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MONTANA STATE LEGISLATURE

IN THE SUPREME COURT OF THE STATE OF MONTANA
No. OP 21-0173

BETH McLAUGHLIN,

Petitioner,

v.

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

Respondents.

RESPONSE TO PETITION FOR ORIGINAL JURISDICTION

I. Jurisdiction and Rules

Members of this Court have taken the extraordinary step of issuing an emergency order concerning subpoenas of which they and their employee are the subject.[1] This is simply impermissible. The Court has

[1] 4/16/21 Order at 5.

made itself party to this matter creating a jurisdictional failure.[2] Even if this Court could hear this case, it may only accept original jurisdiction "when urgency or emergency factors exist making litigation in the trial courts and the normal appeal process inadequate and when the case involves purely legal questions of statutory or constitutional interpretation which are of state-wide importance." Mont. R. App. P. 14(4).

McLaughlin claims sweeping privileges covering all public records subject to the legislative subpoenas. Her claims are not purely legal questions. Determining what documents are public records is necessarily fact-intensive and alone renders this case inappropriate for an original proceeding. But more than that, McLaughlin and her counsel have had all the documents compiled by the Department of Administration ("DOA") for over two weeks and have not produced a privilege log nor agreed to any negotiations with the Legislature. Upon information and belief, McLaughlin has also refused to negotiate a resolution with DOA, preferring instead the sanctuary of her bosses' conflict of interest.

[2] *See* Motion for Disqualification filed contemporaneously with this Response.

Meanwhile, neither the Legislature nor the DOA have disclosed a single document that contains privileged information. There is no emergency.

This Court must reject jurisdiction under Mont. R. App. P. 14(4).

II. The procedural history of this case raises serious concerns under the Due Process clause of the United States and Montana Constitutions.

Every person is guaranteed the right to an impartial tribunal. *See Clements v. Airport Auth.*, 69 F. 3d 321, 333 (9th Cir. 1995) citing *Ward v. Monroeville,* 409 U.S. 57 (1972) ("At a minimum, Due Process requires a hearing before an impartial tribunal."). The Due Process Clause incorporates the maxim that "no man is allowed to be a judge in his own cause." *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) quoting Federalist No. 10. Due Process likewise protects against a judge hearing a case when that judge possesses an interest that presents an objective risk of actual bias or prejudgment "under a realistic appraisal of psychological tendencies and human weakness." *Id.* at 883-84 citing *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). The Montana Code of Judicial Conduct requires disqualification and recusal when "the judge's impartiality might reasonably be questioned" including when "[t]he judge has a personal bias or prejudice concerning a party or a

party's lawyer, or personal knowledge of facts that are in dispute in the proceeding." Rule 2.12.

The present dispute is the latest entry in a series of numerous procedural irregularities that merit careful and cautious consideration by a substitute panel in how this matter proceeds. *See* Motion to Disqualify (filed contemporaneously herewith); *see also* Draft Committee Report.[3] The Special Joint Select Committee on Judicial Transparency and Accountability ("Select Committee") has released its Draft Committee Report which contains the following findings of procedural irregularity:

- Email records indicate attempted *ex parte* communications by the Goetz Law Firm and Edwards & Culver law firm representing the Petitioners in OP 21-0125.

- Chief Justice McGrath admitted that, though recused, he appointed Judge Kurt Krueger to fill his seat in OP21-0125 and that he called Judge Krueger immediately after the Attorney General filed a motion to disqualify the latter.

- Subsequently, the Court ordered that six panelists would decide the OP 21-0125 constitutional challenge despite the requirement that the Court sit *en banc* to decide constitutional challenges pursuant to Article VII,

[3] Draft Select Committee Report found here: (https://leg.mt.gov/content/Committees/JointSlctJudical/CommitteeReportDraft4-27.docx) (last accessed April 30, 2021).

section 3(2) of the Montana Constitution, and the Court's own internal operating rules.

- The Court appears to have engaged in *ex parte* communications with Administrator McLaughlin's counsel to allow him to file a motion on a Saturday, and then rule on that motion on a Sunday without providing notice or opportunity for argument.

