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POLITICAL ACTIVITY FOR PUBLIC OFFICIALS

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PUBLIC INFORMATION

In Montana, the public has a constitutional right to examine public documents and to have the reasonable opportunity to observe and participate in the operation of government prior to a final decision. (Article II, Sections 8 and 9, Montana Constitution.) These rights extend to persons from out of state and media entities. (*Krakauer v. State*, 2016 MT 230, ¶16; *Jefferson County v. Montana Standard*, 2003 MT 304, ¶13.) Public disclosure is not required where the demand for individual privacy clearly exceeds the public's constitutional right to know, unless the right is waived by the individual. (Art. II, Sec. 9. Mont. Const.; Section 2-6-1002(11).)

The public's constitutional right to know is codified in the Montana statutes. The general rule is that *every person has a right to examine and obtain a copy of any public information in this state.* (Sections 2-6-1003(1), MCA.) "Public information" is information prepared, owned, used, or retained by any public agency relating to the transaction of official business, regardless of form, except for confidential information. (Section 2-6-1002(11), MCA.) "Public agency" includes any local government, including any city, town, county, consolidated city-county, special district, or school district or a subdivision of one of these entities. (*Id.*, (7).)

Upon receiving a request for public information, the public agency must respond in a timely manner by: (1) making the information available for inspection and copying; (2) if the information cannot be readily identified and gathered, providing an estimate of time necessary to fulfill the request and any fees that may be charged; or (3) providing a written explanation for denial of the request. (Sections 2-6-1006(2) and 2-6-1009(1), MCA.) If the request is denied or not fulfilled, the requestor can file a complaint in district court and may be awarded costs and reasonable attorney fees (Sections 2-6-1009(2) and (3), MCA).

OPEN MEETINGS

Likewise, the public's constitutional right to know is codified in the Montana statutes. "Meeting" is defined as a convening of a quorum of the constituent membership of a public agency ... to hear, discuss, or act upon a matter over which the agency has supervision, control, jurisdiction, or advisory power." (Section 2-3-202, MCA.) A meeting can take place in person, by telephone conference or videoconference, or by email – any place a quorum is convened to hear, discuss, or act upon a matter. (*Ibid.*)

The general rule is that all meetings of public or governmental bodies must be open to the public. (Sections 2-3-203(1) and 7-1-4141, MCA.) While a quorum of a public body may create a meeting through convening by email discussion, it can be difficult if not impossible to hold such an electronic meeting open to the public. A meeting may be closed by the presiding officer for a discussion relating to a matter of individual privacy, but only when the demands of that privacy clearly exceed the merits of public disclosure and only if the individual about whom the discussion pertains does not waive their right to privacy. (*Id.*, subsection (3).) Agencies may close a meeting to discuss litigation strategy, unless all parties are public bodies. (*Id.*, subsection (4).)

If a public body will hear, discuss, or act upon a matter of significant public interest – any non-ministerial decision or action that has meaning to or affects a portion of the community – notice must be given sufficiently in advance to permit the public to attend and participate. (Sections 2-3-103(1)(a), 7-1-4142, and 7-1-4143, MCA; 47 Mont. AG Op. No. 13 (1998).) As a rule of thumb, 48 hours is generally considered sufficient, but the notice required may vary depending on the significance of the decision to be made. (47 Mont. Op. No. 13.)

A person may file suit in district court for violation of these laws and be awarded costs and reasonable attorney fees. (Section 2-3-114(2), MCA.) A public official or employee who knowingly conducts a meeting of a public agency in violation of the open meeting laws is guilty of a misdemeanor. (Section 45-7-401(1)(e), MCA.) The court may also invalidate any decision made at a meeting conducted in violation of the public’s right to know and participate. (*Id.*, subsection (1).)

RULES OF CONDUCT – POLITICAL ACTIVITY

Under state law, a public employee may not solicit support for or opposition to any political committee, the nomination or election of any person to public office, or the passage of a ballot issue while on the job or at the place of employment. (Section 13-35-226(4), MCA.) Further, an elected public officer¹ or public employee² may not use or permit the use of public time, facilities, equipment, supplies, personnel, or funds to solicit support for or opposition to any political committee, candidate, or the passage of a ballot issue unless the use is: (i) authorized by law; or (ii) properly incidental to another activity required or authorized by law, such as the function of an elected public officer or the officer’s staff in the normal course of duties. (Section 2-2-121(3), MCA.)

With respect to ballot issues, “properly incidental activities” are restricted to the activities of a public officer or the officer’s staff related to determining the impact of passage or failure of a ballot issue on state or local government operations. (*Id.*, at (3)(b).) This is a broad and encompassing restriction on the ability of local public employees and elected officials to solicit opposition to or support of a candidate or ballot issue using any public equipment, supplies, or funds. Under the statute, a public employee may not conduct any activities in support or opposition of a candidate or ballot issue during those hours for which the employee receives compensation from his or her public employer (*Molnar v Fox*, 2013 MT 132, ¶138); using public email or computers (*Molnar*, at ¶145); or using the employee’s work address, email, letterhead, or any other public supplies. (*Molnar*, at ¶144.)

The rules are essentially the same for elected officials. However, the Montana Supreme Court recognizes that elected officials, as opposed to public employees, do not necessarily have restricted hours within which they are considered on public time. Accordingly, the Court has held that “...as long as public facilities, equipment, supplies, or funds are not involved, elected officials are not restricted in the exercise of political speech by the provisions of Montana law.” (*Molnar*, at ¶139.) The Montana Attorney General has held that a public employee or official may use their title in expressing their personal political beliefs “so long as public resources were not used.” (51 Mont. AG Op No. 1 (2005).)

Both the statutes and the decisions contain express language that these laws do not restrict the right of a public employee or official to express personal political views. (Sections 2-2-121(3)(c) and 13-35-226(4); 51

¹ A public officer is defined as any elected officer of a local government. This includes county commissioners, clerk and recorders, treasurers, sheriffs, county attorneys, and any other elected officials. (Section 2-2-102(9)(a), MCA.)

² A public employee is defined as any temporary or permanent employee of a local government. (*Id.*, at (7)(b).)

Mont. AG Op. No. 1 at 3.) In short, “a public officer or public employee may engage in political speech so long as his or her speech does not involve the use of public time, facilities, equipment, supplies, personnel, or funds.” (51 MT A.G. Op. No. 1, at 3.) The Attorney General also opined that “[a] title or a uniform is simply an accouterment of a public employee’s or officer’s position,” holding that a sheriff would not be required to shed his uniform in order to exercise his personal political beliefs. (*Id.*; see also Commissioner of Political Practices Advisory Opinion COPP-2014-AO-007 (2014) regarding sheriff’s uniforms.) The statute also does not prohibit lobbying for or against the introduction or enactment of legislation or policy by legislators or other public agencies or officials.

If a local government has established an ethics panel, a complaint must be filed with the panel before making a complaint to the county attorney. (Section 2-2-144(5), MCA.) If there is no panel, any person may file a complaint directly with the county attorney, who must decline to bring an action before the person may file a civil action in court. (*Id.*, subsection (3).) A violation may result in a fine of not less than \$50 or more than \$1,000. (*Ibid.*)