

April 2021

SPECIAL JOINT SELECT COMMITTEE ON JUDICIAL  
TRANSPARENCY AND ACCOUNTABILITY

**THE MINORITY REPORT TO THE 67<sup>TH</sup> MONTANA LEGISLATURE**

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REPORT ON JUDICIAL  
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This select committee, and subsequent committee report, are part of a coordinated effort to attack and smear the independent judiciary by Republicans in the Legislature and the Executive Branch.

Throughout the 67th Legislative Session, Republican leaders have been told by legislative attorneys the legislation they're trying to pass violates our Montana Constitution. Republicans know full well these bills will likely be held unconstitutional in the court, so the Republicans in the Legislature conspired with the Governor's Office to hack the judiciary's records in an effort to smear and delegitimize the courts.

We believe this is an attack on our system of checks and balances, and an attack on the very rule of law itself. We struggle to understand the purpose of this committee and its report. Mason's Manual lists the following limitations that apply to the Legislature's investigation powers:

**“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 legislature.”** (Mason's Manual, pp 566-567)

The Montana Constitution clearly outlines the constitutional process within the judicial branch to discipline or remove judges through the independent Judicial Standards Commission, not through the legislative branch. Article VII, Section 11 states upon the recommendations of the Commission, the Montana Supreme Court may:

**(a) Retire any justice or judge for disability that seriously interferes with the performance of his duties and is or may become permanent; or  
(b) Censure, suspend, or remove any justice or judge for willful misconduct in office, willful and persistent failure to perform his duties, violation of canons of judicial ethics adopted by the supreme court of the state of Montana, or habitual intemperance.**

The Montana Constitution takes precedence over any other statute the legislative and executive branch can enact. We believe this committee, and its actions, were set up for political purposes to further undermine our independent courts, and is therefore an illegitimate legislative proceeding.

All questions the committee wanted answered by the Montana Supreme Court were sent to Chairman Hertz and committee members in a letter from Chief Justice McGrath on Friday, April 16, 2021 before the committee met.

The court provided answers on the work of the Montana Judges Association (MJA) to inform the legislature on bills relating to the judiciary. The letter explained the use of polls to district court judges on rare occasions to determine whether MJA should support, oppose, or remain neutral towards proposed legislation relating to the judiciary. Montana Supreme Court Justices do not participate in these polls. The practice of MJA contacting judicial members using state resources is a common practice that occurs every session and is the practice of other associations who represent government organizations, such as law enforcement officers. Their participation in the legislative process on these limited matters benefits the legislature and is consistent with Rule 3.2 of the Montana Canons of Judicial Conduct.

Furthermore, the letter states these polls relate only to matters of public policy to inform the legislature and by no means indicates how a judge will rule on possible litigation or the constitutionality of a law. Our independent judiciary's role is to set aside personal views and make decisions solely on the law and its constitutionality. There is zero evidence of any misconduct.

Instead, the actions by the executive branch raise serious questions regarding that branch's own conduct, the conduct of Department of Administration Acting Director (DOA) Misty Ann Giles and her superiors that failed to safeguard confidential and private information unrelated to this matter—exposing the state to significant legal liability.

On Friday April 9, 2021, Acting Director Giles was served with a purported subpoena by Senate Judiciary Chairman Keith Regier to appear before the legislature with documents from the judicial branch by the end of the day. The subpoena in question asked for records from a separate branch of government by using the executive branch to go through the back door of the state email servers to produce these records. Emails and phone records obtained by Senate Minority Leader Cohenour show Giles was aware of the subpoena well before it was issued on Friday and was in constant communication with the Governor's Office about completing the request. Records show Acting Director Giles' eagerness to produce these records as soon as possible, with no privacy review, in what can only be presumed as an attempt to outrun a court order by the Montana Supreme Court to quash a legislative subpoena to prevent private and sensitive case information from being released. While the executive branch may hold these records on the state servers, they are not the owners of these records but rather the custodians. It is unprecedented for the executive branch to essentially hack into the judicial branch's records, without consent or providing any opportunity to review the records for privileged or confidential information affecting the constitutionally-protected privacy rights of third parties.

The contents of the records, as described in Ms. McLaughlin's court filings, included private personal and medical information, private information regarding Youth Court Cases, information on active security threats to judges and exchanges with law enforcement, and Judicial Standards Commission information. In releasing this information to Legislative Republicans and their staff, Acting Director Giles has created immense legal liability for the State of Montana and potentially violated the constitutionally-protected privacy rights of third parties who have absolutely nothing to do with MJA or the SB140 poll. Her rush to outrun an impending Court



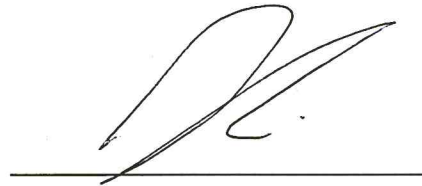
order on the improper subpoena could cost Montana taxpayers dearly when lawsuits inevitably follow.

In conclusion, the minority does not support the creation of committees for political theater. This is a waste of public resources and an embarrassment to the dignity of the Legislature. The only purpose of this select committee is to undermine and smear the judicial branch, and delegitimize any future decisions that may strike down unconstitutional actions of this body. Our own lawyers in the Legislature have warned us this is a likely consequence of passing laws that violate Montana's constitutional protections for liberty.

Republican legislators and their staff have had their questions answered by the Montana Supreme Court and there is no evidence of misconduct by the judiciary as it relates to the work of MJA or the use of public resources to contact members. Any further work by this committee is purely political theater. If this episode has any lessons for our system of checks and balances, it is that the executive branch and the Department of Administration must be held accountable for using their position as custodians for the records of a separate branch of government, to exploit that position for political gain. DOA must work with the separate branches of government to develop a responsible process for the release of any confidential records in its possession. This is essential to reduce costly legal liability for taxpayers when DOA's releases violate the constitutional rights of Montanans and to ensure our system of checks and balances is protected.



SENATOR DIANE SANDS  
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REPRESENTATIVE KIM ABBOTT  
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