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October 3, 2017

Mr. Scot Ross
Executive Director
One Wisconsin Now
152 W Johnson Street, Ste. 214
Madison, WI 53703

Re: Logrolling, Executive Favor

Dear Mr. Ross:

My office reviews and prosecutes matters referred by law enforcement, but does not engage in independent investigations except in rare circumstances. Anyone who believes a crime has been committed should contact the police. That said, I would make the following observations from your email of October 2nd, 2017.

Your current complaint is similar to the one you brought two years ago after the last budget was completed. Now, as then, I do not believe that public pronouncements about legislative priorities by a legislator offend Wis. Stats. § 13.05. Wis. Stats. § 13.05 is meant to embrace a direct quid pro quo, conditioning support for one piece of legislation to that to be given to another. Your other claim of a violation of Wis. Stats § 13.06, Executive Favor, is similarly infirm and may be based on a misreading of the statute. Finally, as I wrote to you on October 2, 2017, any allegations of open meetings or open records statutes cannot be made by an email. These must be raised by a verified complaint, something I have not received.

The complaint you made after the 2015 budget was that Senator Stroebel had violated Wis. Stats. § 13.05 by making a public statement that he would not vote for it while another legislative matter remained unsettled. Then, as now, I do not believe that conduct was a violation of the law. Your allegations this time are much more generalized, but also fail. The essence of a logrolling violation is the hidden subtext of 'one hand washes the other' with respect to the separate legislative priorities of different legislators.

The state budget is an enormous legislative undertaking that includes numerous fiscal and policy matters. It's the most central piece of legislation of any biennium.

Practically speaking, it's an aggregate bill containing the priorities, needs and requests from every agency in the state. Stated otherwise, there's not a single issue that might be important to a legislator that isn't affected in some way by the state budget.

Here, you have provided me with a number of articles that openly discuss the efforts of various legislators to garner support for the budget, and the public pronouncements by certain legislators of what it would take to capture their vote. Your materials outline many private discussions that likely happened with regard to the budget. After reviewing your material, and researching the applicable law, I have to conclude that your allegations – even if taken as true – would not constitute a crime. What you describe is not 'logrolling' and does not violate Wis. Stats. § 13.06, Executive Favor.

Appellate Courts in Wisconsin have addressed 'logrolling' on numerous occasions. In Wisconsin Senate v. Thompson, 144 Wis.2d 429 (1988) the Court observed:

> The definition of logrolling the *Martin* court apparently had in mind is consistent with the definition that term is given in other jurisdictions. *Black's Law Dictionary*, 5th ed., p. 849 (1979) defines logrolling as:
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> "A legislative practice of embracing in one bill several distinct matters, none of which, perhaps, could singly obtain the assent of the legislature, and then procuring its passage by a combination of the minorities in favor of each of the measures into a majority that will adopt them all."
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> Variations on this definition of logrolling have been followed in other states, especially those with constitutional prohibitions against having a bill relate to more than one subject. For example, in *Gillert v. State of Alaska*, 522 P.2d 1120, 1122 (Alaska 1974) the Alaska Supreme Court described logrolling as deliberately inserting in one bill several dissimilar or incongruous subjects in order to secure the necessary support for the passage of the measure. The Washington Supreme Court in *Flanders v. Morris*, 88 Wn.2d 184, 558 P.2d 769 (1977) recognized that the constitutional provision that no law shall contain more than one subject, which shall be expressed in the title, has a dual purpose:
>
> ...

> Article IV, sec. 18 of the Wisconsin Constitution only prohibits private or local bills embracing more than one subject; that provision further requires that the subject be expressed in the title. It thus appears that Wisconsin has always condoned "logrolling" in the sense that this state has never prohibited the inclusion of substantive legislation in appropriation bills and has never adopted a "one-bill-one-subject" limitation on bills other than the private and local limitation. *See State ex rel. Wisconsin Telephone Co. v. Henry*, 218 Wis. 302, 315, 260 N.W. 486 (1935).
>
> ...
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> This conclusion is bolstered by the fact that this state has since 1911 — 19 years before the partial veto constitutional amendment — had a statute specifically prohibiting a defined type of logrolling. This legislative prohibition is now found in sec. 13.05, Stats. This statutory prohibition aimed at preventing individual legislators from exchanging votes — i.e., reciprocal voting for each other's separate bills — has remained relatively unchanged since its 1911 adoption. Sec. 13.05, provides:
>
> ...

