



Montana Legislative Services Division
Legal Services Office

April 18, 2018

TO: Representative Ron Ehli, Vice Chair, Special Select Committee on State Settlement
Accountability

FR: Todd Everts, Chief Legal Counsel

RE: Information Request Regarding the Montana Legislature's Investigative Authority

In anticipation of the organizational meeting on April 25, 2018, of the Special Select Committee on State Settlement Accountability, you requested information regarding the investigative authority of the Montana Legislature and its legislative committees and staff. This memorandum is in response to that request.

MEMORANDUM

I. Background

On March 16, 2018, pursuant to House Rules 30-20(7) and (8) and Senate Rule 30-10(4), the Speaker of the House and the President of the Senate jointly appointed the Special Select Committee on State Settlement Accountability to investigate executive branch confidential settlements paid out to public employees. The Special Select Committee is comprised of six Republicans and four Democrats. Leadership appointed Senator Nels Swandal as chair and appointed Representative Ron Ehli as vice chair of the Special Select Committee.

II. Investigative Authority of the Montana Legislature and Its Legislative Committees and Staff

It has been consistently recognized by the courts and uniformly reflected in constitutional and parliamentary law that a legislative body has the clear and very broad authority to conduct legislative investigations to gather and evaluate information to make wise and timely policy judgements inherent and indispensable in the power of enacting law.¹ A legislative body's inherent power to investigate may be exercised directly or through a duly authorized committee.² A legislative body's investigative power is not absolute and there are limitations. The presumption of constitutionality of legislative actions applies to legislative investigations.³

¹ *Mason's Manual of Legislative Procedure* (2010), p. 561; *Sutherland Statutory Construction* (2010), p. 596.

² *Mason's Manual*, p. 569; *Sutherland*, p. 570.

³ *Sutherland*, p. 578.

However, the power to investigate must be exercised for a proper legislative purpose related to enacting law, and the application and exercise of the legislative investigation power must protect the rights of citizens and adhere to all constitutional protections related to privacy, life, liberty, and property.⁴ The power to investigate the private affairs of a citizen only exists when the investigative authority exercised is directly related to a legitimate legislative purpose.⁵

A. *Source of Legislative Investigative Authority*

The organic source of the Montana Legislature's investigative powers can be found in Article V, section 1, of the Montana Constitution, which provides: "The legislative power is vested in a legislature consisting of a senate and a house of representatives." The Montana Constitution further provides that:

Each house shall judge the election and qualifications of its members. It may by law vest in the courts the power to try and determine contested elections. Each house shall choose its officers from among its members, keep a journal, and make rules for its proceedings. Each house may expel or punish a member for good cause shown with the concurrence of two-thirds of all its members.⁶

With Montana's constitutional advent of a bicameral Legislature, the power to investigate resides as a separate and distinct power in each house of the Legislature.⁷ However, both the Montana Senate and the House of Representatives may jointly appoint an investigative committee.⁸

Constitutional investigative powers also reside in specific administrative committees and interim committees. Article V, section 10(4), of the Montana Constitution provides that the Legislature may establish a Legislative Council and other interim committees and that the Legislature shall establish a legislative post-audit committee that shall supervise post-auditing duties as provided by law.

Other provisions of the Montana Constitution that buttress the Legislature's investigative authority include Article II, sections 8 and 9, the public's constitutional right to participate in the decision-making process of state government and the public's right to examine documents and

⁴ Mason's Manual, p. 566; Article II, section 10, of the Montana Constitution.

⁵ Mason's Manual, p. 566; Sutherland, pp. 578-583.

⁶ Article V, section 10(1), of the Montana Constitution.

⁷ Article V, sections 1 and 10, of the Montana Constitution; Mason's Manual, p. 562.

⁸ Rules of the Montana Legislature, Joint Rules 30-10 and 30-20; House Rules 30-20(7) and (8); and Senate Rule 30-10(4).

observe the deliberations of all public bodies or agencies of state government. Synchronized with the public's right to know and participate is the constitutional requirement that all committee meetings and hearings of the Legislature be open to the public.⁹

In addition to the Constitution, the bulk of the Montana Legislature's investigative authority resides in statute with respect to subpoenas, contempt, compelling attendance of a witness, immunity of a witness, administering oaths, powers of statutory and interim committees related to legislative hearings, authority of the Legislative Services Division on behalf of committees to investigate state government activities, and authority of the legislative auditor and the legislative fiscal analyst to access confidential information.¹⁰

The Rules of the Montana Legislature offer little detail regarding the Legislature's investigative authority other than describing the authority of the Speaker and the President to issue subpoenas and referencing that *Mason's Manual of Legislature Procedure* (2010) governs the proceedings of the Senate and the House in all cases not governed by the rules.¹¹ Mason's Manual devotes an entire chapter on the source, scope, exercise, and limitations of legislative bodies' investigative powers.¹²

B. Scope of Legislative Investigative Authority

The scope of a Legislature's investigative power broadly extends to any subject related to enacting law. According to Mason's Manual:

The legislature has the power to investigate any subject regarding which it may desire information in connection with the proper discharge of its function to enact, amend or repeal statutes or to perform any other act delegated to it by the constitution.¹³

⁹ Article V, section 10 (3), of the Montana Constitution.

