Your Right to Know / John Foust

Ask lawmakers for the records they delete

If a legislator deletes an email, is it truly gone? Not necessarily.

On March 10, Dane County Circuit Judge Valerie Bailey-Rihn [ordered](https://www.nbc15.com/2022/03/10/judge-orders-speaker-robin-vos-produce-deleted-emails/) Assembly Speaker Robin Vos to search for deleted emails that should have been preserved after an open records request from American Oversight, a watchdog group.

Weeks later, Vos’ team [surrendered](https://www.americanoversight.org/document/wisconsin-assembly-previously-deleted-records-related-to-election-investigation) an astounding 20,000 emails recovered from the “deleted items” folders of government email accounts.

Obtaining records from state lawmakers can be especially difficult. Decades ago, the Legislature exempted itself from the state’s records retention statute. The smallest township in Wisconsin is required to keep some records for years, but the legislators and their staff can destroy records at will.

But the state’s open records law states that, once a record has been requested, destroying it is illegal. If you make an open records request, even legislators need to pause their deletions to properly respond to your request.

Judge Bailey-Rihn took this further, ordering Vos to search for records that had been deleted but were still retrievable. Steve Fawcett, Vos’s staff counsel, waited up to 13 days before he notified staff to stop deleting records that may have been responsive to American Oversight’s requests. On March 30, Bailey-Rihn [found](https://www.wpr.org/robin-vos-assembly-found-contempt-court-over-2020-election-investigation-records) Vos in contempt of court in a different case, saying he and the Assembly had shown “a collective and abject disregard” of a prior order to produce the records.

Former Wisconsin Supreme Court Justice Michael Gableman, who was hired by Vos at taxpayer expense to search for evidence of fraud in the 2020 election, was also [ordered](https://www.wpr.org/judge-orders-gablemans-office-stop-deleting-records-election-investigation) by a judge to stop deleting records.

The Wisconsin Legislative Council, the non-partisan agency that gives legal and policy advice to the Legislature, [concluded](https://bloximages.chicago2.vip.townnews.com/kenoshanews.com/content/tncms/assets/v3/editorial/b/19/b1951978-7afc-5009-9f4b-7aec5f1210c5/626191726e502.pdf.pdf) last year that Gableman’s Office of Special Counsel is subject to the records retention statutes. And yet it was continuing to delete records it decided were “irrelevant or useless” to its investigation.

As the Wisconsin Examiner recently [reported](https://wisconsinexaminer.com/2022/04/11/will-release-of-deleted-records-make-it-easier-to-uncover-legislatures-secrets/), the ability to request records that have been deleted opens up a new avenue for reporters and others seeking to hold public officials accountable—and perhaps provides an end-run around lawmakers’ ability to delete records.

“I’ve already changed my request template,” Amanda St. Hilaire, an investigative reporter at Fox6 WITI in Milwaukee who makes hundreds of records requests a year, told the news outlet. “I’ve never thought to request specifically deleted records because based on the way the law works, I always was under the impression that if they could retrieve those records, that would be responsive to my request.”

Jeff Ylvisaker, director of the Legislative Technology Services Bureau, declined to answer my questions regarding its retention policies that might explain how much email is in their archives and perhaps still accessible.

That’s unfortunate, because lawmakers shouldn’t be deciding which records to keep and which to destroy, a power that could be used to hide misconduct. Lawmakers’ exemption from the retention rules in place for everyone else [should be eliminated](http://wisfoic.org/june-bar-lawmakers-from-destroying-records/).

But until then, citizens seeking to know what lawmakers are up to should be asking them to search the trash cans, too.

*Your Right to Know is a monthly column distributed by the* [*Wisconsin Freedom of Information Council*](http://www.wisfoic.org/) *(www.wisfoic.org), a group dedicated to open government. John Foust is a Council member and a computer consultant in Jefferson.*

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