IN THE SUPREME COURT OF THE STATE OF MONTANA
No. OP 21-0125

DOROTHY BRADLEY, BOB BROWN, MAE NAN ELLINGSON, VERNON FINLEY, and MONTANA LEAGUE OF WOMEN VOTERS,

Petitioners,

v.

GREG GIANFORTE, Governor of the State of Montana,

Respondent.

INTERVENOR BETH McLAUGHLIN'S EMERGENCY MOTION TO QUASH AND ENJOIN LEGISLATIVE SUBPOENA DUCES TECUM

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MOTION

This emergency motion seeks an immediate ruling from the Court to quash and enjoin a Subpoena issued by the Montana State Legislature calling for the production of emails and documents sent to or received by the Court Administrator of the Montana Supreme Court that likely contain private medical information, personnel matters including employee disciplinary issues, discussions with judges about ongoing litigation, information regarding Youth Court cases, judicial work product, ADA requests for disability accommodations, confidential matters before the Judicial Standards Commission, and information that could subject the State of Montana to liability were protected information exposed. Court Administrator Beth McLaughlin ("McLaughlin") is informed and believes the Department of Administration is actively working over the weekend to produce this privileged, confidential, and highly sensitive information, as commanded by the Subpoena. This, in turn, would deprive McLaughlin and those persons affected by the Subpoena of any opportunity to seek relief and avoid severe irreparable harm. Thus, McLaughlin respectfully requests the Court issue an Order on this motion over this weekend, or as soon as reasonably possible. McLaughlin understands this may require the Court to confer outside its normal schedule, but respectfully submits that such relief is warranted by the extenuating circumstances and extreme time-sensitivity of this matter.

Pursuant to Mont. R. App. P. 14(2), (4), Mont. Code Ann. §§ 3-2-205, 26-2-401, and this Court's inherent authority to control original proceedings, McLaughlin[1] moves the Court to issue an immediate order: (1) quashing an April 7, 2021 Subpoena served upon the Montana Department of Administration by the Montana State Legislature, and (2) enjoining the Montana Department of Administration and its Director from complying with, producing, or otherwise disclosing the documents and information requested in the Subpoena. The Subpoena, attached hereto as Exhibit A, demands the production of "[a]ll emails and attachments" and "[a]ny and all recoverable deleted emails sent and received by Court Administrator Beth McLaughlin between January 4, 2021 and April 8, 2021." (Ex. A (emphasis added); Declaration of Beth McLaughlin, Exhibit B, ¶¶ 4, 5.) Failure to grant the requested relief will result in severe irreparable harm to individual privacy rights and potentially give rise to a constitutional crisis.

This motion is supported by the following brief and proposed order (attached as Exhibit C). Counsel for the Montana Legislature and for the Department of Administration have been contacted with respect to this motion, and have not

[1] As one with an asserted interest who has voluntarily appeared in this proceeding, McLaughlin qualifies as an Intervenor under Mont. R. App. 2(1)(f).

responded. The letter to counsel is attached as Exhibit D. Counsel for Petitioners has been contacted and does not object.[2]

BACKGROUND

This emergency request arises from discovery efforts to obtain information for use in this original proceeding. Specifically, the Montana State Legislature previously issued a request to McLaughlin for information on a poll of members of the Montana Judges Association ("MJA") pertaining to SB 140. (Ex. B, ¶ 3.) Unsatisfied with her response, Respondent asked the Court to stay these proceedings pending release of further information relating to the MJA poll.

On April 7, 2021, this Court denied the motion. The Order stated, in pertinent part: (1) Judge Krueger, who had participated in the poll, had voluntarily recused himself from this case; (2) "no member of this Court participated in the aforementioned poll"; and (3) "the six undersigned members of this Court will consider the case on the Petition and the responses submitted. . . ." (April 7, 2021 Order at 1, 2.)

The very next day, April 8, 2021, the Montana State Legislature issued a Subpoena to Director Misty Ann Giles of the Montana Department of Administration, not to the judicial branch, requiring her to appear the next day and produce:

[2] McLaughlin also seeks leave to file an overlength brief. The applicable word limit of 1,500 words, pursuant to Mont. R. App. 16(3), is insufficient under the circumstances of this case. Given the emergency nature of McLaughlin's motion, she had no opportunity to seek the Court's leave in advance.

(1) All emails and attachments sent and received by Court Administrator Beth McLaughlin between January 4, 2021 and April 8, 2021 delivered as hard copies and .pst digital files.