¹⁰ Subpoenas (5-5-101 and 5-5-102, MCA), contempt (5-5-103, MCA), compelling attendance of witness (5-5-104, MCA), immunity of a witness (5-5-105, MCA), administering oaths (5-5-201, MCA), authority of the Legislative Services Division on behalf of committees to investigate state governmental activities (5-11-106, MCA), powers of statutory and interim committees related to legislative hearings (5-11-107, MCA), and authority of the legislative auditor and the legislative fiscal analyst to access confidential information (5-12-303 and 5-13-309, MCA).

¹¹ Rules of the Montana Legislature, Joint Rule 60-20; Senate Rule 10-50(5); and House Rule 10-20(4).

¹² Mason's Manual, Chapter 73, pp. 561-577.

¹³ Mason's Manual, p. 561.

The legislature has power to investigate any subject where there is a legitimate use that the legislature can make of the information sought, and an ulterior purpose in the investigation or an improper use of the information cannot be imputed.¹⁴

An investigation into the management of state institutions and the departments of state government is at all times a legitimate function of a legislative body.¹⁵

It has been noted by courts and legal experts that:

Investigation may be made concerning the administration of existing laws, proposed laws, or potentially necessary laws. Inquiry may be made as to defects in any social, political or economic system to the end of devising remedies for any such defects. Investigation may be made of any subject and any matter that related to the need of legislation on the subject matter, and what kind and the extent of any legislation needed.¹⁶

C. Exercise of Legislative Investigative Authority

Where a legislative body has the constitutional power to institute an investigation, the manner of how the investigation is conducted rests with the sound discretion of the legislative body.¹⁷

There are a number of investigation tools that the Montana Legislature has to exercise its investigative powers. The Legislative Services Division, on behalf of standing committees, select committees, or interim committees and any subcommittees of those committees, may investigate and examine state government activities and may examine and inspect all records, books, and files of any department, agency, commission, board, or institution of the state of Montana.¹⁸

Montana statutes require all state agencies to aid and assist the legislative auditor in auditing of books, accounts, activities, and records, and the legislative auditor may examine at any time the books, accounts, activities, and records, confidential or otherwise, of a state agency.¹⁹ These statutory provisions regarding the legislative auditor's investigative power may not be construed

¹⁴ Mason's Manual, p. 563.

¹⁵ Mason's Manual, p. 563.

¹⁶ C. Quilter, "Primer on the Investigative Authority of Legislative Committees", *Legislative Lawyer*, Vol. 12, No. 1 (Winter 1998), p. 87.

¹⁷ Mason's Manual, p. 568.

¹⁸ 5-11-106, MCA.

¹⁹ 5-13-309, MCA.

as authorizing the publication of information prohibited by law.²⁰

The legislative fiscal analyst has the statutory authority to investigate and examine the costs and revenue of state government activities and may examine and obtain copies of the records, books, and files of any state agency, including confidential records.²¹ When confidential records and information are obtained from a state agency, the legislative fiscal analyst and staff must be subject to the same penalties for unauthorized disclosure of the confidential records and information provided for under the laws administered by the state agency. The legislative fiscal analyst shall develop policies to prevent the unauthorized disclosure of confidential records and information obtained from state agencies.²² These statutory provisions regarding the legislative fiscal analyst do not authorize publication or public disclosure of information if the law prohibits publication or disclosure or if the Department of Revenue notifies the fiscal analyst that specified records or information may contain confidential information.²³

All duly authorized committees of the Legislature may hold hearings, administer oaths, issue subpoenas, and compel the attendance of witnesses and the production of records and testimony.²⁴ As noted previously, the Rules of the Montana Legislature authorize the Speaker and the President to individually issue subpoenas.²⁵

A person sworn and examined before the Legislature or any committee may not be held criminally liable or be subject to any penalty or forfeiture for any fact or act relating to the required testimony.²⁶ Common law and judicial rules of evidence applicable in court proceedings, do not apply to legislative investigations.²⁷

When a summoned witness refuses to obey a subpoena or refuses to testify, the Senate or the

²⁰ 5-13-309, MCA.

²¹ 5-12-303(1), MCA.

