

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.

PETITIONER'S RESPONSE TO RESPONDENT'S
MOTION TO DISMISS AS MOOT

APPEARANCES:

Randy J. Cox
BOONE KARLBERG P.C.
201 West Main, Suite 300
P. O. Box 9199
Missoula, MT 59807-9199
Tel: (406)543-6646
Fax: (406) 549-6804
rcox@boonekarlberg.com

Counsel for Petitioner

Kristin Hansen
Lieutenant General
Derek J. Oestreicher
General Counsel
OFFICE OF THE ATTORNEY GENERAL
215 N. Sanders
P. O. Box 201401
Helena, MT 59620-1401
Tel: (406) 444-2026
Fax: (406) 444-3549
khansen@mt.gov
derek.oestreicher@mt.gov

*Counsel for Respondent Montana
State Legislature*

Michael P. Manion
STATE OF MONTANA DEPARTMENT
OF ADMINISTRATION
P. O. Box 200101
Helena, MT 59620-0101
Tel: (406) 443-3033
Fax: (406) 444-6194
mmanion@mt.gov

*Counsel for Respondent Montana
Department of Administration*

Dale Schowengerdt
CROWLEY FLECK PLLP
900 N. Last Chance Gulch, Ste. 200
Helena, MT 59601
Tel: (406) 457-2040
Fax: (406) 449-5149
dschowengerdt@crowleyfleck.com

*Counsel for Respondent Montana
Department of Administration*

Petitioner Beth McLaughlin filed an emergency motion in this Court April 10, 2021, when the Legislature sought judicial branch emails from the executive branch. The subpoenas sought a range of information untethered to legislation and with no procedure for screening materials that may be privileged. Having had all subpoenas quashed by both a district court and this Court, the Legislature, through the Attorney General, has withdrawn all subpoenas and claims the case is moot. While she would love to see this case in the rearview mirror, Petitioner opposes its dismissal.

The Attorney General paints withdrawal of the subpoenas as a “measure of good faith,” so the parties can “negotiate and make accommodations in good faith.”¹ Thus, it claims the subpoena issues should be moot. If withdrawal closed the books, we would agree. But the same day the subpoenas were withdrawn, Sen. Greg Hertz made clear the Legislature will continue pursuit of judicial branch records. See Exhibit B attached. For that reason, we respectfully seek a ruling to guide whatever further proceedings the Legislature has in mind. The Court has authority and should rule because exceptions to the mootness doctrine apply.

¹Petitioner takes the Legislature at its word, but the subpoena was served on the Dept. of Administration, not her, and contains no invitation to negotiate or accommodate. Attached as Exhibit A are representative letters and emails regarding attempts to resolve the issue. In an April 10 letter to Director Giles Petitioner suggested “an orderly process” for handling the subpoenaed materials. When that entreaty was ignored did Petitioner file her emergency motion.

This Court recognizes several mootness exceptions, including “public interest,” “voluntary cessation,” and “capable of repetition, but evading review.” *E.g., Havre Daily News, LLC v. City of Havre*, 2006 MT 215, ¶¶ 1-48, 333 Mont. 331, 142 P.3d 864. All apply here.

A. Public Interest

This Court “reserves to itself the power to examine constitutional issues that involve broad public concerns to avoid future litigation on a point of law.” *Walker v. State*, 2003 MT 134, ¶ 41, 316 Mont. 103, 68 P.3d 872. The public interest exception applies where: (1) the case presents an issue of public importance; (2) the issue is likely to recur; and (3) an answer will guide public officers in the performance of their duties. *Gateway Opencut Mining Action Grp. v. Bd. of Cnty. Comm’rs*, 2011 MT 198, ¶ 14, 361 Mont. 398, 260 P.3d 133.

The Court most recently applied this exception in *Ramon v. Short*, 2020 MT 69, ¶ 24, 399 Mont. 254, 460 P.3d 867, when called upon to decide whether a state law enforcement officer had authority to grant a federal civil immigration detainer. *Id.*, ¶ 22. The Court noted it has “consistently held that where questions implicate fundamental constitutional rights or where the legal power of a public official is in question, the issue is one of public importance.” *Id.* (citing cases).

The public interest exception applied because (1) a state officer’s authority to detain an individual based on a federal civil immigration detainer “obviously

presents a question of public importance”; (2) the issue was likely to recur because the defendants continued to argue their actions were lawful, indicating a “plan to continue operating under the same terms leading to this very same issue recurring,” and (3) an answer would benefit state officers “by providing authoritative guidance on an unsettled issue regarding their authority . . . particularly given that there is no Montana Supreme Court ruling addressing this issue.” *Id.*, ¶¶ 22-25.