(2) Any and all recoverable deleted e-mails sent or received by Court Administrator Beth McLaughlin between January 4, 2021 and April 8, 2021 delivered as hard copies and .pst digital files.

(3) This request excludes any emails and attachments related to decisions made by the justices in disposition of final opinion.

(Ex. A.) Although the Subpoena demanded the production of all emails and attachments on Friday, April 9, 2021, a one-day turnaround, Director Giles reached an agreement whereby the documents would be compiled this weekend and produced, presumably, on Monday or perhaps sooner during the weekend. (Ex. B, ¶ 6.) McLaughlin is informed and believes that Director Giles intends to comply with the Legislature's Subpoena. (Ex. B, ¶ 6.)[3]

In her capacity as Court Administrator, McLaughlin receives a wide variety of emails and attachments that implicate the rights and privileges of other parties. (Ex. B.) These emails and attachments include, but are not limited to:

- Information pertaining to medical information both for employees and elected officials.
- Discussions of potential employee disciplinary issues including requests from employees and judges to discuss pending discipline.
- Discussions with judges about case processing and ongoing litigation in pending or potential cases.

[3] The Subpoena seeks records of the judicial branch but only provide a "courtesy copy" to McLaughlin the afternoon of April 9, 2021. McLaughlin has yet to receive any response to her request to delay the matter while she sought legal advice.

- Information related to complaints pending before the Judicial Standards Commission.

- Information or documentation of Youth Court Case information in my role as supervisor of the Youth Court bureau chief.

- Information about potential on-going security risks to individual judges including communications with law enforcement.

- Copied on exchanges between judges in which advice about case law and potential decisions were being sought from other judges.

- Copied on exchanges between judges in which information was exchanged about judicial work product.

- Requests from members of the public for disability accommodations including documentation of the disability.

- Other unknown items that could expose the state and Judicial Branch to liability if protected information is exposed.

(Ex. B, ¶ 7.)

The Subpoena is broad enough to include the privileged and confidential documents identified above. It deliberately seeks all McLaughlin emails, no matter the subject, with one limited and vague exception. As such, severe and irreparable harm will occur if the Subpoena is not immediately quashed and enforcement enjoined.

ANALYSIS

This Court is authorized under Mont. R. App. 14(2) and (4) to decide requests for injunctive relief in original proceedings. It likewise has broad power in the administration of discovery. *Asencio v. Halligan*, 395 Mont. 522, 437 P.3d

113 (2019). That broad power rests with this Court where, as here, the matter is the subject of an original proceeding. Mont. R. App. P. 14.

The broad discretion to control proceedings includes the power to protect against subpoenas that seek irrelevant, improper, illegal, or impertinent information. Mont. Code Ann. § 26-2-401. If a subpoena seeks "confidential" information, courts generally may "quash or modify" a subpoena "protect a person subject to or affected by a subpoena." Mont. R. Civ. P. 45(d)(3)(B). Most importantly, a court "must" modify or quash a subpoena that "requires disclosure of privileged or other protected matter, if no exception or waiver applies." Mont. R. Civ. P. 45(d)(3)(A) (emphasis added). The Court also has authority to "preserve the status quo" by issuing immediate injunctive relief ex parte. *See generally* Mont. Code Ann. § 3-2-205; *Boyer v. Karagacin*, 178 Mont. 26, 32, 582 P.2d 1173, 1177 (1978) ("It is well settled that the purpose of a temporary restraining order is to preserve the status quo until a hearing can be held to determine whether an injunction pendente lite should be granted.").[4]

Moreover, a person subject to a subpoena has certain rights under Montana law which this Court has the authority to protect and enforce. Mont. Code Ann. §§ 26-2-101, 26-2-401. Importantly, "[i]t is the right of a witness to be protected from irrelevant, improper" questions and "to be examined only as to matters legal and

[4] Although the Montana Rules of Appellate Procedure do not contain specific rules regarding subpoenas (like Mont. R. Civ. P. 45), the procedure and protections of Rule 45 are at the very least instructive. After all, the importance of consistency in the handling of—and protections against—subpoenas is self-evident.

pertinent to the issue." Mont. Code Ann. § 26-2-401 (emphasis added.) *See also* Mont. R. Civ. P. 45(d)(3)(A) and (B).

Here, the Subpoena's breadth raises numerous issues and compliance would inflict irreparable harm. Given the Court's recent ruling, any additional information that might exist regarding the MJA poll is irrelevant and thus improper under Mont. Code Ann. § 26-2-401. Yet, the Legislature made no attempt to limit the Subpoena's scope to even that topic, perhaps recognizing that doing so would be regarded as an end-around the Court. Instead, the Subpoena demands the production of "all emails and attachments," existing or deleted, "sent and received by Court Administrator Beth McLaughlin" during a three-month time period. (Ex. A (emphasis added).) The only exception, to the extent it can be meaningfully understood and implemented, is narrow, and applies to "decisions made by the justices in disposition of final opinion." (Ex. A.)