- The Court preliminarily acted on an Original Petition filed by its own appointed Court Administrator to quash a legislative subpoena in a matter in which the Court Administrator was not a party.

- The Court entered an Order providing relief to its own members from Legislative subpoenas issued to the Justices themselves in a case in which the Justices are not parties.

- The Court has not refused to consider or acknowledge that under the Montana Code of Judicial Conduct it cannot hear a case in which the Court's own appointed Administrator is a party.

- Chief Justice McGrath appears to have violated judicial recusal rules by continuing to make decisions about how the OP 21-0125 proceedings would be conducted after he recused himself.

See Draft Committee Report, at 19-20, n.3.

At a minimum, no justice should serve as arbiter of their own case. "To hold otherwise would vest unfettered power over the citizenry of this State in a single branch of government, contrary to our well-enshrined

system of checks and balances." *Commissioner of Political Practices v. Montana Republican Party*, 2021 MT 99, ¶15.

III. Legislative Subpoena 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. As discussed in the Motion to Dismiss, that power is broad.

Since the power is broad, limitations on the legislative subpoena are narrow because the "power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function." *See McGahn*, 968 F.3d at 764 (citations omitted). A legislative subpoena must be related to a legitimate task of the Legislature. *See Watkins v. United States*, 354 U.S. 178, 197 (1957). Legislative subpoenas may not be issued to "try" someone "before [a] committee for any crime or wrongdoing." *See McGrain v. Daugherty*, 273 U.S. 135, 179 (1927). Finally, "[i]nvestigations conducted solely for the personal aggrandizement of the investigators or to 'punish' those investigated are indefensible." *Watkins*, 354 U.S. at 187. However, "[w]hen Congress seeks information needed for intelligent legislative action, it

unquestionably remains the duty of *all* to cooperate." *Trump v. Mazars USA, L.L.P.*, 140 S. Ct. 2019, 2035 (2020) (emphasis in original) (citations omitted).

The Legislative power to examine the records of state agencies, including agencies in the executive or judicial branch is both long-standing and uncontroversial.[4] The Select Committee, likewise, is noncontroversial. The purpose of the Select Committee is to investigate and determine whether legislation should be enacted concerning: the judicial branch's public information and records retention protocols; members of the judicial branch improperly using government time and resources to lobby on behalf of a private entity; judges' and justices' statements on legislation creating judicial bias; and the courts' conflict of interest in hearing these matters. *See Draft Committee Report*, n.3.

The subjects of the legislative subpoenas are all public officers or employees. *See* Mont. Code Ann. §§ 2-2-102(7), (9) (defining "public

[4] *See e.g.* Mont. Code Ann. § 5-13-309(2) ("The legislative auditor may examine at any time the books, accounts, activities, and records, confidential or otherwise, of a state agency."), Mont. Code Ann. § 5-11-106 ("The legislative services division on behalf of standing committees, select committees, or interim committees and any subcommittee of those committees, may investigate and examine state governmental activities and may examine and inspect all records, books, and files of any department, agency, commission, board, or institution of the state of Montana.").

employee" and "public officer" respectively). The legislative subpoenas focus on the activities of these public employees and officers as they relate to work with the Montana Judges Association ("MJA"), which is not a state entity and is a private organization. The subpoenas also focus on public records retention laws which protect the individual right to examine public documents and observe public deliberations is enshrined in Article II, section 9 of the Montana Constitution. *See* Mont. Code Ann. §§ 2-6-1002(11), (13) (defining "public information" and "public record" respectively).

The Legislature has a fundamental right to know and understand what entities engage in the legislative process via lobbying legislators to take official action. *See United States v. Harriss*, 347 U.S. 612, 625 (1954) ("full realization of the American idea of government by elected representatives depends to no small extent on their ability to properly evaluate such [lobbying] pressures"). Montana has enacted various statutes regulating the lobbyist industry. *See e.g.* Mont. Code Ann. 5-7-101, et seq. Further, "[a] public officer or employee may not engage in any activity, including lobbying, . . . on behalf of an organization . . . of which the public officer or employee is a member while

performing the public officer's or public employee's job duties." Mont. Code Ann. § 2-2-121(6).

