

**LEGISLATIVE QUESTIONS
TO BETH McLAUGHLIN**

1. Please state your name
2. How long have you served as the Court Administrator?
3. This committee considers the Court Administrator a “public officer” as defined by M.C.A. § 2-6-1002(12). Do you agree?
4. As court administrator, you are aware that the judges and justices are bound by the Code of Judicial Conduct, correct?
5. The Code requires that judges ensure that other people don’t undertake on their behalves, what they cannot do themselves. So as court administrator, you can’t do something on behalf of the judges that they couldn’t do themselves, right?
6. Are you prepared to produce all your state-owned laptops, computers, and hard-drives requested in the Legislature’s Subpoena? (if “no,” “This committee will take that into consideration in preparation of its report.”)

A. Public Records Processes/Requests/Retention/Right to Know

The law requires the Judicial branch to have a records retention policy.

7. Does the Judicial Branch maintain a records management plan under M.C.A. § 2-6-1012(1)(e).
8. Who is responsible for creating that plan and keeping it current?
9. I have a copy of the plan here. It is dated _____. Is this the current plan?
10. Does this Judicial Branch Email policy apply to all Judicial Branch employees?
11. Are Judicial Branch employees ever trained on public records retention laws and policies?

- a. If yes, please describe the training received.
 - b. Can you provide any records of completion of training for the judges and justices to this committee?
12. Does the Judicial Branch email policy state that all messages created, sent or retrieved, over the state's system are the property of the State of Montana?
13. Does the Judicial Branch email policy state that employees should not have the expectation of privacy for any messages and that any message sent is subject to public scrutiny?
14. On March 22, 2021, you received a request from the Senate State Administration Committee to provide the Judicial Branch public document retention schedule. You stated in response that "[a]s to e-mails, we follow the SITSD (State IT) retention schedule." State IT records retention schedules require retention of routine email correspondence for 3 years. Are all judicial branch employee emails retained for the required 3 years?

The legislature was made aware that emails exist amongst members of the judiciary stating their opinions on legislation. Many of these bills have had opponents that have threatened the committees, the sponsors, and the legislature with lawsuits if the bills become law. It is no secret that many new laws will be challenged in court when the legislature concludes sine die. Emails produced by the Department of Administration indicate there is a large stack of emails amongst judges concerning (HB685). There is a very small stack concerning SB140 which was immediately challenged in court the day after it became law. You stated you have deleted emails you deemed "ministerial."

15. Is there an exemption in State IT policy for “ministerial-type” emails from retention.
16. Is there a Judicial Branch Email policy that defines or exempts “ministerial-type” emails from retention?
17. Did you delete emails and poll data concerning SB140?
18. Did you delete emails and poll data concerning any other bill?
19. Did you delete emails because the content of some them would make you and the judges look bad?
20. You have attributed deleting emails to “sloppiness.” Even if you were just “sloppy,” the emails may exist on your state computer or hard drive. Explain why you have refused to produce your hard drive or state computer for recovery of deleted emails.
21. Do you believe the public has the right to know the content of judicial emails that have nothing to do with individual cases before the courts? If you do not believe that, please show us the law or policy exempting the judicial branch from public records retention.

Rule 1.1 of the Code states “A judge shall comply with the law.”

22. Are you aware of whether any judge or justice for whom you are administrator, has similarly deleted emails from their state computers? If so, please identify the members.

B. Polls

Rule 2.2 of the Code of Judicial Conduct states that “A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.”

23. How long has the judiciary been conducting polls of judges on legislation?

24. Prior to and during the legislative session, do supreme court justices conference on legislation that may be important to the judiciary?
25. What role do Supreme Court Justices have in determining which legislation will be polled to the judges?
26. Have Supreme Court Justices discussed pending legislation with you, either in writing or verbally?
 - a. If yes, please describe all instances in which Supreme Court Justices have discussed pending legislation with you, identifying the Justice(s), the legislation, and the approximate date(s) on which these discussions occurred.
 - b. If yes, did the justice or justices state or imply their opinion on the constitutionality or other legal status of the bill?
27. Have Supreme Court Justices requested that you facilitate polls of judges regarding any issue or topic?
 - a. If yes, please describe all instances in which Supreme Court Justices have requested that you facilitate polls of judges regarding any issue or topic, identifying the Justice(s), the issue or topic, and the approximate date(s) on which these requests were made.
28. Have Supreme Court Justices ever participated in polls you facilitated regarding legislation?
29. Have you facilitated polls of Montana Justices and Judges at the request of the Montana Judges Association while on state work time using state email and equipment?
30. Please describe how the results of Montana Justices and Judges polls are used.