The current form of Wis. Stats. § 13.05 reads:

> **13.05 Logrolling prohibited.** Any member of the legislature who gives, offers or promises to give his or her vote or influence in favor of or against any measure or proposition pending or proposed to be introduced in the legislature in consideration or upon condition that any other person elected to the same legislature will give or will promise or agree to give his or her vote or influence in favor of or against any other measure or proposition pending or proposed to be introduced in such legislature, or who gives, offers or promises to give his or her vote or influence for or against any measure on condition that any other member will give his or her vote or influence in favor of any change in any other bill pending or proposed to be introduced in the legislature, is guilty of a Class I felony.

While the form of logrolling discussed in Thompson has been the subject of many opinions, there's no authority that provides guidance of what would – or would not – constitute a violation of Wis. Stats. § 13.05. There is also no jury instruction that defines the elements of that crime.

I would interpret the offense of logrolling contrary to Wis. Stats. § 13.05 to have the following elements.

1. The defendant is a member of the legislature.
2. The defendant (offered)(promised) to vote a certain way, on a measure pending or soon to be introduced in the legislature.
3. The defendant's (offer)(promise) to vote was in consideration for or upon the condition that another legislator would give, promise or agree to vote or influence another measure or proposition pending or proposed to be introduced in such legislature.

You have also alleged a violation of Wis. Stats. § 13.06, Executive Favor, a statute that doesn't appear to have ever been addressed by a Wisconsin appellate court. I can't find any evidence this statute has ever been applied since it was created as Wis. Stats. § 13.74 around 1955, nor since it was renumbered to 13.06 in 1967. Wis. Stats § 13.74 originally appeared as follows:

> 13.74 Executive favor. Any member of the legislature who shall give, offer or promise to give his vote or influence in favor of or against any measure or proposition pending or proposed to be introduced in the legislature, or that has already been passed by either house of the legislature, in consideration of or on condition that any person, being governor of the state, shall .approve or disapprove, veto or sign, or agree to approve or disapprove, veto or sign, any other measure or proposition pending or proposed to be introduced in the legislature or that has already been passed by the legislature, or either house thereof, or in consideration or upon condition that any person, being governor of this state, shall nominate for appointment or appoint or remove any person or persons to or from any office or position under the laws of this state, shall be fined not less than $500 nor more than $1,000, or imprisoned in the state prison not less than one year nor more than 2 years, or both.

Today, Wis. Stats. § 13.06 reads as follows:

> 13.06 Executive favor. Any member of the legislature who gives, offers or promises to give his or her vote or influence in favor of or against any measure or proposition pending or proposed to be introduced in the legislature, or that has already been passed by either house of the legislature, in consideration of or on condition that the governor approve, disapprove, veto or sign, or agree to approve, disapprove, veto or sign, any other measure or proposition pending or proposed to be introduced in the legislature or that has already been passed by the legislature, or either house thereof, or in consideration or upon condition that the governor nominate for appointment or appoint or remove any person to or from any office or position under the laws of this state, is guilty of a Class I felony.

You claim that what transpired might be a violation of this statute. It clearly wouldn't be. In making this claim, I submit, you've missed an essential

component. Nothing prohibits a legislator from offering to vote on a specific matter on condition that the governor agreed to veto part of that bill being voted on. What is prohibited by Wis. Stats. § 13.06 is a bargain where there is commitment to veto " ... any other measure or proposition pending or proposed to be introduced in the legislature or that has already been passed by the legislature. ..." Here, the only discussions that we know of were related to certain vetoes that might be made to the budget itself – not any other matter. For reasons discussed later in this letter, there is no evidence of anything else.

Both logrolling and Executive Favor are statutes which have always been located near Wis. Stats. § 13.75 or the modern 13.07. In my opinion, § 13.07 is part of the inherent policy that guides enforcement of the preceding statutes. Wis. Stats. § 13.07 reads:

> 13.07 Freedom of debate confirmed. Nothing in ss. 13.05 and 13.06 shall be construed as prohibiting free discussion and deliberation upon any question pending before the legislature by members thereof, privately or publicly, nor as prohibiting agreements by members to support any single measure pending, on condition that certain changes be made in such measure, nor as prohibiting agreements to compromise conflicting provisions of different measures.

Nothing you have provided suggests anything other than what might have been contemplated when the legislature crafted Wis. Stats. §§ 13.75 and 13.07.

You've given me newspaper articles questioning whether the creation of the position of Inspector General might be that 'other matter.' You added to this your argument that certain legislators may have supported this measure in the past, and from this chain of inductive reasoning speculate that this might have been some sort of quid pro violating the statutes discussed above.

