

HOUSE BILL NO. 163
INTRODUCED BY R. KOOPMAN

A BILL FOR AN ACT ENTITLED: "AN ACT CREATING THE "FAIR INFLUENCE ON GOVERNMENT ACT"; ESTABLISHING AS A MATTER OF LEGISLATIVE POLICY THAT PUBLIC FUNDS MAY NOT, IN GENERAL, BE EXPENDED FOR LOBBYING; PROHIBITING CERTAIN PUBLIC EMPLOYEES FROM LOBBYING; ESTABLISHING THE PROCEDURE FOR AND PURPOSE OF INFORMATIONAL TESTIMONY BY PUBLIC EMPLOYEES; ESTABLISHING PENALTIES FOR VIOLATING THE LEGISLATIVE POLICY THAT GENERALLY PROHIBITS THE USE OF PUBLIC FUNDS FOR LOBBYING AND THAT GENERALLY PROHIBITS CERTAIN PUBLIC EMPLOYEES FROM LOBBYING; AND AMENDING SECTIONS 2-2-105, 2-2-121, 2-2-136, 2-2-144, 5-7-102, 5-7-305, AND 20-25-109, MCA."

WHEREAS, the legitimate role of public employees in providing useful information and testimony is fully acknowledged, but the lobbying and advocacy role of public servants is a source of growing concern in our democratic society; and

WHEREAS, common citizens who lack the easy access to legislative proceedings enjoyed by onsite public employees feel increasingly crowded out of the process; and

WHEREAS, government should be primarily influenced by the citizens it serves rather than the other branches of government; and

WHEREAS, the Legislature wishes to encourage greater citizen involvement, influence, and trust in the lawmaking process.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. **Section 1. Short title -- policy.** (1) This section may be cited as the "Fair Influence on Government Act".

(2) (a) It is the policy of the legislature that public funds may be spent only for the specific purpose for which the funds were appropriated.

(b) The expenditure of public funds to influence pending legislation, a legislator, or the legislature by lobbying is never the purpose of an appropriation unless specifically stated in the legislation appropriating the funds.

(c) The expenditure of public resources, including goods and employee time, beyond or outside the purposes specified in the appropriation violates the public trust and legislative policy.

(3) Nothing in this section:

(a) limits, precludes, or deprives an individual, including an employee, from exercising the individual's constitutional right to communicate with public officials; or

(b) subjects an individual, including an employee, who is acting on the individual's own time and own behalf or on behalf of a principal that is not the state or a subdivision of the state to the restrictions of subsection (2).

(4) The senate or the house of representatives may adopt rules to implement the provisions of this section.

(5) For the purposes of this section, "employee" means an individual employed by the state or a subdivision of the state, including an individual employed by the state or a subdivision of the state who is a lobbyist registered under 5-7-103, except:

(a) an elected official;

(b) an employee of the legislature who is serving in the employee's official capacity;

(c) an individual who is employed by the state or a subdivision of the state:

(i) who is attempting to influence legislation, a legislator, or the legislature by lobbying while not being paid by the state or a subdivision of the state but who is, instead, acting on the individual's own time and own behalf or on behalf of a principal that is not the state or a subdivision of the state and does not claim to be an employee of the state or a subdivision of the state; or

(ii) who has been requested, in writing, by a legislator to appear and provide information on a specific bill. An individual appearing under this subsection (5)(c)(ii) may provide only objective, unbiased information specified in the request and may not support or oppose any matter before the legislature.

Section 2. Section 2-2-105, MCA, is amended to read:

"2-2-105. Ethical requirements for public officers and public employees. (1) The requirements in this section are intended as rules of conduct, and violations constitute a breach of the public trust and public duty of office or employment in state or local government.

(2) Except as provided in subsection (4), a public officer or public employee may not acquire an interest in any business or undertaking that the officer or employee has reason to believe may be directly and substantially affected to its economic benefit by official action to be taken by the officer's or employee's agency.