The legislative subpoenas have revealed information important to the committee and full compliance with the subpoenas will further aid in these important legislative purposes. For example, the Chief Justice coordinated lobbying efforts on HB 685 as well as coordinated support for pending judicial nominations. *See e.g.* Draft Committee Report, at 10-11, n.3 (Chief Justice McGrath email stating "[t]hey don't seem to care much for Judicial Standards now that they have found out about it. We will need to pick off some votes here to keep it below 100."); (Chief Justice McGrath email stating "[s]hould we have them start poking around? This would be such a cluster if they aren't confirmed.").

The Legislature intends to fully understand the degree to which MJA lobbying activities are directed by public employees and officers using public resources and whether current law is sufficient to ensure taxpayer resources are not inappropriately used for the benefit of private organizations.

McLaughlin admits to deleting public records claiming a "ministerial" exemption to state policy. Draft Committee Report at 18,

n.3. Justice Sandefur stated "it has been [his] routine practice to immediately delete non-essential email traffic." *Id.* Justice Shea and Chief Justice McGrath stated they routinely delete emails deemed non-essential. *Id.*, at 19. Finally, Chief Justice McGrath stated "our policy regarding retention is that we're to clear our email boxes periodically because they fill up and our IT people don't have the capacity." *Id.* These statements are surprising admissions, though possibly justifiable, at least if more fully explained. But as it is now, and without willingness by members of the Court and the Court Administrator to produce documents or equipment for review, it simply appears as an assertion by the judicial branch that it can be the sole arbiter of what is a "non-essential" public record and thereby destroy property of the State of Montana. Montana record retention policies dictate that "routine: non-permanent" emails be retained for three years. *Id.* at 18. The Legislature is entitled to review these contradictions, and if necessary, enact legislation to address them.

IV. Deliberative Privilege

McLaughlin misconstrues and misapplies the judicial deliberative privilege to cover not just the communications and mental processes of a

judicial officer leading to a judicial decision, but to *all* communications by *any* judicial branch employee. *See e.g.* Pet. Br. at 26. The deliberative privilege must be narrowly tailored. *See In re Enforcement of a Subpoena*, 463 Mass. 162, 174 (2012). The privilege covers communications made by a judicial officer related to the deliberation and adjudication of a case before the court. *Id.* It does not cover communications by a judicial officer or their staff outside of the deliberative process. *Id.* at 175 (stating that ex parte communications or inquiries into an improper influence on the judge are outside of the scope of the privilege). Neither does the privilege cover communications or acts that "simply happen to have been done by judges." *Id.* citing *State ex rel Kaufman v. Zakaib*, 207 W. Va. 662, 671, 535 S.E.2d 727 (2000); *Leber v. Stretton*, 928 A.2d 262, 270 n.12 (Pa. Super. Ct. 2007).

The legislative subpoenas in this case do not seek any deliberative material from the judicial branch. The subpoenas expressly exclude from the requested information "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." *See* McLaughlin subpoena. Unlike the subjects of cases cited by Petitioner,

the legislative subpoenas at issue seek communications and public records that are non-deliberative.[5]

The Legislature seeks information regarding how the judicial branch engaged in the legislative process. *See* Draft Committee Report, n.4. The Legislature has a right to know who is pressuring legislators to take official actions in support or opposition of proposed legislation. *See Harriss*, 347 U.S. at 625. When Chief Justice McGrath stated, "of course the problem here is it allows a citizen's commission to discipline or remove judges," he is engaged in the legislative process not judicial deliberation. Draft Committee Report at 18, n.3. Chief Justice McGrath prefaced these remarks on LC3218 by saying "[w]e should probably get a membership vote on this and ask who can make calls." *Id.* at 10. The judicial branch cannot claim deliberative privilege when it steps outside that lane and crosses over into lobbying the Legislature.

