



# Legislative Council

## 63rd Montana Legislature

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### COMMITTEE STAFF

SUSAN FOX, Executive Director  
TODD EVERTS, Legal Division Director  
FONG HOM, Secretary

## LEGISLATOR ELECTRONIC COMMUNICATIONS SUBCOMMITTEE MINUTES LOG

June 10, 2014  
Room 102, Capitol Building  
Helena, Montana

Please note: These minutes provide abbreviated information about committee discussion, public testimony, action taken, and other activities. To the left of each section in these minutes is a time designation indicating the approximate amount of time in hours, minutes, and seconds that has elapsed since the start of the meeting. This time designation may be used to locate the referenced discussion on the audio or video recording of this meeting.

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Hard copies of the exhibits for this meeting are available upon request. Legislative Council policy requires a charge of 15 cents a page for copies of the document.

### SUBCOMMITTEE MEMBERS PRESENT

SEN. CLIFF LARSEN  
SEN. DEBBY BARRETT

REP. MARK BLASDEL  
REP. CHUCK HUNTER

### STAFF PRESENT

TODD EVERTS, Legal Director  
FONG HOM, Committee Secretary

### AGENDA AND VISITORS' LIST

Agenda (**Attachment 1**)  
Visitors' list (**Attachment 2**)

## COMMITTEE ACTION

### CALL TO ORDER AND ROLL CALL

00:00:01 Rep. Hunter called the meeting to order at 8:05 a.m. The Secretary called roll. Everyone was present.

### UPDATE ON HJR 2 - ELECTRONIC RECORDS MANAGEMENT STUDY - Pad McCracken

00:00:48 Mr. McCracken provided an update on activities of the HJR 2, Electronic Records Management for State and Local Government work group.

#### Committee questions

00:06:38 Rep. Hunter requested a copy of the two bill drafts mention by Mr. McCracken.

00:06:48 Mr. McCracken distributed a copy of the comparisons of the bill draft language with the existing statutory language. **(Exhibit 1)**

00:06:54 Sen. Larsen asked for a review of the expected outcome of the subcommittee and what the ultimate mission of this committee with respect to the electronic media is.

00:06:57 Rep. Hunter said that this committee will have a discussion on a common email system for all legislators, get a better definition of what documents are considered in the public domain and which are private that we receive on our personal systems, and third, the topic of what do we do with texting, social media in committee meetings and on the floor.

### LEGISLATOR EMAIL PILOT PROJECT COSTS AND OPTIONS - Darrin McLean, Information Systems Manager

00:09:23 Mr. McLean provided a comparison of the three email systems that they were looking at for a common email address for legislators. **(Exhibit 2)**

#### Committee questions

00:13:34 Rep. Hunter asked if Mr. McLean had a recommendation among the three systems.

00:13:52 Mr. McLean said that he would recommend Office 365 or the state system.

00:15:08 Sen. Larsen asked how much administrative effort would it take for Office 365 versus the state email system.

00:15:36 Mr. McLean said that the administration level will go up if we go to Office 365, whereas if we went to the state email system, there's not much administrative level at all.

00:17:56 Rep. Hunter said for legislators who are contemplating a common email address

might also have a personal email address. On your private email you might have correspondence or documents that you feel are part of the public record and need to be moved over. Is there any advantage to any of these systems in terms of being able to move things between addresses.

00:18:36 Mr. McLean said that they can set up the systems to do that.

00:18:45 Mr. Everts said that in the current state of affairs, if you generate a public document there are certain obligations in retention of that document. The reason this issue has been on the agenda is to try and provide a central repository that can retain actual public records so that we fulfill our legal obligation under the constitution.

### **LEGAL ANALYSIS CHECKLIST - Todd Everts**

- **Checklist - Public Right to Know - Legal Review**

00:20:48 Mr. Everts discussed the document "Checklist - Public Right to Know - Legal Review Constitutional Considerations". **(Exhibit 3)**

#### Committee questions

00:24:50 Mr. Everts said a document is considered a public document if it was generated or received in official public business.

00:25:22 Sen. Larsen said that he remembered an instance where this matter came before the courts and the courts decided that everything that was generated by that elected person on his electronic media machine that was furnished by the state, was considered a public document. He asked if that is true of legislators as well?

00:25:49 Mr. Everts said that he noted in his legal analysis that there is an exception to that requirement for the Executive Branch and state employees with regard to using a public computer for private business purposes. That doesn't apply to the legislature and because you are a part-time legislature, you have an expectation of privacy; you have businesses outside of the legislature; and the argument would be that if it is a private matter that doesn't relate to legislative business, even though it was generated on a public computer system, that would be private.

- **Electronic Mail Public Right to Know Summary**

00:27:03 Mr. Everts discussed the document "Electronic Mail Public Right to Know Summary". **(Exhibit 4)**

#### Committee questions

00:32:18 Sen. Barrett said that when this issue first came up, it seemed to be bills specific and the request for information was how many emails did each legislator received on bill xxx in favor or opposed. That was the first conversation that she remembers. Was that the nature of the first request to Mr. Everts?