Ramon applies here. The scope of the Legislature’s authority to issue legislative subpoenas to a co-equal branch of government is a matter of obvious public importance. It implicates the very foundations of Montana’s constitutional separation of powers doctrine. *See Brown v. Gianforte*, 2021 MT 149, ¶¶ 52-66, 404 Mont. 269 (Rice, J., concurring).

Next, like the defendants in *Ramon*, the Legislature continues to insist its conduct was lawful while it blames the Court for the morass the subpoenas created. The Legislature clearly intends to continue seeking judicial records.² The issues before this Court are highly likely to recur.

Lastly, Montana has almost no case law addressing the scope of legislative subpoena power. An answer to the pending legal questions will benefit state officials by providing authoritative guidance on an unsettled issue.

² McLaughlin seeks only to protect privileged documents. Documents not privileged are public and subject to production if properly requested.

B. Voluntary Cessation

The “voluntary cessation” exception applies when “a defendant’s challenged conduct is of indefinite duration, but is voluntarily terminated by the defendant prior to completion of appellate review. . . .” *Havre*, ¶ 34. Accordingly, a defendant’s voluntary conduct never moots a case unless it is “absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.” *Id.*, ¶ 38.

In adopting this exception, this Court stressed, “[d]ue to concern that a defendant may utilize voluntary cessation to manipulate the litigation process, the heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness.” *Id.*, ¶ 34 (internal quotations omitted). *See also Heisler v. Hines Motor Co.*, 282 Mont. 270, 937 P.2d 45 (1997) (the legality of defendant’s refusal to pay medical expenses was not mooted when defendant subsequently made payment); *Montana-Dakota Util. Co. v. City of Billings*, 2003 MT 332 ¶ 8, 318 Mont. 407, 80 P.3d 1247 (the legality of city ordinance incorporating franchise fees was not mooted when the city voters overturned the ordinance).

Voluntary withdrawal of the subpoenas before a decision can be rendered does not moot the issue of their legality. Far from demonstrating its behavior “cannot reasonably be expected to recur,” evidence shows it will recur. *Havre*, ¶

34. A final adjudication would therefore “provide useful guidance that may obviate future violations.” *Id.*, ¶ 39.

C. Capable of Repetition, Yet Evading Review

A related exception is for wrongs “capable of repetition, yet evading review.” *See Common Cause v. Statutory Committee*, 263 Mont. 324, 328, 868 P.2d 604, 607 (1994). This exception applies where: (1) the challenged action is too short in duration to be fully litigated prior to cessation; and (2) there is a reasonable expectation that the same complaining party would be subject to the same action again. *Skinner Enters, Inc. v. Lewis & Clark City-County Health Dep’t.*, 1999 MT 106, ¶ 18, 294 Mont. 310, 980 P.2d 1049; *see also Common Cause*, 263 Mont. at 328, 868 P.2d at 606 (exception applied because the alleged violation of open meeting statutes was capable of recurring in future selections of nominees for advisory entities). Here too, the Legislature’s authority to issue subpoenas that exceed the limits of its constitutionally designated role is a matter of first impression and surely capable of recurring.

CONCLUSION

Petitioner respectfully asks the Court to deny the motion to dismiss and rule on the merits.

Dated this 24th day of June, 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 brief 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 1,146 words.

Dated this 24th day of June, 2021.

BOONE KARLBERG P.C.

/s/ Randy J. Cox
Randy J. Cox

BOONE  KARLBERG P.C.
ATTORNEYS AT LAW

T. BOONE (1910-1984)
KARL R. KARLBERG (1923-1988)
JAMES J. BENN (1944-1992)
THOMAS H. BOONE, of Counsel
WILLIAM L. CROWLEY
RANDY J. COX
ROBERT J. SULLIVAN
DEAN A. STENSLAND
CYNTHIA K. THIEL
ROSS D. TILMAN
JAMES A. BOWDITCH
MATTHEW B. HAYHURST

SCOTT M. STEARNS
NATASHA PRINZING JONES
THOMAS J. LEONARD
JULIE R. SIRRS
TRACEY NEIGHBOR JOHNSON
CHRISTOPHER L. DECKER
ZACHARY A. FRANZ
TYLER M. STOCKTON
EVAN B. COREN
ALISON R. POTTS
WILLIAM T. CASEY
REBECCA L. STURBERG