(3) A public officer or public employee may not, within 12 months following the voluntary termination of office or employment, obtain employment in which the officer or employee will take direct advantage, unavailable to others, of matters with which the officer or employee was directly involved during a term of office or during employment. These matters are rules, other than rules of general application, that the officer or employee actively helped to formulate and applications, claims, or contested cases in the consideration of which the officer or employee was an active participant.

(4) When a public employee who is a member of a quasi-judicial board or commission or of a board, commission, or committee with rulemaking authority is required to take official action on a matter as to which the public employee has a conflict created by a personal or private interest that would directly give rise to an appearance of impropriety as to the public employee's influence, benefit, or detriment in regard to the matter, the public employee shall disclose the interest creating the conflict prior to participating in the official action.

(5) A public officer or public employee may not perform an official act directly and substantially affecting a business or other undertaking to its economic detriment when the officer or employee has a substantial personal interest in a competing firm or undertaking.

(6) (a) An employee, as defined in [section 1], may not appear or testify before a committee of the legislature or provide information to a member of the Montana senate or house of representatives or to a committee of the legislature except as provided in [section 1].

(b) An employee who violates the provisions of subsection (6)(a) is subject to the penalties provided in 2-2-136."

Section 3. Section 2-2-121, MCA, is amended to read:

"2-2-121. Rules of conduct for public officers and public employees. (1) Proof of commission of any act enumerated in subsection (2) is proof that the actor has breached a public duty.

(2) A public officer or a public employee may not:

(a) subject to subsection (7), use public time, facilities, equipment, supplies, personnel, or funds for the officer's or employee's private business purposes;

(b) engage in a substantial financial transaction for the officer's or employee's private business purposes with a person whom the officer or employee inspects or supervises in the course of official duties;

(c) assist any person for a fee or other compensation in obtaining a contract, claim, license, or other economic benefit from the officer's or employee's agency;

(d) assist any person for a contingent fee in obtaining a contract, claim, license, or other economic

benefit from any agency;

(e) perform an official act directly and substantially affecting to its economic benefit a business or other undertaking in which the officer or employee either has a substantial financial interest or is engaged as counsel, consultant, representative, or agent; or

(f) solicit or accept employment, or engage in negotiations or meetings to consider employment, with a person whom the officer or employee regulates in the course of official duties without first giving written notification to the officer's or employee's supervisor and department director.

(3) (a) Except as provided in subsection (3)(b), a public officer or public employee may not use public time, facilities, equipment, supplies, personnel, or funds to 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 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, the officer's staff, or the legislative staff in the normal course of duties.

(b) As used in this subsection (3), "properly incidental to another activity required or authorized by law" does not include any activities related to solicitation of support for or opposition to the nomination or election of a person to public office or political committees organized to support or oppose a candidate or candidates for public office. With respect to ballot issues, properly incidental activities are restricted to:

(i) the activities of a public officer, the public officer's staff, or legislative staff related to determining the impact of passage or failure of a ballot issue on state or local government operations;

(ii) in the case of a school district, as defined in Title 20, chapter 6, compliance with the requirements of law governing public meetings of the local board of trustees, including the resulting dissemination of information by a board of trustees or a school superintendent or a designated employee in a district with no superintendent in support of or opposition to a bond issue or levy submitted to the electors. Public funds may not be expended for any form of commercial advertising in support of or opposition to a bond issue or levy submitted to the electors.

(c) This subsection (3) is not intended to restrict the right of a public officer or public employee to express personal political views.

(4) A candidate, as defined in 13-1-101(6)(a), may not use or permit the use of state funds for any advertisement or public service announcement in a newspaper, on radio, or on television that contains the candidate's name, picture, or voice except in the case of a state or national emergency and then only if the

announcement is reasonably necessary to the candidate's official functions.

(5) A public officer or, except as provided in [section 1], a public employee may not participate in a proceeding when an organization, other than an organization or association of local government officials, of which the public officer or public employee is an officer or director is:

(a) involved in a proceeding before the employing agency that is within the scope of the public officer's or public employee's job duties; or

(b) attempting to influence a local, state, or federal proceeding in which the public officer or public employee represents the state or local government.