- 00:33:12 Mr. Everts said they had a request that wasn't follow through and that was regarding Medical Marijuana. It was any correspondence or emails from legislators that involved those bills, whether they were in favor or against and related to the bill itself.
- 00:33:55 Ms. Fox said she had received a request from the media asking about any ALEC related correspondence and that's why she sent that email. She said that she had a former legislator who went to the executive branch and she had an inquiry that said, "all his correspondence as a legislator". Sometimes it's bills specific and sometimes it's broader. Those are very rare.
- 00:34:33 Rep. Hunter said when he worked in the Executive Branch, at the time we were working on a CHIP transition, he got a request for every email in the records. He asked Mr. Everts if he had a recommendation as he has thought about the question of what would be the most workable system both from the records perspective from the legislature's need to have those records and from the perspective as legislators as to what is most easily manageable.
- 00:36:10 Mr. Everts said that he doesn't have a recommendation with respect to either the state system or the Office 365 system but he does recommend that you have a system. What should happen is there should be guidelines for use and then training for legislators for that system. He doesn't necessarily think that this issue needs to be incorporated in legislative rule, but that's a debate for you to have. He said he would recommend that you not only think about the legislators themselves, but when we roll out this email system, think about your constituents and the public at large. He also recommends what staff has been talking about in terms of committee guidelines both for the session standing committees and for the interim committees. We can come up with guidelines on the dos and don'ts and what constitutes and what doesn't constitute a public record.
- 00:39:44 Mr. Everts discussed the document "Legislative Branch Administrative Manual". **(Exhibit 5)** He said that this is basically a policy statement that says certain documents and records are private under the constitution but everything else is subject to the right to know provisions.
- 00:40:33 Ms. Fox said if we go to a common email, it would be helpful because when she get the Freedom of Information Act which is federal, requests, it would be good to have some guidelines on how to handle those requests.
- 00:42:42 Rep. Hunter said that the corollary question for him is, if we are providing a bunch of information on electronic documents, those often include attached documents in Word, can those be put out there to the requester in an electronic format in a way that the document can be manipulated in a way that none of us can manipulate.
- 00:43:15 Sen. Larsen asked Mr. McLean, on the broader perspective on the two choices we are examining. In a broad way, is one of these systems more open to intrusiveness than the other?

- 00:44:11 Mr. McLean said that if you look at the systems with regard to your question, the state email system would be more locked down than like an Office 365 environment. The Office 365, if you went that route, all your email and sharing is controlled by you and in order for them to control that, it needs to be set up right. The state email system is already set up, we don't have to do much for other people to have access to it.
- 00:45:31 Sen. Larsen said that the whole idea is that we have to be open and accessible with this trail of documentation. But if the state system has a built in barrier to limit or prohibit random accessibility, does that make it a better choice?
- 00:46:24 Mr. Everts said that it's almost a security issue that Mr. McLean is talking about in terms of protection.
- 00:46:55 Rep. Hunter discussed the decisions that are in front of the committee: the fundamental choice of should we adopt a common system for legislators and making a recommendation on that to the full Council; and if in favor of that, we have a second choice of do we have a preference of the systems as listed in Exhibit 2. The third issue is what we need to do in terms of guidance or policy or rules for legislators to understand that there is a whole other set of decisions and guidance for staff in looking into the corollary issues. The first issue of the public nature of what we do in these electronic correspondence, we heard the needs of the state for some kind of system that provides a better access to those records. Is there anyone who wants to make a motion for a common system, or do we have a recommendation that we don't have that common system to take to the full Council.
- 00:48:11 Sen. Barrett said this subject keeps evolving. What came to light to her is the request, if we are going to have an open system that everybody knows everything, then the legislators should know the requests that are coming in, and it should be listed to them once a month on who makes the request, what the request is, why they made it, and what documents for our information. What we're looking at right now is just focused on further regulation of the legislature which is already the weakest branch of the government. So, at this time she is not prepared to say go ahead and put more regulations on this branch.
- 00:49:39 Sen. Larsen understands what been driving these discussions, is Sen. Barrett's option reasonable or are we compelled by the force of lawsuits in the courts, pressure on us as a legislature to create a more accessible pathway?
- 00:50:31 Mr. Everts said that this is a policy decision for you as legislators. The tack that he has taken is that we have certain legal obligations that have been fairly well defined. It's a question of how you go about addressing these obligations.
- 00:51:25 Ms. Fox said that we've had so few requests and the one time she was able to say that they did not have his email, you need to contact hm directly. The other one she did contact the legislators. When you think of how many requests she's had, it's so few. So, you are probably safe in not going to the common email. It would be for your convenience and not necessarily for anybody else. There

would be no way for us to access your email without your knowledge, we wouldn't copy it and give it away to somebody. To her, the important thing is that legislators are made aware of the law. As long as we provide training to you so that you are given that awareness as a new legislator that there is the potential out there that someone is going to ask you for these things and here's the checklist to figure out if it was under official duties or not, etc.

00:53:36 Rep. Hunter said that seeing no recommendations from the committee on this issue, we will report to the full Council that we are not ready to act on the recommendation to have a common email address for all legislators. He asked if we should provide the checklist information in a format that is useful for the legislators. He saw a couple of nods.

### **ADJOURNMENT**

00:54:00 Rep. Hunter adjourned the meeting at 9:01 a.m.

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