

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL



DANA NESSEL
ATTORNEY GENERAL

P.O. Box 30736
LANSING, MICHIGAN 48909

November 16, 2020

Senator Ed McBroom, Chair, Senate Oversight Committee
Representative Matt Hall, Chair, House Oversight Committee
State Capitol
P.O. Box 30036 (S)
P.O. Box 30014 (H)
Lansing, MI 48909

Dear Chairman McBroom, Chairman Hall, and Members of the House and Senate Oversight Committees:

The Bureau of Elections (“Bureau”) is in receipt of the Senate and House Oversight Committees’ November 7, 2020 Subpoena to Produce Documents, addressed to the Bureau (“the Subpoena”). The document request focuses on events leading up to the November 3, 2020 General Election. In the spirit of transparency and cooperation, the Bureau is prepared to produce documents responsive to the Subpoena.

Less than two weeks ago, Bureau staff and more than 1,600 local election officials across the state administered the largest election in our state’s history in which more than 5.5 million Michiganders cast their vote. Though unofficial results have been reported, the election work of the Bureau and local officials is not done. Each of Michigan’s 83 county boards of canvassers must canvass and certify their election results so that the Board of State Canvassers can meet to canvass and certify statewide results. Because Bureau staff is helping with this time-sensitive work, the Bureau will produce documents on a rolling basis given the need to prioritize its work regarding the November election.

The Bureau is also reviewing responsive material for information covered by privilege, which is a time-intensive process. By producing documents responsive to the Subpoena, the Bureau does not waive any privilege and preserves all defenses and objections as more fully set forth below.

A. Legislative Purpose

As you know, a legislative subpoena is only valid to the extent it serves a *legislative purpose* of the committee that issues the subpoena.¹ Here, neither the Subpoena nor the November 6, 2020 letter to Director of Elections Jonathan Brater sent in advance of the Subpoena describe the legislative purpose for the requests.

The Bureau is aware that leadership in the legislature and this committee has stated that the purpose of this inquiry is not to change the results of the November election or overturn the will of the voters. Nevertheless, the Bureau is also aware that the Chairman of the House Oversight Committee has indicated that a purpose of the current investigation is to assure that “legal votes were counted only.”² Further, in the joint letter addressed to Director Brater on November 6, the Senate Majority Leader and Speaker of the House framed the inquiry as responding to “numerous allegations regarding the integrity of the November 3 election.”

Michigan has a system of checks-and-balances in place to help ensure that election results are complete and accurate. Further, there are processes in place so that a person or candidate who believes that he or she has been aggrieved in an election can adjudicate those disputes by, for example, seeking a recount under state law or legal redress in our state and federal courts.³ In addition, the state and the

¹ See MCL 4.541 (“Such records and files shall be subpoenaed, examined or used only in connection with the jurisdiction and purposes for which the committee was created.”) Legislative investigations “must be in aid of a legislative purpose and the information sought must be pertinent to the inquiry made.” See OAG, 1975-1976, No 4998, p 421 (April 22, 1976).) Investigations aid a legislative purpose if the investigation seeks to “determine what action or inaction had been effected by [] departments and agencies,” which may spur a change in the laws or alter the organization or operations of the relevant departments and agencies. *Id.* Moreover, the scope of the subpoena power is subject to additional limitations. A legislative investigation may “pursue its legitimate course,” but “the legislative power to compel disclosure of information by the executive branch may not be used for ‘irrelevant purposes’ [and] must respect the ‘traditional independence’ of another ‘constitutionally established’” branch. See OAG, 1981-1982, No 5994, (September 30, 1981), quoting OAG, 1967-1968, No 4606, p 109 (September 20, 1967). “[T]he investigatory process may not be used for such irrelevant purposes as the airing of personal disputes or individual grievances.” OAG, 1967-1968, No 4606, p 109 (September 20, 1967).

² See Kendall Keys, AnnMarie Kent, Michigan lawmakers vote to subpoena election officials, WNEM.Com (Nov. 7, 2020), https://www.wnem.com/news/michigan-lawmakers-vote-to-subpoena-election-officials/article_29a4630a-2143-11eb-9181-3376e9490a66.html.

³ There are, in fact, several lawsuits already pending that involve allegations of errors or irregularities in the November election. Several of the judges in these cases have already rejected such claims.

counties conduct post-election audits after the statewide election results are certified.⁴

Attempting to challenge or invalidate the results of an election cannot be considered a proper legislative purpose of any committee of the House or Senate. The legislature plays no role in the actual administration of an election or the recount and challenge procedures that may apply. The Bureau thus objects to the Subpoena to the extent it seeks information for that improper purpose.⁵

The Bureau is hopeful, however, that the committees and their members share the view of the legislative leadership and understand that review and approval of the November election results is properly committed to the county and state canvass processes at this time.