(6) A public officer or public employee may not engage in any activity, including lobbying, as defined in 5-7-102, on behalf of an organization, other than an organization or association of local government officials, of which the public officer or public employee is a member while performing the public officer's or public employee's job duties. The provisions of this subsection do not prohibit a public officer or public employee from performing charitable fundraising activities if approved by the public officer's or public employee's supervisor or authorized by law.

(7) A listing by a public officer or a public employee in the electronic directory provided for in 30-17-101 of any product created outside of work in a public agency is not in violation of subsection (2)(a) of this section. The public officer or public employee may not make arrangements for the listing in the electronic directory during work hours.

(8) A department head or a member of a quasi-judicial or rulemaking board may perform an official act notwithstanding the provisions of subsection (2)(e) if participation is necessary to the administration of a statute and if the person complies with the disclosure procedures under 2-2-131.

(9) Subsection (2)(d) does not apply to a member of a board, commission, council, or committee unless the member is also a full-time public employee.

(10) Subsections (2)(b) and (2)(e) do not prevent a member of the governing body of a local government from performing an official act when the member's participation is necessary to obtain a quorum or to otherwise enable the body to act. The member shall disclose the interest creating the appearance of impropriety prior to performing the official act."

Section 4. Section 2-2-136, MCA, is amended to read:

"2-2-136. Enforcement for state officers, legislators, and state employees -- referral of complaint involving county attorney. (1) (a) A person alleging a violation of this part by a state officer, legislator, or state

employee may file a complaint with the commissioner of political practices. The commissioner does not have jurisdiction for a complaint concerning a legislator if a legislative act is involved in the complaint. The commissioner also has jurisdiction over complaints against a county attorney that are referred by a local government review panel pursuant to 2-2-144 or filed by a person directly with the commissioner pursuant to 2-2-144(6). The commissioner may request additional information from the complainant or the person who is the subject of the complaint to make an initial determination of whether the complaint states a potential violation of this part.

(b) The commissioner may dismiss a complaint that is frivolous, does not state a potential violation of this part, or does not contain sufficient allegations to enable the commissioner to determine whether the complaint states a potential violation of this part. If the issues presented in a complaint have been addressed and decided in a prior decision and the commissioner determines that no additional factual development is necessary, the commissioner may issue a summary decision without holding an informal contested case hearing on the complaint.

(c) Except as provided in subsection (1)(b), if the commissioner determines that the complaint states a potential violation of this part, the commissioner shall hold an informal contested case hearing on the complaint as provided in Title 2, chapter 4, part 6. The commissioner shall issue a decision based upon the record established before the commissioner.

(2) If the commissioner determines that a violation of this part has occurred, the commissioner may impose an administrative penalty of not less than \$50 or more than \$1,000, and if the violation was committed by a state employee, the commissioner may also recommend that the employing state agency discipline the employee. The employing entity of a state employee may take disciplinary action against an employee for a violation of this part, regardless of whether the commissioner makes a recommendation for discipline. The commissioner may assess the costs of the proceeding against the person bringing the charges if the commissioner determines that a violation did not occur or against the officer or employee if the commissioner determines that a violation did occur.

(3) A party may seek judicial review of the commissioner's decision, as provided in chapter 4, part 7, of this title, after a hearing, a dismissal, or a summary decision issued pursuant to subsection (1)(b).

(4) Except for records made public in the course of a hearing held under subsection (1) and records that are open for public inspection pursuant to Montana law, a complaint and records obtained or prepared by the commissioner in connection with an investigation or complaint are confidential documents and are not open for public inspection. The complainant and the person who is the subject of the complaint shall maintain the

confidentiality of the complaint and any related documents released to the parties by the commissioner until the commissioner issues a decision. However, the person who is the subject of a complaint may waive, in writing, the right of confidentiality provided in this subsection. If a waiver is filed with the commissioner, the complaint and any related documents must be open for public inspection. The commissioner's decision issued after a hearing is a public record open to inspection.

