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**Montana Legislative Services Division**  
**Legal Services Office**

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TO: Redistricting and Apportionment Commission

FROM: K. Virginia Aldrich, Staff Attorney

RE: Application of Open Meeting and Public Document Laws

DATE: July 31, 2019

This memorandum was prepared as background information for the Districting and Apportionment Commission (Commission), and it does not represent any opinion or action on the part of the Commission.

**Procedural Requirements**

The Montana Constitution ensures the public with access to state government. Specifically, the Montana Constitution ensures the public's right to examine public documents and participate in the decisions of governmental agencies through two related provisions: the right to know and the right to participate. The Commission must be aware of and adhere to the legal requirements related to these provisions.

**I. The Right to Know**

Article II, section 9, of the Montana Constitution provides legal requirements for public bodies pertaining to their deliberations and the availability of their public documents. Specifically, Article II, section 9, of the Montana Constitution provides:

No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

Provisions implementing this section must be liberally construed. Section 2-3-201, MCA. In addition, the Supreme Court has directed that the Montana Constitution and the implementing statutes "must be liberally interpreted in favor of openness." *Assoc. Press, Inc. v. Crofts*, 2004 MT 120, ¶ 242, 321 Mont. 193, 201, 89 P.3d 971, 975.

The Montana Supreme Court has noted that Article II, section 9, is "unique, clear and unequivocal." *Assoc. Press v. Board of Pub. Ed.*, 246 Mont. 386, 804 P.2d 376 (1991). The Court has stated that "[t]his constitutional provision generally requires information regarding state government to be disclosed to the public, except in cases where the demand of individual privacy clearly exceeds the merits of public disclosure." *Assoc. Press, Inc. v. Mont. Dept. of Revenue*, 2000 MT 160, ¶ 24, 300 Mont. 233, 241, 4 P.3d 5, 14. The Court has also stated that "our constitution gives a high priority to the public's right to know". *Krakauer v. St.*, 2016 MT

230, ¶ 35, 384 Mont. 527, 540, 381 P.3d 524, 533 (citations omitted).

Nevertheless, "the right to know is not absolute. It requires a balancing of the competing constitutional interests **in the context of the facts of each case**, to determine whether the demands of individual privacy clearly exceed the merits of public disclosure." *Mont. Dept. of Revenue* at ¶ 24, 300 Mont. 233, 241, 4 P.3d 5, 14 (citations omitted) (emphasis in original).

As a public body, the Commission is subject to the Right to Know constitutional requirements. Because the Commission's work usually will not fall under the limited exemptions provided by the Constitution or statute, commissioners should expect that everything they say or do as a commissioner may wind up in the public eye.

### **A. Right to Examine Documents**

In implementing Article II, section 9, with respect to the right to examine documents, the Legislature has enacted Title 2, chapter 6, part 10. Montana law specifies that, with narrow exceptions concerning privacy and security, "every person has a right to examine and obtain a copy of any public information of this state." Section 2-6-1003, MCA. Public information is defined as "information prepared, owned, used, or retained by any public agency *relating to the transaction of official business, regardless of form*, except for confidential information that must be protected against public disclosure under applicable law." Section 2-6-1002, MCA (emphasis added). Indeed, the Montana Supreme Court has stated that "there is a *constitutional presumption* that all documents of every kind in the hands of public officials are amenable to inspection . . . ." *Mont. Dept. of Revenue*, 2000 MT at ¶ 85, 300 Mont. 233, 256, 4 P.3d 5, 46 (citations omitted) (emphasis in original). Thus, public information subject to public scrutiny includes all material compiled, created, or in the possession of the Commission that relates to the transaction of official business, unless protected under confidentiality laws.

The determination of whether an item is considered public information does not rely on the physical form of the document. Rather, the determination rests on whether the content relates to the transaction of official business. *See e.g. Bryan v. Yellowstone County Elem. Sch. Dist. No. 2*, 2002 MT 264, ¶35, 312 Mont. 257, 268, 60 P.3d 381, 389, and *Becky v. Butte-Silver Bow Sch. Dist. 1*, 274 Mont. 131, 137, 906 P.2d 193, 196-197 (1995). This analysis implicates traditional paper documents as well as electronically stored documents. Therefore, regardless of whether a commissioner chooses to use a private e-mail address or a public email address, emails determined to be public information are public records subject to disclosure and the applicable retention schedules.

"Each public officer is responsible for properly managing the public records within the public officer's possession or control through an established records management plan that satisfies the requirements of [Title 2, chapter 6]". Section 2-6-1012, MCA. By statute, the Legislative Council administers the records management plan for the legislative branch. Section 2-6-1012, MCA. Therefore, the Commission must adhere to the relevant portions of the legislative branch's current records management plan, including with respect to emails concerning Commission

business.