April 10, 2021

Misty Ann Giles, Director
Montana Department of Administration
c/o Michael Manion, Legal Counsel
Email delivery: MManion@mt.gov

Todd Everts, Esq.
Legislature Legal Services Division
Email delivery: teverts@mt.gov

Re: Legislative Subpoena dated April 8, 2021

Dear Director Giles, Mr. Manion, Mr. Everts:

I write this letter in my capacity as legal counsel for Beth McLaughlin, the Montana Supreme Court Administrator. This letter pertains to the Legislative Subpoena served April 8 on the Department of Administration. We write to request that the Department temporarily but immediately stay action on that subpoena for reasons noted below. If the Department of Administration, instead, chooses to proceed, we respectfully ask that you advise us of your intentions so we may file an emergency motion with the Montana Supreme Court.

The Legislature, by its subpoena, seeks communications that reside within the Judicial Branch of Montana government. It is our position that legislative subpoenas for internal judicial documents are categorically invalid as in violation of fundamental separation of powers principles, among other things. Regardless, it is our intention to propose a means of resolving the issues raised by the subpoena in an orderly way.

The most troublesome aspect of the Legislative Subpoena is its breadth. Legislative subpoenas must be specific and narrowly drawn. Yet, this subpoena seeks "all emails and attachments" sent or received by Court Administrator Beth McLaughlin between January 4, 2021 and April 8, 2021.

The Legislature's subpoena relates to the petition pending before the Supreme Court regarding SB 140 and its elimination of the Judicial Nomination

Commission. Yet there is no such limitation in the subpoena. The subpoena asks for every email with one minor exception relating to “decisions made by the justices in disposition of final opinion.” Because of her position and broad responsibilities, the Court Administrator’s emails contain personal and private information. For example, the requested emails 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 to liability were protected information exposed. Without a mechanism to review every email in that three-month period and screen them for privileged or private information, the Department could easily disclose sensitive, private information and create serious liability problems for the State.

We firmly take the position that judicial records are not subject to legislative subpoena. We further take the position that the Department of Administration has no authority over judicial branch records. Nevertheless, in the interest of avoiding litigation of constitutional dimension, I write to propose at least a temporary solution that avoids irreparable harm wrought by executive branch production of judicial records containing private and privileged information.

I suggest an orderly process by which the legislative subpoena of April 8 be withdrawn, revised to be more narrowly tailored to information regarding discussions of SB 140 and then served on the branch of government whose records are being sought – specifically, the Supreme Court Administrator. The Court Administrator will respond through an orderly process that protects existing privacy interests.

We understand the Department of Administration is actively working this weekend to produce documents in response to the subpoena. Given the extreme time sensitivities and irreparable harm that will result, please advise immediately if you agree to stay response to the legislative subpoena until the issues are resolved by agreement or through court process. If you are unwilling to agree to our proposal, we will file an emergency petition asking for a temporary restraining order and an order quashing the subpoena and staying response by the Department of Administration until the important Constitutional and personal privacy issues can be resolved in a legally appropriate way. If you choose for us to proceed in that fashion, we will advise the Court that our motion is opposed.

April 10, 2021
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You may reach me directly via my cell phone at 406 370-3926 or by email at rcox@boonekarlberg.com. Thank you for your consideration. I look forward to hearing from you.

Sincerely,

A handwritten signature in black ink, appearing to read 'Randy J. Cox', with a long, sweeping underline that extends to the right.

Randy J. Cox

cc: Beth McLaughlin

Randy Cox

From: Randy Cox
Sent: Sunday, April 11, 2021 2:23 PM
To: 'Giles, Misty Ann'
Cc: 'mmanion@mt.gov'; 'teverts@mt.gov'; Matt Hayhurst; Thomas Leonard
Subject: Supplementation of Emergency motion
Attachments: Emergency Supplementation of Emergency Motion to Quash Enjoin Legislative SDT (00821134).pdf

Director Giles:

I appreciate you advising me of the fact that some documents have already been produced. I respectfully ask that you immediately provide a .pst file of those documents directly to me, as counsel for the Court Administrator. To the extent that personal or private information has been unlawfully released, the Administrator may have an obligation to notify the affected individuals.