(5) When a complaint is filed, the commissioner:

(a) may issue statements or respond to inquiries to confirm that a complaint has been filed, to identify against whom it has been filed, and to describe the procedural aspects and status of the case; and

(b) shall, if the complaint alleges a violation of [section 1] or 2-2-105(6)(a), notify the appropriate county attorney of the allegation.

(6) The commissioner may adopt rules to carry out the responsibilities and duties assigned by this part."

Section 5. Section 2-2-144, MCA, is amended to read:

"2-2-144. Enforcement for local government. (1) Except as provided in subsections (5) and (6), a person alleging a violation of this part by a local government officer or local government employee, including a local government employee who is also an employee as defined in [section 1], shall notify the county attorney of the county where the local government is located. The county attorney shall request from the complainant or the person who is the subject of the complaint any information necessary to make a determination concerning the validity of the complaint.

(2) (a) If the county attorney determines that the complaint is justified, the county attorney may bring an action in district court seeking a civil fine of not less than \$50 or more than \$1,000. If the county attorney determines that the complaint alleges a criminal violation, the county attorney shall bring criminal charges against the officer or employee.

(b) If the complaint alleges a violation of [section 1] and the defendant is found to have violated [section 1], the penalty imposed by this section is in addition to the penalty provided for in 2-2-136 for violating the public trust.

(3) If the county attorney declines to bring an action under this section, the person alleging a violation of this part may file a civil action in district court seeking a civil fine of not less than \$50 or more than \$1,000. In an action filed under this subsection, the court may assess the costs and attorney fees against the person bringing the charges if the court determines that a violation did not occur or against the officer or employee if the court determines that a violation did occur. The court may impose sanctions if the court determines that the action

was frivolous or intended for harassment.

(4) The employing entity of a local government employee may take disciplinary action against an employee for a violation of this part.

(5) (a) A local government may establish a three-member panel to review complaints alleging violations of this part by officers or employees of the local government. The local government shall establish procedures and rules for the panel. The members of the panel may not be officers or employees of the local government. The panel shall review complaints and may refer to the county attorney complaints that appear to be substantiated. If the complaint is against the county attorney, the panel shall refer the matter to the commissioner of political practices and the complaint must then be processed by the commissioner pursuant to 2-2-136.

(b) In a local government that establishes a panel under this subsection (5), a complaint must be referred to the panel prior to making a complaint to the county attorney.

(6) If a local government review panel has not been established pursuant to subsection (5), a person alleging a violation of this part by a county attorney shall file the complaint with the commissioner of political practices pursuant to 2-2-136."

Section 6. Section 5-7-102, MCA, is amended to read:

"5-7-102. Definitions. The following definitions apply in this chapter:

(1) "Appointed state official" means an individual who is appointed:

(a) to public office in state government by the governor or the chief justice of the Montana supreme court and who is subject to confirmation by the Montana senate;

(b) by the board of regents of higher education to serve either as the commissioner of higher education or as the chief executive officer of a campus of the Montana university system; or

(c) by the board of trustees of a community college to serve as president.

(2) "Business" means:

(a) a holding or interest whose fair market value is greater than \$1,000 in a corporation, partnership, sole proprietorship, firm, enterprise, franchise, association, self-employed person, holding company, joint-stock company, receivership, trust, or other entity or property held in anticipation of profit, but does not include nonprofit organizations; and

(b) present or past employment from which benefits, including retirement allowances, are received.

(3) "Commissioner" means the commissioner of political practices.

(4) "Docket" means the register of lobbyists and principals maintained by the commissioner pursuant

to 5-7-201.

(5) "Elected federal official" means a person elected to a federal office, including but not limited to a member of the United States senate or house of representatives. The term includes an individual appointed to fill the unexpired term of an elected federal official and an individual who has been elected to a federal office but who has not yet been sworn in.

(6) "Elected local official" means an elected officer of a county, a consolidated government, an incorporated city or town, a school district, or a special district. The term includes an individual appointed to fill the unexpired term of an elected local official and an individual who has been elected to a local office but who has not yet been sworn in.