²² 5-12-303(2), MCA.

²³ 5-12-303(3), MCA.

²⁴ Subpoenas (5-5-101 and 5-5-102, MCA), contempt (5-5-103, MCA), compelling attendance of witness (5-5-104, MCA), immunity of a witness (5-5-105, MCA), administering oaths (5-5-201, MCA), powers of statutory and interim committees related to legislative hearings (5-11-107, MCA), and Mason's Manual, Chapter 73, pp. 561-577.

²⁵ Rules of the Montana Legislature, Senate Rule 10-50(5) and House Rule 10-20(4).

²⁶ 5-5-105(1), MCA.

²⁷ Mason's Manual, p. 567; Sutherland, p. 586.

House may, by resolution, commit the witness for contempt.²⁸ A witness refusing to attend in obedience to a subpoena may be arrested by the sergeant at arms and brought before the Senate or the House. A copy of a resolution of the Senate or the House, signed by the President or the Speaker and countersigned by the secretary or the clerk, is necessary to authorize the arrest.²⁹

Although the appointed Special Select Committee is neither a statutory committee nor an interim committee, those types of committees are statutorily authorized to hold hearings, administer oaths, issue subpoenas, compel the attendance of witnesses and the production of papers, books, accounts, documents, and testimony, and cause depositions of witnesses to be taken in the manner prescribed by law for taking depositions in civil actions in district court.³⁰ If a person disobeys a subpoena issued by a statutory committee or an interim committee or if a witness refuses to testify on any matters regarding which the witness may be lawfully interrogated, the district court of any county shall, on application of the committee, compel obedience by proceedings for contempt as in the case of disobedience of the requirements of a subpoena issued from a district court or a refusal to testify in the district court.³¹

D. Limitations on Legislative Investigative Authority

A legislative body's investigative power is not absolute, and there are constitutional and common law limitations placed on that power. The presumption of constitutionality of legislative actions applies to legislative investigations.³² However, the power to investigate must be exercised for a proper legislative purpose related to enacting law, and the application and exercise of the legislative investigation power must protect the rights of citizens and adhere to all constitutional protections related to privacy, life, liberty, and property.³³ The power to investigate the private affairs of a citizen only exists when the investigative authority exercised is directly related to a legitimate legislative purpose.³⁴

With the Rules of the Montana Legislature defaulting to Mason's Manual to govern the

²⁸ 5-5-103, MCA.

²⁹ 5-5-104, MCA.

³⁰ 5-11-107(1), MCA.

³¹ 5-11-107(2), MCA.

³² Sutherland, p. 578.

³³ Mason's Manual, p. 566; Article II, section 10, of the Montana Constitution.

³⁴ Mason's Manual, p. 566; Sutherland, pp. 578-583.

proceedings of the Senate and the House in all cases not governed by the rules,³⁵ Mason's Manual lists the following limitations that would apply to the Montana Legislature's investigation powers

in addition to the Montana Constitution and statutory limitations:

1. It is the general rule that the legislature has no power through itself or any committee or any agency to make inquiry into the private affairs of a citizen except to accomplish some authorized end.
2. The legislature has no right to conduct an investigation for the purpose of laying a foundation for the institution of criminal proceedings, for the aid and benefit of grand juries in planning indictments, for the purpose of intentionally injuring such persons or for any ulterior purpose.
3. A state legislature, in conducting any investigation, must observe the constitutional provisions relating to the enjoyment of life, liberty and property.
4. 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.
5. When a committee is appointed by resolution to make an investigation and the object of the investigation, as shown by the resolution, is not a proper legislative object but is to establish an extraordinary tribunal for the trial of judicial and other officers, the duties imposed on the commission being strictly judicial and not ancillary to legislation, the committee has no legal status.
6. A governmental investigation into the papers of a private corporation on the possibility that they may disclose evidence of crime is contrary to the first principles of justice and an intention to grant the power must be expressed in explicit language.
7. The investigatory power of a legislative body is limited to obtaining information on matters that fall within its proper field of legislative action.³⁶

III. Conclusion

The Montana Legislature and its duly authorized committees have the clear and very broad

³⁵ Rules of the Montana Legislature, Joint Rule 60-20; Senate Rule 10-50(5); and House Rule 10-20(4).

³⁶ Mason's Manual, pp. 566-567.

authority to conduct legislative investigations. The Legislature's investigation into the management of state institutions and the departments of state government is a legitimate function of a legislative body. The Legislature's investigative power is not absolute and there are limitations. The presumption of constitutionality of legislative actions applies to legislative investigations. However, the power to investigate must be exercised for a proper legislative purpose related to enacting law. The Legislature's investigative power must protect the rights of citizens and adhere to all constitutional protections.

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