

# Senate Bill 490 (2023) Codified Provisions on Legislature's Investigative Powers

## Title 5, Chapter 5, Part 1 Legislature Investigative Powers

**5-5-106. Scope and application of legislature investigative powers.** (1) (a) Pursuant to Article V, section 1, of the Montana constitution, the legislative power is vested in the legislature consisting of a senate and a house of representatives.

(b) The constitutional legislative power includes the legislature's broad power to investigate any subject related to enacting law, the implementation of enacted law, and the expenditure of money appropriated by the legislature.

(c) The presumption of constitutionality of legislative actions applies to legislative investigations.

(2) The broad scope and application of the legislature's investigative powers include but are not limited to the power to investigate:

(a) any subject regarding information in connection with the proper discharge of the legislature's function to enact, amend, or repeal statutes, appropriate money, audit state and local government finances and programs, or perform any other act delegated to the legislature by the constitution;

(b) any subject in which there is a legitimate use that the legislature can make of the information being sought;

(c) the management of state institutions and public agencies, as defined in 2-6-1002;

(d) matters concerning the administration of existing laws, proposed laws, or potentially necessary laws; and

(e) matters concerning defects in any social, political, or economic system to remedy those defects.

(3) The application and exercise of the legislature's investigative power must protect the rights of all persons and adhere to all state and federal constitutional protections related to privacy, life, liberty, and property.

**5-5-107. Subpoenas — witnesses — records.** (1) A subpoena requiring the attendance of any witness before either house of the legislature, a committee of either house, a committee established under legislative rules, or a statutory committee or an interim committee may be issued by the president of the senate, the speaker of the house, or the presiding officer of any committee before whom the attendance of the witness is desired.

(2) A subpoena compelling attendance of a witness is sufficient if:

(a) it states whether the proceeding is before the house of representatives, the senate, or a committee;

(b) it states the legislative purpose for issuing the subpoena;

(c) it is addressed to the witness;

(d) it requires the attendance of the witness at a time and place certain; and

(e) it is signed by the president of the senate, the speaker of the house, or the

presiding officer of a committee.

(3) (a) In the discharge of its duties, either house of the legislature, a committee of either house, a committee established under legislative rules, or a statutory committee or an interim committee may issue a subpoena to compel the production of a record that is fixed in any medium and is retrievable from a person that is in possession, custody, or control of the record.

(b) A subpoena compelling the production of a record is sufficient if:

(i) it states whether the proceeding is before the house of representatives, the senate, or a committee;

(ii) it states the legislative purpose for issuing the subpoena;

(iii) it provides a description of the records being compelled for production;

(iv) it is addressed to a person;

(v) except as provided in subsection (3)(c), it requires the production of a record at a date and place certain, but not later than 10 business days from receipt of the subpoena; and

(vi) it is signed by the president of the senate, the speaker of the house, or the presiding officer of a committee.

(c) (i) A person that is served a subpoena to produce records that may include confidential information shall notify the presiding officer that signed the subpoena and submit a written notice of denial and a written explanation for the denial pursuant to 2-6-1009.

(ii) A person served a subpoena under subsection (3)(c)(i), may request additional time to produce the records pursuant to subsection (3)(b)(v).

(4) For the purposes of this section:

(a) "confidential information" has the meaning provided in 2-6-1002; and

(b) "person" has the meaning provided in 2-5-103.

**5-5-108. Service of subpoenas.** The subpoena may be served by any elector of the state, and the elector's affidavit that the elector delivered a copy to the witness or the person compelled to produce records under 5-5-107(3) is evidence of service.

**5-5-109. Contempt — misdemeanor.** (1) If a witness neglects or refuses to obey a subpoena or, appearing, neglects or refuses to testify, the senate or house may, by resolution entered on the journal, commit the witness for contempt.

(2) If a person compelled to produce records under 5-5-107(3) neglects or refuses to obey a subpoena, the senate or house may, by resolution entered on the journal, commit the witness for contempt.

(3) A person who neglects or refuses to obey a subpoena under subsection (1) or (2) is guilty of a misdemeanor punishable as provided in 46-18-212.