[5] Petitioner's statement that the documents that reach deliberative privilege have already been produced is likewise without merit. *Declaration of Kris Hansen*, April 14, 2021. Prior to production, the DOA and the Montana Legislature conducted a legal review. *Id.* Currently, these documents are held by the Legislature's counsel and no sensitive or protected or privileged information has been disclosed. *Id.* None of the concerns raised by McLaughlin have been implicated in these public documents. *Id.* None of the communications publicly disclosed by the Montana press have contained any confidential information.

V. Governmental Bodies and the Right to Know

The Montana Constitution provides, "[n]o person shall be deprived the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure." Mont. Const. Art. II, § 9.

The public right to know and inspect public documents applies to the judicial branch. "First and foremost, is the realization that the Constitution is the supreme law of this State. Its mandate must be followed by each of the three branches of government." *The Associated Press v. Board of Public Education*, 246 Mont. 386, 390 (1991) (stating that Article II, § 9 applies to the judicial branch). Article II, § 9 creates "a constitutional presumption that every document within the possession of public officials is subject to inspection." *Nelson v. City of Billings*, 2018 MT 36, ¶ 17. "The language of [Art. II, § 9] speaks for itself. It applies to all persons and all public bodies of the state and its subdivisions without exception." *Great Falls Tribune v. Dist. Court of the Eighth Judicial Dist*, 186 Mont. 433, 437-38, 608 P.2d 116, 119 (1980).

See also *Goldstein v. Commission on Practice of the Supreme Court,* 2000 MT 8, ¶100 (Nelson, J. dissenting) (emphasis in original).

The court has recognized "there is a *constitutional presumption* that all documents of every kind in the hands of public officials are amenable to inspection. . . ." *Great Falls Tribune v. Mont. PSC*, 2003 MT 359, ¶ 54 (emphasis in original) (citations omitted). The fundamental premise is that "people must be able to learn what their institutions are 'up to,' and that the government is not engaged in inappropriate conduct." *Krakauer v. State*, 2019 MT 153, ¶ 54 (Rice, J. dissenting).

Petitioner's attempt to distinguish 'governmental bodies' from 'public bodies' is unavailing. *See* Pet. Br. at 22. As this court has previously stated, "[s]ection 9 applies to both public and governmental bodies. A 'public or governmental body' is a group of individuals organized for a governmental or public purpose." *Willems v. State,* 2014 MT 82, ¶16. While judicial deliberations may be protected from public disclosure, that is not a license to broadly exempt judicial branch employees from the sunshine provisions of the Montana Constitution.

VI. Third-Party Privilege

The Legislature strongly opposes the stunningly overbroad third-party privileges claimed by McLaughlin and will vigorously enforce its constitutional authority to seek responsive information that aids in the development of its legislative objectives.

McLaughlin raises the privacy rights of third parties not before the court to allege the subpoenas violate the rights of those parties. McLaughlin does not raise her own privacy rights. *See* Pet. Br. at 27-29. The Legislature will protect the privacy rights of third parties in accordance with state and federal law. *See* Motion to Dismiss, April 14, 2021. The Legislature is not seeking health records, or employee discipline files. It is seeking access to state-owned records and equipment to further its aforementioned legislative inquiries. McLaughlin does not have a presumption of privacy in these records. *See* Mont. Const. Art. II, § 9; *see also* 4/14/21 Hansen Declaration, Ex. B. Unless a specific privacy privilege is asserted against a specific record, the presumption is that it is subject to the public's right to know.

This Court should decline to entertain McLaughlin's arguments that despite the plain wording of Article II, § 9, and despite the warnings that judicial branch employees have no expectation of privacy in their

email, she should nonetheless be able to deny public access to public records based on vague assertions of the hypothetical privacy interest of unnamed third parties.

VII. Prudential Standing and Separation of Powers.

"Prudential standing is a form of 'judicial self-governance' that discretionarily limits the exercise of judicial authority consistent with the separation of powers." *Bullock v. Fox*, 2019 MT 50, ¶ 43, 395 Mont. 35, 435 P.3d 1187 (citations ommitted). It "embodies the notion that courts generally should not adjudicate matters more appropriately in the domain of the legislative or executive branches or the reserved political power of the people." *Id.* (citation and internal quotation marks omitted). "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. District Court*, 260 Mont. 410, 417, 859 P.2d 992, 996 (1993) (citations omitted). The principles of separation of powers prohibit one branch of government from hearing and arbitrating its own dispute with another branch of government. *See Comm'n of Political Practices v. Montana Republican Party*, 2021 MT 99, ¶ 15 (due process considerations are "necessarily implicated" when one branch of government acts as a

tribunal in its own case). The Court should decline to adjudicate this matter based on the principles of prudential standing and separation of powers.

