

IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 21-0173

BETH McLAUGHLIN,

Petitioner,

v.

The MONTANA STATE LEGISLATURE, and the MONTANA
DEPARTMENT OF ADMINISTRATION,

Respondents.

MOTION TO DISMISS

APPEARANCES:

KRISTIN HANSEN
Lieutenant General
DEREK J. OESTREICHER
General Counsel
215 N. Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
Fax: 406-444-3549
khansen@mt.gov
derek.oestreicher@mt.gov

RANDY J. COX
BOONE KARLBERG P.C.
201 West Main, Suite 300
P.O. Box 9199
Missoula, MT 59807-9199

ATTORNEY FOR PETITIONER

ATTORNEYS FOR RESPONDENT
MONTANA STATE LEGISLATURE

In recognition that her Motion in OP 21-0125 was improperly filed, Beth McLaughlin has now filed an Original Petition requesting that the Court quash the Legislature's April 8, 2021 subpoena. *See Petition for Original Jurisdiction*, April 13, 2021. This Court lacks jurisdiction to interfere with a duly authorized legislative investigation and must dismiss McLaughlin's Petition.

PREDICATE

Original Proceeding 21-0125 pending in this Court is a matter seeking this Court's opinion on the constitutionality of SB140, recently enacted and signed into law by Governor Gianforte. In response to a legislative inquiry regarding OP 21-0125, McLaughlin stated that she did not retain responsive emails and that Judicial Branch policy did not require retention of "these ministerial-type e-mails."

These emails are anything but ministerial. And contrary to McLaughlin's response, judicial branch policy *does* require retention of emails and there is no exemption for "ministerial-type" emails. *Exhibit B to Hansen Dec.* Moreover, the Judicial Branch policy provides that: "[p]rivacy of e-mail is not guaranteed; employees should not have the expectation of privacy for any messages. It is the expectation that any

message sent is subject to public scrutiny.” *Id.* Judicial Branch policy also provides that using the state e-mail system for “non-profit” or professional organizations is misuse of state e-mail resources. *Id.* Leaving no room for interpretation, the Judicial Branch policy states that “[a]ll messages created, sent or retrieved, over the state’s systems are the property of the State of Montana.” *Id.*

Since McLaughlin’s response suggested she had improperly destroyed public records, the Legislature began an investigation and utilized its subpoena powers to compel the production of records from the Department of Administration (DOA). *Exhibit A to Petition*, OP 21-0173. On April 9, 2021, DOA produced over 5,000 emails. *Hansen Dec.*, ¶ 5. Prior to production DOA and the Legislature conducted legal review and redaction of protected information. *Hansen Dec.*, ¶ 6 & 7. Currently, these documents are held by the Legislature’s counsel and no sensitive or protected information has been disclosed. *Hansen Dec.*, ¶ 8. The emails that are known to have been publicly disclosed by the press are attached to the Hansen Declaration. None of the concerns raised by McLaughlin in this Petition have been implicated by disclosure of these public

documents. Public confidence in the due process afforded an impartial judiciary, however, has been jeopardized.

LEGAL AUTHORITY AND ANALYSIS

1. Legislative Power

The Montana Constitution provides that legislative power and control over procedures is vested in the Legislature. Mont. Const. art. V, §§ 1 & 10. The power to “conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes.” *Watkins v. United States*, 354 U.S. 178, 187 (1957). “A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information . . . recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed.” *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927). Montana codified this inherent

power through the legislative subpoena. Mont. Code Ann. § 5-5-101 *et seq.*

McLaughlin concedes that legislative subpoenas are valid so long as they are tied to a legislative purpose. *See Petition* at 17. The questions the Legislature seeks to be informed on through the instant subpoena are certainly tied to a significant legislative purpose: an investigation into whether members of the Judiciary and the Court Administrator have deleted public records and information in violation of state law and policy; whether the Court Administrator has performed tasks for the Montana Judges Association during taxpayer funded worktime in violation of law and policy; and whether 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 courts for decision. Each of these inquiries are firmly grounded in the administration of existing law, policies, and constitutional mandates placed on the Legislature.¹ The Legislature has the power to investigate

¹ Current law provides for the “efficient and effective management of public records and public information.” Mont. Code Ann. § 2-6-1001. Judicial Branch policy prohibits the use of state resources, including staff time, for the benefit of private organizations. *Exhibit B to Hansen Dec.* The Montana Constitution requires the

these matters and this Court cannot hinder the investigation simply because the responsive materials may tend to “disgrace” the Judicial Branch or render it “infamous.” Mont. Code Ann. § 5-5-105(2).

McLaughlin errs by conflating a legislative subpoena issued under Mont. Code Ann. § 5-5-101 with a subpoena issued under § 26-2-101 *et seq.* The differences are clear. A legislative subpoena issued under § 5-5-101 requires the attendance of a witness before either house of the legislature or a committee of either house. Failure to appear or comply with the legislative subpoena, puts the recipients at risk of being held in contempt by the house or senate. Mont. Code Ann. § 5-5-103. By contrast, subpoenas issued under Title 26 compel attendance before a court or judicial officer. Mont. Code Ann. § 26-2-102. Failure to comply with a subpoena under Title 26 risks being held in contempt of court. Mont. Code Ann. § 26-2-104. A legislative subpoena rests on the legislative power and it would violate the inherent authority of the Legislature to force application of the court rules for judicial proceedings to the legislative process.