B. Vagueness, Overbreadth & Burden

The Bureau further objects to the Subpoena on the grounds that it is overbroad, vague, and unduly burdensome.⁶ The Subpoena requests “all documents and communications” relating to (1) “the mass mailing beginning on or about May 19, 2020 . . . of absent voter ballot applications”; (2) “the mailing beginning on or about August 20, 2020 and continuing through September 2020 . . . of approximately 4.4 million postcards ‘informing voters of their right to vote from home in the November presidential election and encouraging them to do so by applying online or at their location election clerk’s office[]’”; and (3) “the mailing beginning on or about September 9, 2020 . . . of approximately 700,000 letters to individuals who purportedly had a Michigan driver’s license or state ID and were eligible but not registered to vote in Michigan.”

The scope of the Oversight Committees’ subpoena authority does not entitle it to request a broad and sweeping array of materials with the hope that the committees

⁴ See Const 1963, art 2, § 4(1)(h), MCL 168.31a.

⁵ That said, if any member of the legislature has credible information of wrongdoing related to the election, it should promptly be forwarded to law enforcement since state law expressly commits the power to investigate and prosecute such claims to police and prosecutors. See MCL 168.940, MCL 168.941.

⁶ See *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 545–46 (1963) (“It is no less obvious, however, that the legislative power to investigate, broad as it may be, is not without limit. The fact that the general scope of the inquiry is authorized and permissible does not compel the conclusion that the investigatory body is free to inquire into or demand all forms of information. Validation of the broad subject matter under investigation does not necessarily carry with it automatic and wholesale validation of all individual questions, subpoenas, and documentary demands.”).

may find information of interest. Rather, the requests should be narrowly tailored to obtain specific information consistent with a proper legislative purpose. That purpose, of course, remains somewhat unclear with respect to the Subpoena. This is particularly true where significant information has already been provided to the legislature as to these mailings through oral testimony⁷ and the voluntary production of documents.⁸

In addition, though a legislative subpoena may not technically be subject to Michigan Court Rules, those rules provide guidance as to the reasonableness of any such request. MCR 2.305(A)(3) provides that a subpoena to a non-party shall provide *a minimum* of 14 days after service for the requested act, or a shorter time if the court so directs. For requests for production of documents served on a party to a proceeding, the rules generally provide that the party must serve a written response within 28 days after service of the request. MCR 2.310(C)(2).

The committees' demand that the requested documents be provided in only 9 days (6 business days) is unduly burdensome, especially considering the important duties the Bureau is currently performing to ensure that Michigan's election results are timely and properly certified under state law. Further, because the committees' inquiry is presumably for the appropriate purpose of considering future election-related legislation, the committees' expedited timeframe for production appears unwarranted. The burden of the document request is further compounded in that the committees have failed to identify any terms or custodians to be searched as is typical when parties seek the production of electronically stored information.

C. Conclusion

Without waiving any of the legal objections described above, the Bureau is producing 1,098 pages of documents today, which are bates numbered, and will

⁷ On June 9, 2020, at the request of the Senate Elections Committee, of which Senator McBroom is a member, Secretary of State Benson made a presentation updating the committee on elections processes, including the mailing of absentee applications. On July 29, 2020, again at the request of the Senate Elections Committee, Secretary Benson answered questions from members for ninety minutes on these and other topics. And on October 20, 2020, Director Brater answered questions on these and other topics for ninety minutes in a joint Senate Oversight and Election Committees hearing.

⁸ On October 19, 2020, at Senator McBroom's request, the Department of State provided a detailed memorandum along with requested documents detailing the criteria used in assembling the mailing lists as well as the actual mailing lists used in each of the three mailers. On October 30, 2020, the Department of State responded to interrogatories received from Senator McBroom about these very same mailers.

Senator Ed McBroom & Representative Matt Hall

Page 5

November 16, 2020

promptly produce the remaining non-privileged, responsive documents on a rolling basis until production is complete.

Please feel free to contact me if you any questions or concerns related to the matters discussed above. The Bureau thanks you in advance for your patience and cooperation as it works to produce the requested documents.

Sincerely,



Heather S. Meingast
Division Chief
Civil Litigation, Employment &
Elections Division
517.335.7659

HSM/lsa