1. The Subpoena Violates Separation of Powers and Exceeds Any Proper Scope.

The Legislature's power to issues subpoenas is finite. As recently discussed by the United States Supreme Court in *Trump v. Mazars USA, LLP*, subpoena power is "justified solely as an adjunct to the legislative process," and is therefore subject to several limitations. 140 S. Ct. 2019, 2031-32 (2020). Foremost among those is that "the subpoena must serve a valid legislative purpose." *Id*., *quoting Quinn* v. *United States*, 349 U. S. 155, 161, 75 S. Ct. 668, 99 L. Ed. 964 (1955). It

must "concern a subject on which legislation could be had." *Id*. *See also State ex rel. Joint Comm. on Gov't & Fin. v. Bonar*, 230 S.E.2d 629, 629 (W. Va. 1976) (legislature must show: "(1) that a proper legislative purpose exists; (2) that the subpoenaed documents are relevant and material to the accomplishment of such purpose").

Based on the cornerstone constitutional principle of separation of powers into three coordinate branches, s*ee Morrison v. Olson*, 487 U.S. 654, 693-94 (1988), the legislative subpoena power is most limited when directed toward the judicial or executive branches. *Sullivan v. McDonald*, 2006 Conn. Super. LEXIS 2073, at *20 (Super. Ct. June 30, 2006) ("a subpoena power from one governmental branch to another is very limited…"). In *Sullivan*, the Court considered an analogous legislative subpoena that demanded testimony from a judicial officer. The Court deemed the subpoena a dangerous legislative foray into the independent judiciary:

> For the foregoing reasons, the court grants the plaintiff's motion to quash the subpoena and issues a temporary injunction preventing the defendants from compelling the attendance of Justice Sullivan at this hearing in the future. The failure to rule in this manner would allow unbridled power in any legislative committee to compel the attendance of sitting judicial officers. Such a ruling would cast a chilling effect upon the independence of the judiciary

Id., * 20.

Here, the Legislature attempts to use its limited subpoena power to obtain judicial communications—not for a legislative purpose or a "subject upon which legislation could be had," *Trump*, 140 S. Ct. at 2031-32, but for a litigation purpose. Indeed, the Legislature asks for judicial records from the executive branch. The purpose originally offered by the Legislature for the MJA poll information was that it might shed light on how certain justices presiding over this case viewed SB 140. But the Court has already issued an Order stating none of the six justices who will continue presiding over this case participated in the poll. There is, therefore, no arguable "legitimate legislative purpose" for continuing to seek the MJA poll information. *See id*. The Subpoena should be quashed on this basis alone.

Even if there was a legitimate legislative purpose to seek the MJA poll information, there is no conceivable justification for demanding all of McLaughlin's emails and attachments on any and all topics or for seeking them from the executive branch. Needless to say, one branch of government must have some basis to require another branch to produce its communications. Here, there is none.

2. Judicial Deliberations and Communications Are Not the Publicly Available Information of a "Public Body."

If the Legislature's argument is that the judicial emails are open to the public under the rubric of the right to know, that argument is wrong. The constitutional

history and the discussion of the term "public body," this Court has previously noted that while the judiciary is a branch of the government, and thus a "governmental body," it is not a "public body" subject to the open deliberation requirements set forth in article II, section 9. See Order, *In re Selection of a Fifth Member to the Montana Districting Apportionment Commission*, August 3, 1999 (Leaphart, J., specially concurring) (arguing that framers did not intend to include the judiciary within the term "public body" and that confidentiality of judicial deliberations was essential to operation of independent judiciary).[5] *See also, e.g.*, Mont. Code Ann. § 2-3-203(5) ("The supreme court may close a meeting that involves judicial deliberations in an adversarial proceeding.").

