

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

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

Petitioners,

v.

GREG GIANFORTE, Governor of the State of Montana, and MONTANA STATE
LEGISLATURE,¹

Respondents.

**EMERGENCY MOTION TO QUASH
REVISED LEGISLATIVE SUBPOENA**

APPEARANCES:

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¹ The caption has been amended to reflect the Court's April 14, 2021 Order granting the Montana State Legislature's Motion to Intervene as Respondent. (April 14, 2021 Order.)

MOTION

Recognizing the serious problems with the unlawful subpoena quashed by the Court's Temporary Order, today the Legislature served Court Administrator Beth McLaughlin with a new version ("Revised Subpoena"), attached as Exhibit A. The Revised Subpoena still suffers from fundamental deficiencies and must be quashed. This is particularly true given the Legislature's stated position it will not abide by court decisions it does not agree with. McLaughlin is entitled to protection before being compelled to testify and turn over sensitive information to a body which now, apparently, regards itself as unshackled from any check or balance.

The Revised Subpoena requires McLaughlin to appear, testify, and provide information on Monday, April 19, 2021. Pursuant to M.R.App.P. 14, MCA §§ 3-2-205, 26-2-401, and M.R.Civ.P. 45, McLaughlin requests an immediate order temporarily quashing the Revised Subpoena to maintain the status quo and prevent further irreparable injury, and ordering the Legislature to show cause why the Revised Subpoena should not be permanently quashed. Respondents object.

BACKGROUND

Most of the pertinent background is set forth in McLaughlin's Emergency Motion to Quash, filed April 10, 2021. The new facts are limited but significant.

The Revised Subpoena was served on McLaughlin today, April 15, 2021,

and states:

THE MONTANA STATE LEGISLATURE, to Administrator McLaughlin.

You are hereby required to appear at the Montana State Capitol Building, room 303, in the City of Helena, Montana, on the 19th day of April, 2021, at 9:00 a.m., to produce the following documents and answer questions regarding the same:

- (1) All emails and attachments sent and received by your government e-mail account, bmclaughlin@mt.gov, including recoverable deleted emails, between January 4, 2021, and April 12, 2021 delivered as hard copies and .pst digital files.
- (2) Any and all laptops, desktops, hard-drives, or telephones owned by the State of Montana which were utilized in facilitating polls or votes with Montana Judges and Justices regarding legislation or issues that may come or have come before Montana courts for decision.

This request excludes any emails, documents, and information related to decisions made by Montana justices or judges in the disposition of any final opinion or any decisional case-related matters. Any personal, confidential, or protected documents or information responsive to this request will be redacted and not subject to public disclosure.

This request pertains to the Legislature's investigation into whether members of the Judiciary or employees of the Judicial Branch deleted public records and information in violation of state law and policy; and whether the current policies and processes of the Judicial Standards Commission are sufficient to address the serious nature of polling members of the Judiciary to prejudge legislation and issues which have come and will come before the courts for decision.

(Ex. A.)

The Revised Subpoena is broader than the prior version in key respects. It requires McLaughlin, in two business days, to produce not just "all emails and attachments," but also "[a]ny and all laptops, desktops, hard-drives, or telephones owned by the State" which were used in polling any members of the judiciary. It requires her to "answer questions" about the documents, which will number in the thousands. It also extends the date range for responsive information to April 12, 2021, despite SB140 being signed into law on March 16, 2021. (Ex. A.)

The Revised Subpoena appears to exclude at least some communications subject to the judicial deliberative privilege, but does not exclude a host of other private and confidential information.

The other change is the addition of a statement of purpose. Rather than help the Legislature's cause, however, it only underscores the lack of a legitimate legislative purpose, laying bare the most fundamental problem with the Revised Subpoena.

ANALYSIS

The legal basis for the Court's original jurisdiction and authority to grant the requested relief is set forth in McLaughlin's April 10, 2021 Emergency Motion, incorporated by reference.

A. Invalid Exercise of Legislative Subpoena Power.

The Legislature's power to issue subpoenas is finite. The U.S. Supreme Court recently addressed this precise issue in connection with a subpoena issued by Congress to President Donald J. Trump, wherein the Chief Justice wrote legislative subpoena power is "justified solely as an adjunct to the legislative process" and "must serve a valid legislative purpose." *See Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2031-32 (2020).