Legislature to create the Judicial Standards Commission. Mont. Const. art. VII, § 13. Statute provides for the organization of the Commission, as well as its mission, policies, and procedures. Mont. Code Ann. § 3-1-1101 *et seq.*

2. Conflict of Interest

The Office of the Court Administrator is created by Mont. Code Ann. § 3-1-701, and the supreme Court appoints an administrator who serves at the pleasure of the Court to act on its behalf. Original jurisdiction here, if accepted, creates a conflict of interest for the Court in that the Court's employee, though attempting to skirt this fact by styling the suit solely in her personal capacity, is acting in her representative capacity for the Court, and is the Plaintiff. This inherent bias requires recusal of, at minimum, the entire panel of Justices. *See Mont. Code Jud. Conduct*, Rules 1.1, 1.2, 2.2, 2.3, 2.4, 2.9, 2.10, 2.11, 2.12, 2.14, 2.16, 2.17, 3.1, 3.2, 4.1.² The Court may not grant the relief requested by the Petitioner, may not accept original jurisdiction, and must refuse to further interfere with a duly authorized legislative investigation. "No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly

² Rule 2.10 permits the Court to engage in scheduling, administrative, or emergency *ex parte* communications with parties, i.e. McLaughlin, so long as the communication does not address substantive matters. However, the Rule only permits such communication if the Court believes McLaughlin will not receive an advantage in the case and the Court promptly notifies all other parties of the content of every *ex parte* communication, whether written or verbal, and gives the parties an opportunity to respond. As the Court's administrator, this is an impossibility.

belonging to either of the others...” Mont. Const. art. III, § 1. Moreover, “no man can be judge in his own case.” *Walker v. Birmingham*, 388 U.S. 307, 320 (1967). The Court itself is witness to and has interest in the information sought by the subpoena in question.

3. Failure of Jurisdiction

“If the court determines at any time that it lacks subject matter jurisdiction, the court must dismiss the action.” Mont. R. Civ. P. 12(h)(3). “It has been said that the principle of the separation of powers is fundamental to the exercise of constitutional government.” *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 590 (1949). “Each branch constitutes a check or balance upon the other branches, in order that no one branch has too much power in its hands.” *State ex rel. Fletcher v. Dist. Court*, 260 Mont. 410, 417, 859 P.2d 992, 996 (1993) (citations omitted). This case is non-justiciable under Article III, § 1, and creates a jurisdictional failure for this Court. *See Larson v. State*, 2019 MT 28, P18 (citing *Baker v. Carr*, 369 U.S. 186, 217-36 (1962)).

CONCLUSION

The Montana Legislature submitted a letter to the Acting Chief Justice on April 12, 2021, notifying the Court that the April 11, 2021,

Order is not binding on the legislative branch and will not be followed. *Exhibit C to Petition.* McLaughlin's current Petition seeks yet another Court order which will not bind the Legislature and will not be followed. The Legislature will continue its investigation, Acting-Director Giles will obey the legislative subpoena or be subject to contempt, and this Court lacks jurisdiction to hinder the Legislature's power to investigate these matters of statewide importance.

The separation of powers fundamental to our form of government, the nature of checks and balances, together with basic jurisdictional constraints, demand dismissal of this matter. The Court does not get to routinely issue Orders authoritatively exercising its checks and balances powers, then shun and deflect the Legislature's power to exercise reciprocal checks on the Judiciary. The Legislature has the power and the obligation to serve as the check and balance for the judicial branch of government, and the Legislature's investigation will not be further disrupted or disturbed. "...[A] court without jurisdiction over a case cannot enter judgment in favor of either party. It can only dismiss the case for want of jurisdiction." *State ex rel. Cowan v. District Court*, 131

Mont. 502, 507, 312 P.2d 119, 122-23 (1957) (internal citations omitted).

The Court has no authority but to dismiss this Petition.

Respectfully submitted this 14th day of April, 2021.

Office of the Attorney General
215 N. Sanders
P.O. Box 201401
Helena, MT 59620-1401



KRISTIN HANSEN
Lieutenant General

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this pleading is printed in a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 1,672 words, excluding certificate of service and certificate of compliance.



KRISTIN HANSEN
Lieutenant General

CERTIFICATE OF SERVICE

I, Kristin N. Hansen, hereby certify that I have served true and accurate copies of the foregoing Motion - Dismiss to the following on 04-14-2021:

Randy J. Cox (Attorney)
P. O. Box 9199
Missoula MT 59807
Representing: Beth McLaughlin
Service Method: eService

Austin Miles Knudsen (Govt Attorney)
215 N. Sanders
Helena MT 59620
Representing: Montana State Legislature
Service Method: eService

Michael P. Manion (Attorney)
Department of Administration
P.O. Box 200101
Helena MT 59620-0101
Representing: Administration, Department of
Service Method: E-mail Delivery

Electronically signed by Rochell Standish on behalf of Kristin N. Hansen
Dated: 04-14-2021