I attach a copy of what was sent to the Supreme Court moments ago for filing. I respectfully suggest that it would be prudent to simply stand still and produce no further documents or information until such time as the Montana Supreme Court has had an opportunity to examine the issue of the legality of the subpoena and whether steps must be taken to protect information from being unlawfully released. If we are wrong, and there is no private information in the emails, then nothing has been lost. If we are, however, right and the Department is simply going forward with the production of information it knows is contested, I am concerned about potential liability. I am uncertain how that bell can be un-rung.

I am happy to discuss this matter with your counsel or anyone you designate.

Randy J. Cox
Shareholder

BOONE  **KARLBERG**
ATTORNEYS AT LAW

201 West Main St., Suite 300
P.O. Box 9199
Missoula, MT 59807
Phone: (406) 543-6646
Fax: (406) 549-6804

Randy Cox

From: Randy Cox
Sent: Sunday, April 11, 2021 9:16 PM
To: mark.blasdel@mt.gov; wylie.galt@mt.gov; keith.regier@mt.gov; abra.belke@mt.gov; Todd Everts
Cc: bmclaughlin@mt.gov
Subject: Legislative Subpoena and Supreme Court Order

President Blasdel, Speaker Galt, Senator Regier, Miss Belke, Mr. Everts:

As you are undoubtedly aware by now, early this evening the Montana Supreme Court issued an order quashing the Legislative Subpoena served on the Director of the Department of Administration seeking judicial branch documents, specifically, three months worth of emails to and from Beth McLaughlin, the Supreme Court Administrator. What that means is that any document from Beth McLaughlin's emails in the possession of anyone is unlawfully held. None of those emails may be leaked or used for any purpose.

I represent Beth McLaughlin, the Supreme Court Administrator. Our concern right now, in light of the Court's determination that the subpoena was overbroad and invalid, is what individuals or entities have seen those records and whether any of the confidential, personal or private information contained therein has been compromised. If it has, we will do an analysis that may lead us to the conclusion that the individuals whose personal information has been breached must be notified of who saw the information and why and what has happened to it. Unlike anyone else in this process, we have been concerned about the State's potential legal liability for disclosing personal information.

Our view right now is simple. We know that a batch of documents were delivered on Friday to Abra Belke, COS for President Blasedale and to Senator Regier. According to Misty Ann Giles, "no other documents have been provided to the Legislature." We take her at her word. What we do not know, but need to find out, is where else the documents or copies of them have gone.

We need to know every individual who had access to and in fact saw any of the emails produced pursuant to this subpoena. We need to know where the documents are now and we need to have them returned to me as Ms. McLaughlin's counsel. They are not validly in anyone's possession (other than Ms. McLaughlin) as they were obtained pursuant to an unlawful subpoena.

We are not interested in creating problems, leaking documents to newspaper reporters or scoring ridiculous political points. The world has too much of that foolishness right now. We are interested in safeguarding the private, personal and legally protected information in those emails. Respectfully, you all do NOT know what of that

information is private, personal or otherwise legally protected because you were not parties to the emails.

The only way we can know what has to be done is to get everything back and know where it has been to decide if there are legal obligations to let people know their information has been compromised. Please advise as to the truth of the situation. I repeat - we are not interested in recriminations. We need every single document returned from every single person who has any of them. If we do not know where they have been and who has seen them, and if we learn that documents illegally obtained have been released, we will take the matter to the Supreme Court. You should know we have already advised the Court, in a supplemental filing today, that documents were delivered by the Department of Administration to the Legislature on Friday. We now know who they went to at the Legislature and we need to know where they went after that.

I look forward to hearing from someone about this situation. My cell number is 406 370-3926. My office number is 406 543-6646. You have my email.

Randy J Cox

Randy Cox

From: Randy Cox
Sent: Monday, April 12, 2021 3:25 PM
To: 'derek.ostreicher@mt.gov'
Subject: McLaughlin emails

Derek

I wrote you last night. I am now wondering if the Supreme Court Administrator's emails went from the Legislature to the AG's office. I now specifically ask the question – did the AG's office receive and has it retained any copies of the over 2,000 Beth McLaughlin emails turned over by the Department of Administration to Senate President Blasedale, Senator Regier and Abra Belke.

I have written legislative leadership to demand a return of documents and have received no response. I do not understand that. Why is this situation being ignored?

By the way, I am writing specifically to you because of your position, because I know you and because the Lieutenant Governor said yesterday when we spoke that she would see about having you or the Solicitor General call me. As yet, nothing.