VIII. Negotiation, not Adjudication, is proper to resolve this dispute.

Federal jurisprudence provides a roadmap for how this Court should proceed in this dispute. The first step in resolving any interbranch dispute is good faith negotiation and accommodation. Only after all other avenues have been pursued and the branches arrive at an impasse is the dispute ripe for review by an impartial tribunal.

Federal courts correctly view judicial review of interbranch disputes as a last resort. *See Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 474 (1982). Negotiation and accommodation have been the historical practice for resolving disputes between the federal legislative and executive branches. *See Trump v. Mazars USA, LLP,* 140 S. Ct. 2019, 2031 (2020) (Congress and the President have a "tradition of negotiation and compromise" in subpoena disputes). Judicial review over a legislative subpoena is proper only after "there is an impasse contrary to traditional norms," "no practicable alternative to litigation," and a "breakdown in

the accommodation process." *Commission on the Judiciary of the United States House of Representatives v. McGahn*, 968 F.3d 755, 772 (D.C. Cir. 2020) (en banc). Absent negotiation, a premature judicial order threatens to "impair another [branch] in the performance of its constitutional duties." *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 500 (2010).

Even more uniquely, the instant dispute demands negotiation because unlike a dispute between the Legislature and the Executive branch, the Court cannot serve as an impartial tribunal when it is itself party to the case. *See generally Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) ("no man is allowed to be a judge in his own cause.").

Contrary to McLaughlin's claim, no good faith effort to negotiate with the Legislature over any documents has been made. McLaughlin contacted DOA Director Misty Ann Giles on April 10, 2021, then filed an emergency petition to quash that subpoena in an unrelated case–that the Legislature was not party to at that time–that same day. Pet. Br. at 8-9. McLaughlin does not allege that she had any contact with the Legislature or the Legislature's counsel beyond sending a letter the Code

Commissioner. Pet. Br. at 8. Rather than undertake any good faith effort to comply with the revised legislative subpoena served on April 15, 2021, or negotiate with the Legislature as to the demands made in said subpoena, McLaughlin immediately resorted to another emergency motion in front of this Court and has not agreed to negotiate any further review or production of responsive documents. *See* McLaughlin's Petition.

The premature judicial order issued in this case has created a false hedge of protection around McLaughlin and the Justices, which raises serious separation of powers and due process issues. Just as significantly, it prevents meaningful access to the Court by the Legislature to open good faith negotiations. Negotiation is possible. Indeed, although the seven justices did not obey their subpoenas and produce the requested public records, the justices appeared at a hearing before the Select Committee on April 19, 2021. As Justice Dirk Sandefur stated, the justices' appearance was intended as a "good faith" effort to work with the Legislature. *See* Sandefur Response and Return on Legislative Subpoena, April 19, 2021. These "good faith" efforts should continue in the form of negotiation.

Given what has transpired, the present dispute has not reached that point of "impasse" where "no practicable alternative" exists to resolving any interbranch conflicts. But the only appropriate path forward for this Court is to negotiate with the Legislature in good faith to produce responsive records while continuing to protect confidential information, if any exists, in the emails.

CONCLUSION

This Court should dismiss the petition on prudential standing grounds that the issue raised poses separation of powers issues best resolved through interbranch negotiations, not adjudication. Further, the Petition does not present any urgency or emergency factors that render the normal adjudication process inadequate.

Respectfully submitted this 30th day of April, 2021.

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CERTIFICATE OF SERVICE

I, Derek Joseph Oestreicher, hereby certify that I have served true and accurate copies of the foregoing Response/Objection - Court Order to the following on 04-30-2021:

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