonable excuse. The Petition should be dismissed.

Sixth and finally, should this Court decide not to dismiss the Petition immediately, Mayor Genrich respectfully requests that he be afforded due process in this matter. One possibility is consolidation with the pending litigation in Dane County pursuant to Wis. Stat. § 805.05(1)(b). Another would be to adjourn this Court's noticed December 22 hearing⁹ and set this matter for a scheduling conference in January so the Court can then enter an appropriate briefing schedule and plan a hearing to occur after the Dane County Circuit Court has ruled.

Under long-standing Wisconsin precedent, a witness is entitled to the opportunity to have a court rule on enforceability issues prior to issuing any order for confinement. *State ex rel. St. Mary's Hosp. v. Indus. Comm'n*, 250 Wis. 516, 520, 27 N.W.2d 478 (1947). In addition to the items described in this letter, the Subpoena and the Petition raise serious, novel, and important issues of due process, separation of powers, and the nature and scope of legislative subpoenas in Wisconsin, all of which require briefing and argument should this Court choose to not dismiss the Petition.

⁷ At the same time, the City voluntarily supplemented its document production.

⁸ The Petition is also unclear on the timing. It indicates that Mayor Genrich failed to appear on November 15, though the attached email references a “return date” of November 17.

⁹ In addition, I have long-standing family travel plans out of state on December 22 and will not be able to attend the currently-scheduled hearing in this matter. I will file a short motion addressing that issue shortly, if necessary.

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For the reasons stated herein, as well as others that would require formal briefing and argument, Mayor Genrich respectfully requests that this Court dismiss the Special Counsel's Petition without further proceedings or, in the alternative, issue a briefing schedule and set a hearing that allows the parties to fully address the issues raised by this matter and the light that will be shed by resolution of overlapping litigation in the Dane County Circuit Court.

Thank you for your attention to this matter.

Best regards,

STAFFORD ROSENBAUM LLP



Jeffrey A. Mandell

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