**5-5-111. Compelling attendance.** Any witness neglecting or refusing to attend in obedience to a subpoena may be arrested by the sergeant at arms and brought before the senate or house. The only warrant of authority necessary to authorize the arrest is a copy of a resolution of the senate or house, signed by the president of the senate or speaker of the house and countersigned by the secretary or clerk.

**5-5-112. Immunity of witness.** (1) A person sworn and examined before either house of the legislature or any committee of the legislature may not be held to answer criminally or be subject to any penalty or forfeiture for any fact or act relating to the required testimony. A statement made or paper produced by the witness is not competent evidence in any criminal proceeding against the witness.

(2) A witness cannot refuse to testify to any fact or to produce any paper concerning which the witness is examined for the reason that the witness's testimony or the production of the paper tends to disgrace the witness or render the witness infamous.

(3) This section does not exempt a witness from prosecution and punishment for perjury committed by the witness during the examination.

### **Case Notes**

Issuance of Legislative Subpoena Directed at Another Branch of Government — Mazars Separation of Powers Analysis Appropriate: The Legislature issued two subpoenas requesting electronic records of the court administrator for the Judicial Branch. The administrator opposed the subpoenas and brought an original proceeding in the Supreme Court to quash. The parties submitted competing summary dismissal claims, and the Supreme Court found in favor of the administrator and quashed both subpoenas. The Supreme Court determined that because the controversy involved a legislative subpoena directed at another branch of government, the separation of powers analysis set forth in *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019 (2020), was applicable in order to determine the propriety of the subpoenas. Mazars provides that (1) the legislative body may not compel information from another branch of government if another source could reasonably provide the same information; (2) a subpoena from the Legislative Branch to another branch of government may not be broader than necessary to support the legislative objective; (3) a court must examine the purposes offered by the Legislature for the subpoena to determine if they advance a valid legislative purpose; and (4) a court must scrutinize whether the subpoena is being utilized to secure an institutional advantage for a rival political branch. *McLaughlin v. Mont. St. Legislature*, 2021 MT 178, 405 Mont. 1, 493 P.3d 980.

Legislative Subpoenas for Records of State Officer — Response Subject to In Camera Review by Montana Court — Response Subject to Review by State Officer: The Legislature issued two subpoenas requesting electronic records of the court administrator for the Judicial Branch. The administrator opposed the subpoenas and brought an original proceeding in the Supreme Court to quash. The parties submitted competing summary dismissal claims, and the Supreme Court found in favor of the administrator and quashed both subpoenas. In part, its holding rested on the conclusion that the subject subpoenas improperly balanced the right to know provided by Art. II, sec. 9, Mont. Const., with the right to privacy provided by Art. II, sec. 10, Mont. Const. The Supreme Court found that the subpoenas were likely to reveal personal, confidential, or otherwise protected information without providing an opportunity for the Judicial Branch to ensure that information was protected. The Supreme Court held that, prior to being released, responses to interbranch subpoenas must first be (1) submitted

to an appropriate court for in camera review to ensure that any necessary redactions are properly made and (2) made available for review by the governmental officer from whom the records were sought. *McLaughlin v. Mont. St. Legislature*, 2021 MT 178, 405 Mont. 1, 493 P.3d 980.

**Legislative Subpoenas of Judicial Branch Administrator Not in Furtherance of Legitimate Task of Legislature — Exceeded Legislative Power to Investigate:** The Legislature issued two subpoenas requesting electronic records of the court administrator for the Judicial Branch. The administrator opposed the subpoenas and brought an original proceeding in the Supreme Court to quash. The parties submitted competing summary dismissal claims, and the Supreme Court found in favor of the administrator and quashed both subpoenas. In part, its holding rested on the conclusion that the subject subpoenas did not further a legitimate purpose of the Legislature. The Supreme Court found that although the Legislative Branch has broad power to investigate, the power only extends to matters concerning what legislation could be advanced. The Legislature's stated purposes for the subpoenas were to investigate statements and conduct of members of the judiciary and to investigate Judicial Branch practices and policies regarding records retention and use of state e-mail to communicate with judges about matters pending before the Legislature. The Supreme Court concluded that none of these were legitimate legislative purposes and that the inquiries therefore exceeded the legislative function. *McLaughlin v. Mont. St. Legislature*, 2021 MT 178, 405 Mont. 1, 493 P.3d 980.