Transportation is always one of the greatest expenses of state government. The 'policing' of the Department of Transportation was a key concern voiced by the Governor and the Legislature following the release of Legislative Audit Bureau Report 17-2 in January, 2017. As your materials point out, the transportation budget became the key fiscal dispute between the legislature and the Governor. The Milwaukee Journal Sentinel reported on April 6th, 2017 " *In a move not seen in at least 24 years, top lawmakers yanked dozens of provisions from Gov. Scott Walker's budget bill, including the entire transportation plan put forward by their fellow Republican.*" Again, as your materials point out, these differing views were resolved through negotiation – albeit sometimes acrimoniously. The Governor then used his executive authority to accomplish his priorities. Such is the budget process in Wisconsin. The Legislature has the ability to ignore a governor's initial budget proposals, but the governor in turn has enormous veto authority to entirely shape what is ultimately given to him.

In your letter you refer to your allegations as "fears," because to you these events were "curious," and "too coincidental." This is speculation. You have not voiced a reasonable suspicion of criminal behavior based on fact. I find the following to be the best explanation of what a reasonable suspicion is.

> [A] "Reasonable suspicion" is defined as "[a] particularized and objective basis, supported by specific and articulable facts, for suspecting a person of criminal activity." BLACK'S LAW DICTIONARY 1487 (8th ed. 2004). Conversely, a "hunch" is "a strong intuitive feeling as to how something (as a course of action) will turn out." WEBSTER'S THIRD NEW INT'L DICTIONARY 1102 (1998). A hunch amounts to no more than a subjective good faith guess. Wisconsin case law teaches that a hunch is not enough to justify an investigative stop. See Fields, 239 Wis. 2d 38, ¶10.

State v. Brown, 2007AP1938 (Ct. App. 2008) (unpublished)

Viewed objectively, your suggestion of illegal collusion is nothing more than the wisp of innuendo. Nearly every day I learn of some executive order, policy statement, or political appointment made by the Governor. Having gone through the appointment process myself many years ago, I know that these decisions are often made with the encouragement and support of politicians and community leaders. I also know that legislators are confronted with hundreds – if not thousands – of proposed pieces of legislation, bills, and requests for political support on a yearly basis. While you paint the timing of one activity as suspicious of another, in reality intersecting points of interest in political matters are extremely common. However, this ordinary political activity, if aired in a convenient light, could be caste as mistrustful if someone were motivated or inclined to do so. Viewed objectively, as I must, I don't find the fact that some concept may have been favored by a particular senator at some point in time to be suspicious of an unspoken deal.

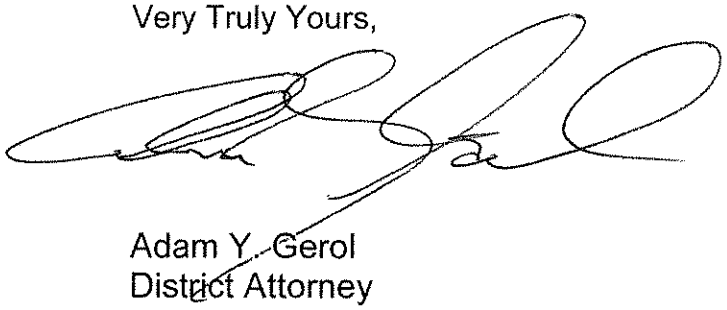
Finally, while everyone has the right – if not the duty – to bring evidence of wrongdoing to the proper authorities, I ask you to reflect on whether this complaint was really done for some sense of political gain. These claims were extremely similar to the ones brought two years ago. I would have hoped that if your intent was to truly correct criminal behavior you might have tried to reference what you felt were distinctions between the two sets of allegations.

I regret that for many years the political world has found it convenient to use law enforcement for political gain. Those inclined to do so are quick to seize on mere theories of criminal behavior for political headlines. This is wrong on many levels and damages the entire criminal justice system. The single most important reason for the greatness of America is the integrity of our rule of law. Prosecutors must avoid being drawn into political contexts because every time they do so the entire prosecutorial

system becomes infected with a political taint. District Attorneys are quasi-judicial officers, and must be viewed as detached from personal or political influences. A suspicion of partisanship is as corrosive to the integrity of the legal system as an allegation of corruption. In the long run, when a prosecutor applies the great weight of the state's criminal justice system to anything but the clearest of political crimes, the entire system loses.

While I answered your complaint quickly, doing so took away my time away from important matters. I read about your allegations the day before you wrote to me, and I note that your twitter feed referenced this matter four hours before you sent your email. In today's environment, I find that not responding quickly to allegations like this made in the public domain can result in things getting carried away. That said, the Ozaukee County District Attorney's Office is confronting more felonies this year than we have seen in modern times. These include more death and bodily harm incidents than I have witnessed in my last 25 years here. Should the next budget cycle bring another complaint of political misconduct from your organization, I would greatly appreciate some sort of factual summary of your allegations, as opposed to having to read through numerous attachments to see if there is a possibility that such facts might exist.

Very Truly Yours,



Adam Y. Gerol
District Attorney
State Bar #1012502

AYG/jm