(7) "Elected state official" means an individual holding a state office filled by a statewide vote of all the electors of Montana or a state district office, including but not limited to public service commissioners and district court judges but not including legislators for the purposes of this chapter. The term includes an individual appointed to fill the unexpired term of an elected state official and an individual who has been elected to a statewide office but who has not yet been sworn in.

(8) "Elected tribal official" means an elected member of a tribal council or other elected office filled by a vote of tribal members. The term includes an individual appointed to fill the unexpired term of an elected tribal official and an individual who has been elected to a tribal office but who has not yet been sworn in.

(9) "Individual" means a human being.

(10) "Legislator" means an individual holding public office as a representative or a senator in the Montana legislature. The term includes an individual who has been elected or appointed to the legislature but who has not yet been sworn in.

(11) (a) "Lobbying" means:

(i) the practice of promoting or opposing the introduction or enactment of legislation before the legislature or the members of the legislature; and

(ii) the practice of promoting or opposing official action by any public official.

(b) The term does not include actions described in subsections (11)(a)(i) and (11)(a)(ii) when performed by a legislator, a public official, an elected local official, an elected federal official, or an elected tribal official while acting in an official governmental capacity.

(12) (a) "Lobbyist" means a person who engages in the practice of lobbying.

(b) Lobbyist does not include:

(i) an individual acting solely on the individual's own behalf;

(ii) an individual working for the same principal as a licensed lobbyist if the individual does not have personal contact involving lobbying with a public official on behalf of the lobbyist's principal; or

(iii) an individual who receives payments from one or more persons that total less than the amount specified under 5-7-112 in a calendar year.

(c) Nothing in this chapter deprives an individual who is not a lobbyist of the constitutional right to communicate with public officials.

(13) (a) "Payment" means distribution, transfer, loan, advance, deposit, gift, or other rendering made or to be made of money, property, or anything of value:

(i) to a lobbyist to influence legislation or official action by an elected local official or a public official;

(ii) directly or indirectly to a lobbyist by a principal, such as salary, fee, compensation, or reimbursement for lobbying expenses; or

(iii) in support of or for assistance to a lobbyist or a lobbying activity, including but not limited to the direct payment of expenses incurred at the request or suggestion of the lobbyist.

(b) The term does not include payments or reimbursements for:

(i) personal and necessary living expenses; or

(ii) travel expenses, unless a principal is otherwise required to report expenses pursuant to 5-7-208.

(14) "Person" means an individual, corporation, association, firm, partnership, state or local government or subdivision of state or local government, or other organization or group of persons.

(15) "Principal" means a person who employs a lobbyist or a person required to report pursuant to 5-7-208.

(16) (a) "Public official" means an elected state official or an appointed state official acting in an official capacity for state government.

(b) The term does not include those acting in a judicial or quasi-judicial capacity or performing ministerial acts.

(17) "Unprofessional conduct" means:

(a) violating any of the provisions of this chapter;

(b) instigating action by a public official for the purpose of obtaining employment;

(c) attempting to influence the action of a public official on a measure pending or to be proposed by:

(i) promising financial support; or

(ii) making public any unsubstantiated charges of improper conduct on the part of a lobbyist, a principal, or a legislator; or

(d) attempting to knowingly deceive a public official with regard to the pertinent facts of an official matter or attempting to knowingly misrepresent pertinent facts of an official matter to a public official."

Section 7. Section 5-7-305, MCA, is amended to read:

"5-7-305. Penalties and enforcement. (1) (a) A person who violates any of the provisions of this chapter is subject to civil penalties of not less than \$250 and not more than \$7,500 according to the discretion of the district court, as court of original jurisdiction.

(b) A lobbyist who violates any of the provisions of this chapter must have the lobbyist's license suspended or revoked according to the discretion of the court.

(c) Any public official holding elective office adjudged in violation of the provisions of this chapter is additionally subject to recall under the Montana Recall Act, Title 2, chapter 16, part 6, and the violation constitutes an additional basis for recall to those mentioned in 2-16-603(3).