Is there anyone around who would like to try to solve these problems instead of maneuvering for political cover? I'm all ears.

Randy J. Cox
Shareholder

BOONE  **KARLBERG**
ATTORNEYS AT LAW

201 West Main St., Suite 300
P.O. Box 9199
Missoula, MT 59807
Phone: (406) 543-6646
Fax: (406) 549-6804

https://helenair.com/news/state-and-regional/govt-and-politics/lawmakers-abandon-investigative-subpoenas-for-judges-records/article_87b2fb25-0f1a-5e51-a83c-6a0c160d3199.html

Lawmakers abandon investigative subpoenas for judges' records

By SEABORN LARSON Lee Newspapers

Jun 22, 2021



Sen. Greg Hertz, R-Polson, speaks on the Senate floor in the state Capitol.

THOM BRIDGE, Independent Record

A GOP-led legislative committee investigating the judicial branch has withdrawn its embattled subpoenas for Montana Supreme Court records, a spokesperson said late Tuesday.

Sen. Greg Hertz, a Polson Republican chairing the investigative committee, said in an emailed statement the decision to pull back the subpoenas came after consultation with the state Department of Justice. That Republican-led agency has represented the committee during the escalating confrontation with the judiciary over claims of improper use of state resources, lobbying efforts by judges and failure to retain public records.

The subpoenas had been challenged in court as an overreach of the Legislature's constitutional authority by Supreme Court Administrator Beth McLaughlin, whose own emails had been subpoenaed by the committee.

Supreme Court Justice Jim Rice, a former Republican lawmaker, also challenged the subpoena for his own records in state District Court. Rice testified in Lewis and Clark County District Court in May that he believed the mounting investigation led by Republican lawmakers was a "campaign to discredit and undermine the integrity of the court."

A District Court judge subsequently blocked the subpoena for Rice's records until the case concluded, noting he would have to be "blind" not to see that the subpoena was not a legislative effort but a clash over records of political interests.



Montana Supreme Court Justice Jim Rice, right, takes the witness stand as Judge Mike McMahon watches in the Lewis and Clark County Courthouse in May.

THOM BRIDGE, Independent Record

Lawmakers hatched the investigation and the Select Committee on Judicial Transparency and Accountability after court filings in a lawsuit over new laws passed by the Legislature showed McLaughlin had deleted an internal email poll of judges offering approve-or-oppose opinions on pending legislation that would affect judicial functions. The Supreme Court justices told lawmakers in a committee hearing in April that they had not participated in the polling as state District Court judges had, but lawmakers pursued their records in light of the deleted email poll results.

The committee had produced a preliminary report by the end of that month outlining its concerns with the judicial branch following a month of investigation. That included a subpoena that successfully cached more than 5,000 of McLaughlin’s emails that were turned over by the Department of Administration, a department of the executive branch.

Hertz said in Tuesday’s announcement the committee’s position “all along” has been

that the dispute should have been handled outside of the courts.

“To be clear, we expect the judicial branch to release public records, the same as they have ruled the legislative and executive branches must do in numerous court rulings over the years,” Hertz said.

Hertz also said withdrawing the subpoenas meant the litigation over the Legislature’s subpoena power likewise ended Tuesday.