The Montana Constitution similarly provides for limited investigative authority by the Legislature. Mont. Const. Art V, § 1. As advised by the

Legislature’s own Chief Legal Counsel and its rules, “the power to investigate must be exercised for a proper legislative purpose related to enacting law, and the application and exercise of the legislative investigation power must protect the rights of citizens and adhere to all constitutional protections related to privacy, life, liberty and property.” (April 18, 2018 Montana Legislative Services Division Memorandum, Exhibit B (emphasis added).) The Legislature thus recognizes legal limitations on its investigative powers, including:

- “It is the general rule that the legislature has no power . . . to make inquiry in the private affairs of a citizen except to accomplish some authorized end.”
- “A state legislature, in conducting any investigation, must observe the constitutional provisions relating to the enjoyment of life, liberty and property.”
- “An investigation instituted for political purposes and not connected with intended legislation or with any of the matters upon which a house should act is not a proper legislative proceeding and is beyond the authority of the house or the legislature.”
- “When a committee is appointed by resolution to make an investigation and the object of the investigation, as shown by the resolution, is not a proper legislative objective but is to establish an extraordinary tribunal for the trial of judicial and other officers, the duties imposed on the commission being strictly judicial and not ancillary to legislation, the committee has no legal status.”
- “The investigatory power of a legislative body is limited to obtaining information on matters that fall within its proper field of legislative action.”

(Ex. B at 7).

The limitations are even more pronounced here, because legislative subpoena power is most limited when directed toward the judicial or executive branches. *Trump*, 140 S. Ct. at 2035-36. “[C]ourts should carefully assess whether the asserted legislative purpose warrants the ‘significant step’ of subpoenaing the documents of a co-equal branch of government” and, “to narrow the scope of possible conflict between the branches, courts should insist on a subpoena no broader than reasonably necessary to support Congress’s legislative objective.” *Id.*

Here, the Legislature is violating the *Trump* principles. It is attempting to use its limited subpoena power to obtain judicial communications—not for any legitimate legislative purpose, but for a litigation purpose, political purpose, or something tantamount to “an extraordinary tribunal for the trial of judicial and other officers.” (Ex. B.)

B. Privileged Information.

With the Revised Subpoena, the Legislature excludes some information subject to the judicial deliberations privilege, but not all. It only excludes communications “by Montana justices or judges in the disposition of any final opinion or any decisional case-related matters.” (Ex. A (emphasis added).) To the extent that language is decipherable, it is insufficient. The privilege extends broadly to “communications between judges and between judges and the court’s

staff made in the performance of their judicial duties and relating to official court business.” *E.g., Thomas v. Page*, 837 N.E.2d 483, 490-91 (Ill. App. 2005).

C. Private and Confidential Information.

The Legislature believes privacy rights cannot be violated by disclosure to the Legislature, as long as it promises the information “will be redacted and not subject to public disclosure.” (Ex. A.) There is no legal authority for this position. To the contrary, the Montana Constitution is clear: The right to privacy “shall not be infringed without the showing of a compelling state interest.” Mont. Const. Art. II, § 10.

As set forth in her Petition, McLaughlin receives a wide variety of emails and attachments that implicate the rights and privileges of other parties. These privacy concerns do not vanish simply because the Legislature promises not to further disclose information, or because the Legislature says it will protect the information.

D. Insufficient Time for Compliance.

Montana law provides a court “must quash or modify a subpoena that . . . fails to allow a reasonable time to comply.” MRCP 45(3)(A)(i) (emphasis added). Two business days is insufficient to review thousands of emails and “[a]ny and all laptops, desktops, hard-drives, or telephones owned by the State of Montana,” review for privilege, and be prepared to testify regarding the same.

E. End-Around the Court’s Temporary Order.

The Court quashed the original subpoena in its Temporary Order on April 11, 2021, and directed the parties to file additional briefing—an approach consistent with Montana law on temporary injunctive relief. *See* MCA §§ 27-19-314 to -319. Pending further order of the Court, the original Subpoena no longer “remains in effect.” MCA § 26-2-11. The Revised Subpoena is nothing short of an end-run around the Court’s Temporary Order and directives.

CONCLUSION

For the reasons stated, the Revised Subpoena must be quashed.

Dated this 15th 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 1250 words, excluding the caption, Certificate of Compliance and Certificate of Service.

Dated this 15th day of April 2021.

BOONE KARLBERG P.C.

\s\ Randy J. Cox
Randy J. Cox

Exhibit Index

- Exhibit A – Revised Subpoena
- Exhibit B – April 18, 2018 Montana Legislative Services Division Memorandum

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Dated: 04-15-2021