(d) In addition to the penalties provided in this section, an employee, as defined in [section 1], who violates the provisions of [section 1] is also subject to the penalties provided for in 2-2-136 for violating the public trust.

(2) The attorney general, the commissioner, or the county attorney of the county in which the violation takes place may bring a civil action in the name of the state for any appropriate civil remedy.

(3) If a civil penalty action is undertaken by the attorney general or the commissioner, all costs associated with the prosecution must be paid by the state of Montana.

(4) (a) Any individual who has notified the attorney general, the commissioner, and the appropriate county attorney in writing that there is reason to believe that some portion of this chapter is being violated may bring in the name of the state an action (referred to as a citizen's action) authorized under this chapter if:

(i) the attorney general, the commissioner, or the appropriate county attorney has failed to commence an action within 90 days after notice; and

(ii) the attorney general, the commissioner, or the county attorney fails to commence an action within 10 days after receiving a written notice that a citizen's action will be brought if the attorney general, the commissioner, or the county attorney does not bring an action.

(b) Each notification tolls the applicable statute of limitations until the expiration of the waiting period.

(c) If the individual who brings the citizen's action prevails, the individual is entitled to be reimbursed by the state of Montana for costs and attorney fees incurred. However, in the case of a citizen's action that is dismissed and that the court also finds was brought without reasonable cause, the court may order the individual

commencing the action to pay all costs of trial and reasonable attorney fees incurred by the defendant.

(5) A civil action may not be brought under this section more than 3 years after the occurrence of the facts that give rise to the action.

(6) All civil penalties imposed pursuant to this section must be deposited in the state general fund.

(7) A hearing under this chapter must be held by the court unless the defendant-licensee demands a jury trial. The trial must be held as soon as possible but at least 20 days after the filing of the charges and must take precedence over all other matters pending before the court.

(8) If the court finds for the plaintiff, judgment must be rendered revoking or suspending the license and the clerk of court shall file a certified copy of the judgment with the commissioner."

Section 8. Section 20-25-109, MCA, is amended to read:

"20-25-109. Authorized university system employee or individual activities. (1) A Montana university system employee who, as part of the employee's authorized work for the university system, conceives, creates, discovers, invents, or develops intellectual property may:

(a) if approved by the board of regents, own or be awarded equity interest or participation in the intellectual property; or

(b) if approved by the board of regents, serve as a member of the board of directors or other governing board of or as a director, officer, or employee of a business entity that:

(i) has an agreement with the university system or with any other Montana state agency or political subdivision that relates to the research, development, licensing, or exploitation of that intellectual property; or

(ii) shares an ownership interest in the intellectual property with the university system.

(2) An individual, at the request of and on behalf of the university system, may serve as a member of the board of directors or other governing board of a business entity that:

(a) has an agreement with the university system or with any other Montana state agency or political subdivision that relates to the research, development, licensing, or exploitation of the individual's intellectual property; or

(b) shares an ownership interest in the intellectual property with the university system.

(3) For purposes of this section, "intellectual property" means inventions, discoveries, and creations that may be eligible for copyright or patent. The term also includes other economic development activity of a proprietary nature, including but not limited to business practices, ideas, processes, or arrangements that may not be eligible for either patent or copyright but for which the possibility of profitable commercialization exists.

(4) An employee or individual included under the provisions of subsection (1) or (2) shall report the name of the business entity with which the employee or individual is affiliated to the commissioner of higher education and to the appropriate person within the unit of the university system at which the person is employed or on behalf of which the individual is serving.

(5) An employee, as defined in [section 1], may not engage in lobbying except as provided in [section 1].

~~(5)(6)~~ The provisions of 2-2-104, 2-2-105(1) through (5), 2-2-121, and 2-2-201 do not apply to this section."

NEW SECTION. Section 9. Codification instruction. [Section 1] is intended to be codified as an integral part of Title 5, chapter 7, part 3, and the provisions of Title 5, chapter 7, part 3, apply to [section 1].

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