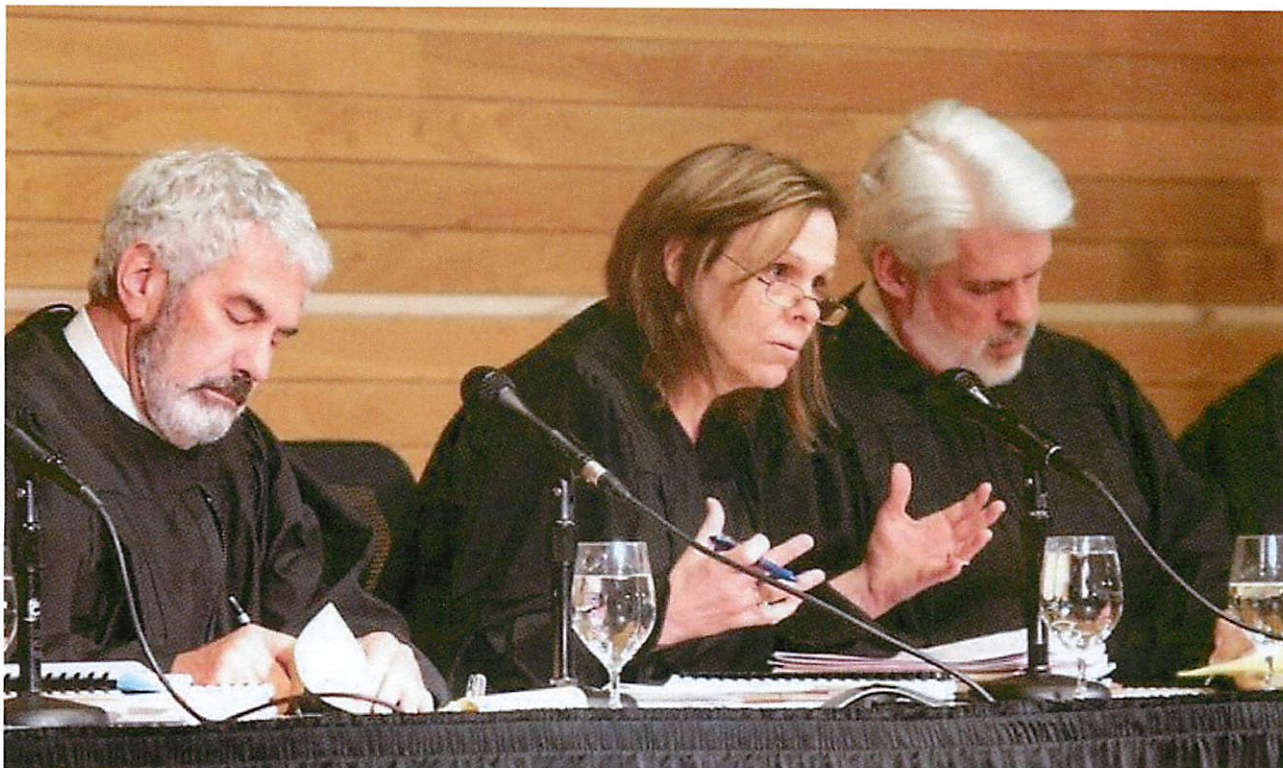


Sen. Greg Hertz, R-Polson

Photo Courtesy of the Montana Legislature

Earlier on Tuesday, the Montana Supreme Court met for a conference meeting on a recent motion by lawmakers asking for the justices to recuse themselves because they, too, were under subpoena. It was the second such motion; the first request for

recusal was heartily denied, with Justice Laurie McKinnon writing in the unanimous decision that lawmakers had attempted to “manufacture a conflict” in an effort to evade the judicial branch getting the final say on the Legislature’s subpoena power.



Montana Supreme Court Justice Laurie McKinnon asks a question during arguments in the Jon Krakauer records request hearing at the Strand Union Building at Montana State University in April 2016.

Casey Page, Billings Gazette

Randy Cox, McLaughlin’s attorney, said late Tuesday he would likely file a motion to see the challenge out in the coming days, citing a need to have the matter settled by the courts.

“We are going to oppose the dismissal because we think this is an important issue,” Cox said.

Rep. Kim Abbott of Helena, one of two Democrats on the committee who have repeatedly criticized the subpoenas as having no legislative purpose, said she hoped the move signaled a downturn in the committee’s investigation.

“This Select Committee was always an overreach that threatened the separation of powers and checks and balances that Montanans expect and that our system of government depends on,” Abbott, the House minority leader, said in an email Tuesday. “We hope this puts an end to expending resources on partisan attacks against a co-equal and independent branch of government.”

Hertz, however, gave no indication that the investigation was winding down.



Kim Abbott
Provided photo

“We’re still seeking documents and information that will provide more clarity on the issues identified in our committee’s initial report and inform legislative fixes to problems within our judicial system,” Hertz said. “I look forward to working with committee members and the judicial branch as we continue this legislative investigation.”

The committee’s website does not list the next date the investigative committee is expected to meet.

CERTIFICATE OF SERVICE

I, Randy J. Cox, hereby certify that I have served true and accurate copies of the foregoing Response/Objection - Response to Motion to Dismiss to the following on 06-24-2021:

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

Dale Schowengerdt (Attorney)
900 N. Last Chance Gulch
Suite 200
Helena MT 59624
Representing: Administration, Department of
Service Method: eService

Kristin N. Hansen (Govt Attorney)
215 N. Sanders
Helena MT 59601
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 Rita Agin on behalf of Randy J. Cox
Dated: 06-24-2021