3. Judicial Deliberations and Communications Are Protected by the Judicial Privilege.

The privilege that safeguards judicial communications is well-established across the country. "[T]he need to protect judicial deliberations has been implicit in our view of the nature of the judicial enterprise since the founding." *In re Enf't of a Subpoena*, 972 N.E.2d 1022, 1032 (Mass. 2012). Indeed, one court observed the only reason there is not more authority on the subject is "undoubtedly because its existence and validity has been so universally recognized." *Kosiorek v. Smigelski*, 54 A.3d 564, 578 n.19 (Conn. App. Ct. 2012) (internal quotations and

[5] The Order was cited and discussed in *Goldstein v. Commission on Practice of the Supreme Court*, 2000 MT 8, ¶ 48, 97, n. 3, 297 Mont. 493, 995 P.2d 923.

citations omitted). *See also United States v. Daoud*, 755 F.3d 479, 483 (7th Cir. 2014) ("And of course judicial deliberations, though critical to the outcome of a case, are secret.").

As a federal district court recently explained in granting a motion to quash a similar subpoena, the bedrock principles underlying this judicial privilege are compelling:

> The privilege generally serves three underlying purposes: (1) ensuring the finality of legal judgments; (2) protecting the integrity and quality of decision-making "that benefits from the free and honest development of a judge's own thinking ... in resolving cases before them"; and (3) protecting independence and impartiality and permitting judges to decide cases without fear or favor.

Taylor v. Grisham, 2020 U.S. Dist. LEXIS 207243, at *6 (D.N.M. Nov. 4, 2020) (citing *Cain v. City of New Orleans*, U.S. Dist. LEXIS 169819, (E.D. La. Dec. 8, 2016)).

The D.C. Circuit similarly explained:

> . . . [P]rivilege against public disclosure or disclosure to other co-equal branches of Government arises from the common sense common law principle that not all public business scan be transacted completely in the open, that public officials are entitled to the private advice of their subordinates and to confer among themselves freely and frankly, without the fear of disclosure, otherwise the advice received and the exchange of views may not be as frank and honest as the public good requires.

See also Soucie v. David, 448 F.2d 1067, 1080-81 (D.C. 1971).

For all of these reasons, "other courts, State and Federal . . . when faced with attempts by third parties to extract from judges their deliberative though processes, have uniformly recognized a judicial deliberative privilege." *In re Enf't of a Subpoena*, 972 N.E.2d at 1032 (listing numerous authorities recognizing judicial deliberative immunity). Here, of course, this Subpoena attempts to extract information by going to the computers of the executive branch, without even asking the judicial branch.

Consistent with these principles, courts in other jurisdictions have repeatedly rejected attempts to invade the judicial decision-making process through subpoenas or other means. *See, e.g., In re Certain Complaints Under Investigation by an Investigating Comm.*, 783 F.2d 1488, 1517-1520 (11th Cir. 1986) (confidentiality protects judge's independent reasoning from improper outside influences); *United States v. Nixon*, 418 U.S. 683, 705, 41 L. Ed. 2d 1039, 94 S. Ct. 3090 (1974) ("those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision making process."); *Commonwealth v. Vartan*, 733 A.2d 1258, 1264 (Pa. 1999) (protection of judicial communications benefits the public, not the individual judges and staff); *Thomas v. Page*, 837 N.E.2d 483, 490-91 (Ill. App. 2005) ("Our analysis leads us to conclude that there exists a judicial deliberation privilege protecting confidential communications between judges and between judges and

the court's staff made in the course of the performance of their judicial duties and relating to official court business.").

Although there is little direct Montana authority on the deliberative privilege, there is no authority suggesting Montana would be an outlier and take a different approach than other jurisdictions. To the contrary, Montana law already provides very similar protections. *See, e.g.*, Mont. Code Ann. § 2-6-1002 ("Confidential information" includes information related to judicial deliberations in adversarial proceedings); Mont. Code Ann. § 2-3-203(5) ("The supreme court may close a meeting that involves judicial deliberations in an adversarial proceeding."); Order, *In re Selection of a Fifth Member to the Montana Districting Apportionment Commission*, August 3, 1999 (Leaphart, J., specially concurring) (explaining that confidentiality of judicial deliberations is essential to the operation of independent judiciary).

The judicial privilege and its underlying policies weigh heavily in favor of quashing/enjoining the Subpoena in this case. As McLaughlin's Declaration makes clear, the Subpoena will reach a variety of communications that relate to the judicial deliberative process. (Ex. B, ¶ 7 ("[d]iscussions with judges about case processing and ongoing litigation in pending or potential cases"; "[c]opied on exchanges between judges in which advice about case law and potential decisions were being sought from other judges"; "[c]opied on exchanges between judges in

which information was exchanged about judicial work product").) To force the extensive disclosure of such communications rings a bell that cannot be un-rung. Separate and apart from the disclosures specific to this case, the Subpoena would send an unmistakable message to Montana's judiciary: "Your communications are not protected." This has precisely the chilling effect on judges and their staffs that the judicial privilege is designed to prevent.