31. Have you facilitated any polls of Montana Justices or Judges using personal email addresses for Justices and Judges?

C. Judicial Bias and Conflict of Interest

The Chief Justice said in his recent letter that you polled the judges on several pieces of pending legislation. Several emails in the public domain show that judges frequently shared their strong opinions about proposed legislation by replying all to the poll emails. Those opinions included the following quotes:

“Wow, likely unconstitutional in its inception.”

“The [Judicial Nominating process] is the hallmark of a Constitution for the people. . . I do not support this bill.”

“I oppose this bill. Apart from being a constitutional violation . . . as others have noted, [it] would make the judicial selection process overtly political.”

“I am adamantly oppose[d].”

“You need to contact your representative to . . . kill this bill.”

32. Do you think it is reasonable for a member of the public to question whether the judges are biased after reading the judges own words?

Rule 2.3 of the Code adds that “a judge shall perform the duties...including administrative duties, without bias or prejudice.” This includes use of “demeaning nicknames and negative stereotyping.” You sent an article to Justice McGrath and Justice Shea with the subject line “Thought you might enjoy this.” The article compared “anti-vaxxers” to legislators.

33. Do you think litigants in a vaccination case would believe they could get an unbiased hearing in front of the judge who said that?

34. Why did you think Justices McGrath and Shea would enjoy that article? Had they already discussed with you their thoughts on anti-vaxxers?

Rule 2.11 of the Code states that “A judge shall not make any public statement that might reasonably be expected to ... impair the fairness of a matter pending... or make in non-public statement that might substantially interfere with a fair trial or hearing.”

35. The judges emails are statements and are being hidden from public view. By refusing to disclose possibly embarrassing emails, aren't you preventing the public from determining for themselves any bias a judge may have about their cases?

36. Don't the rules require judges to disqualify themselves if they have made impartial statements “that appear to commit the judge to reach a particular result?” Rule 2.12.

37. Instead of disqualifying themselves, the Court is issuing Orders protecting its own emails. Doesn't this violate the rules? Shouldn't there be disciplinary proceedings to address this?

D. Judiciary's repeated pattern of failure to respect the public right to know and access government.

The Supreme Court's Public Access to Documents rules have been suspended since October of 2011. The Order suspending those rules states that the rules were suspended to allow time for the creation of a computer system and policies for facilitating public records requests.

38. Have you, as the Court Administrator, or the Court itself, taken any steps to address this 10-year-old delay in access to public court documents?

Justice Nelson's dissent to the Order delaying the rules points out that Article II, Section 9 of the constitution requires that these Rules start from the premise of open public access to court records, which are then walked back where individual privacy merits protection. And these rules address public access to actual court documents in real cases.

39. If the Court must start from the premise of open access in actual cases, how can you and the Court today argue that there are special confidentiality rules for judges' emails?
40. Is there an inherent attitude in the judiciary that it can operate in secret and above the laws concerning open records?

State-owned equipment and State time

41. Did you facilitate a poll of Montana judges regarding Senate Bill 140 in coordination with the Montana Judges Association using your state email?
42. Did you send the poll regarding Senate Bill 140 to all Montana District Court judges and all Montana Supreme Court justices?
43. Who is the President of the Montana Judges Association? Are there other officers of MJA? Who are they? Who are the lobbyists for MJA?
44. Did you delete emails related to the poll regarding Senate Bill 140.
- a. If yes, please produce all documents (including emails) within your possession, custody, or control related to the poll regarding Senate Bill 140.

- b. Please identify all Montana Judges or Justices who responded to your poll regarding Senate Bill 140, either in writing or verbally.
 - c. If yes, please identify the date on which you deleted the emails.
 - d. If yes, please describe your reason(s) for deleting the emails.
45. Did you facilitate a poll of Montana judges regarding HB 685, which was proposed legislation concerning the Judicial Standards Commission.
46. How many polls of judges have you done for the 2021 session regarding legislation?
Which bills? How many of them were in coordination with the MJA?
47. The Judicial Branch Email policy states that it is a misuse of state email to use your email for “non-profit” or public, professional or service organization activities that aren’t related to an employee’s job duties?
48. Please explain how conducting polls of Montana Justices and Judges on bills that do not relate to the administration of justice versus the method the legislature chooses for selecting or electing judges is related to your job duties as the Court Administrator.
49. Please identify the Supreme Court Justice(s) who assigned you, as a job duty, the responsibility to facilitate polls of Montana Justices and Judges.
50. Is it appropriate for you to use state time and state resources to poll judges on behalf of the MJA or in coordination with the MJA? If so, does that apply in all circumstances?
51. Whether on public or personal email, the Rules simply don’t allow judges to make statements of impartiality anywhere, do they? This is what is meant in **Rule 2.11 of the Code states that “A judge shall not make any public statement that might reasonably be expected to ... impair the fairness of a matter pending... or make in non-public statement that might substantially interfere with a fair trial or hearing.”**