The Subpoena's exception for communications "related to decisions made by the justices in disposition of final opinion" does nothing to mitigate the violation of judicial privilege. The exception is incredibly narrow and applies only to justices' decisions in "disposition of final opinion." (Ex. A (emphasis added).) Whether this exception protects communications in the all-important deliberative process that precedes a "disposition of final opinion" is anyone's guess.

4. The Subpoena Violates Multiple Other Rights and Privileges.

Apart from the judicial privilege, the biggest issue is that the Subpoena reaches all of McLaughlin's emails no matter who or what is in the email. This is an egregious disregard of a host of other privileges and rights are implicated by the Subpoena. First and foremost is the fundamental right to privacy of third parties, protected under Article II, Section 10's mandate that "[t]he right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." Mont. Const. Art. II, § 10; *see*

also Missoulian v. Board of Regents, 207 Mont. 513, 522, 675 P.2d 962, 967 (1984).

Similarly, the Subpoena encompasses confidential personnel information (Ex. B, ¶ 7 ("[d]iscussions of potential employee disciplinary issues including requests from employees and judges to discuss pending discipline")), despite well-settled law that public employees have a specific right to privacy in non-disclosure of employment personnel records, including those regarding internal disciplinary matters and other personally sensitive information. *City of Bozeman v. McCarthy*, 2019 MT 209, ¶ 17, 397 Mont. 134, 447 P.3d 1048; *see also State ex rel. Great Falls Tribune Co. v. Eight Judicial Dist. Court*, 238 Mont. 310, 319, 777 P.2d 345, 350 (1989) (individual's right of privacy with respect to employment evaluations is "paramount" when compared with the public's right to know).

The Subpoena requires production of medical information the State is precluded from disclosing under state and federal law. (Ex. B, ¶ 7 ("[i]nformation pertaining to medical information both for employees and elected officials"; "[r]equests from members of the public for disability accommodations including documentation of the disability").) Not only does Article II, § 10 protect private health care information and medical records, the Montana statute specifically provides that "health care information is personal and sensitive information that if improperly used or released may do significant harm to a patient's interest in

privacy and health care or other interests[.]" Mont. Code Ann. § 50-16-502. As this Court has explained, "If the right of informational privacy is to have any meaning it must, at a minimum, encompass the sanctity of one's medical records." *State v. Nelson*, 238 Mont. 231, 242, 941 P.2d 441, 448 (1997). This is consistent with federal health care privacy laws precluding the disclosure of health care information except under limited and carefully specified circumstances. *See* Health Insurance Portability and Accountability Act of 1996, 45 C.F.R. 164.102, *et seq*. The demanded information is confidential, and its disclosure will likely subject the State to liability. Medical information is completely irrelevant to this proceeding, or indeed any legitimate legislative purpose.

The Subpoena also encompasses information matters before the Judicial Standards Commission. (Ex. B, ¶ 7 ("[i]nformation related to complaints pending before the Judicial Standards Commission pertaining to medical information both for employees and elected officials").) Rule 7, Rules of the Judicial Standards Commission provides, "All paper filed herewith and all proceedings before the Commission shall be confidential[.]" *See also* Mont. Code Ann. § 3-1-1105; *Harris v. Smartt*, 2002 MT 239, ¶ 40, 311 Mont. 507, 57 P.3d 58.

The requested information would also encompass "information about potential on-going security risks to individual judges including communications with law enforcement." (Ex. B, ¶ 7.) Security information "necessary to maintain

the security and integrity of secure facilities or information systems owned by or serving the state" constitutes "confidential information" prohibited from disclosure. Mont. Code Ann. § 2-6-1002.

CONCLUSION

For the reasons stated, McLaughlin requests the Court grant her Motion to Quash and Enjoin Legislative Subpoena Duces Tecum. A proposed Order is attached hereto for the Court's consideration.

Dated this 10th day of April 2021.

BOONE KARLBERG P.C.

\s\ Randy J. Cox
Randy J. Cox

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(3) of the Montana Rules of Appellate Procedure, I certify that this Motion is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word is 3,734 words. I understand that motions are limited to 1,250 words, excluding certificate of service and certificate of compliance; however, this motion includes a specific request to exceed the word limitation.

BOONE KARLBERG P.C.

\s\ Randy J. Cox
Randy J. Cox

CERTIFICATE OF SERVICE

I, Randy J. Cox, hereby certify that I have served true and accurate copies of the foregoing Motion - Intervene to the following on 04-10-2021:

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Dated: 04-10-2021