In addition to the foregoing requirements, Commissioners should be aware that public records "must be delivered by outgoing public officers and employees to their successors and must be preserved, stored, transferred, destroyed, or disposed of and otherwise managed only in accordance with the provisions of [Title 2, chapter 6]." Section 2-6-1013, MCA.

Because of these requirements, as a best practice, each commissioner is encouraged to maintain a separate, exclusive email address related to commission work, preferably administered by the state in the event of litigation or public document requests.

The documents commissioners receive from legislative staff and all materials distributed and discussed during a meeting will be managed by the legislative branch and will be publicly available through the Commission's website or meeting minutes and minutes logs. Because those materials are being maintained by the branch, a commissioner is not personally required to retain those materials any longer than they are useful to the commissioner. *However*, a commissioner may receive printed or electronic communications relating to Commission work from organizations and individuals that is not routed through legislative staff. It is a commissioner's responsibility to manage this correspondence as public records. A commissioner should inform individuals and organizations that correspondence received by a commissioner relating to the Commission's business is likely a public record and subject to disclosure. A commissioner should also ensure that public information received by the commissioner and not distributed by legislative staff is retained pursuant to the branch retention policy.

## **B. Right to Observe Deliberations of all Public Bodies**

In implementing Article II, section 9, with respect to observing the deliberation of public bodies, the Legislature has enacted Title 2, chapter 3, parts 1 and 2. For reasons discussed later, the majority of Title 2, chapter 3, part 1, does not apply to the Commission. Therefore, this section focuses on the provisions contained in Title 2, chapter 3, part 2, which does apply to the Commission. *See Willems v. St.*, 2014 MT 82, ¶ 16, 374 Mont. 343, 348, 325 P.3d 1204, 1207, and *Common Cause v. Statutory Committee to Nominate Candidates for Commissioner of Political Practices*, 263 Mont. 324, 868 P.2d 604 (1994).

### **1. Quorum**

A meeting means "the convening of a quorum of the constituent membership of a public agency . . ." Section 2-3-202, MCA. Three or more members constitutes a quorum of the Commission. *Willems*, 2014 MT 82, ¶ 23, 374 Mont. 343, 349, 325 P.3d 1204, 1208. A meeting can be "corporal or by means of electronic equipment, to hear, discuss, or act upon a matter over which the [Commission] has supervision, control, jurisdiction, or advisory power." Section 2-3-202, MCA. Because a meeting does not have to happen in person, the Commission should be cautious not to discuss Commission decisions or substantive business electronically as it may violate the public's right to know.

The mere presence of a quorum at a particular place and time, by itself, does not necessarily invoke Article II, section 9, and related statutory requirements. *See Boulder Monitor v. Jefferson High Sch. Dist. No. 1*, 2014 MT 5, 373 Mont. 212, 316 P.3d 848. However, if the quorum hears, discusses, or acts upon a matter over which it has supervision, control, jurisdiction, or advisory power, the open meeting laws are invoked. Section 2-3-202, MCA. Thus, commissioners should be aware that if a quorum of members is present at a particular place (for instance, at an educational summit), they must be extraordinarily vigilant not to discuss matters over which the Commission has supervision, control, jurisdiction, or advisory power or they will likely violate the open meeting laws. Likewise, commissioners should be aware of both the public perception concerning the gathering of any unnoticed quorum, even if the intention of the quorum is not to discuss public business, and the possibility that conversation could stray into Commission business. To this end, a best practice for commissioners is simply not to congregate as a quorum outside of a properly noticed public meeting.

In addition, the Montana Supreme Court has found that "serial one-on-one discussions" do not constitute a meeting where there was no evidence that commissioners reached any agreement concerning Commission business prior to a public meeting. *Willems*, 2014 MT 82, ¶¶ 24-25, 374 Mont. 343, 349-350, 325 P.3d 1204, 1209. *However*, the Court has *not* addressed a potential constructive quorum where a decision *has been reached* outside of a public meeting. Therefore, Commissioners should ensure that their decisions are reached during a properly noticed public meeting, even if commissioners have one-on-one discussions with other commissioners.

## **2. Meeting Notice**

The Montana Supreme Court has stated that "[w]ithout public notice, an 'open' meeting is open in theory only, not in practice." *Common Cause*, 263 Mont. 324, 331, 868 P.2d 604, 609 (citations omitted). Unless adequate notice of a meeting is given, discussion of matters related to Commission business by a quorum likely violates Montana's open meeting laws. Those laws require the work of the Commission to be discussed in a public forum.

The Legislative Council has adopted the following provisions concerning notice of regular meetings.

Notice of regular meetings must be given to the members and the public a minimum of 10 days prior to each meeting.

Public notice includes posting to the Legislative Branch website the time, location, and agenda of meetings, disseminating the material to news media, committee members, and interested persons. Staff of the Legislative Services Division (LSD) shall maintain an updated mailing list of persons stating an interest in each committee's activities. Anyone who requests to be included on the mailing list must be included. If practical and feasible, notice may also be given by U.S. mail, e-mail, fax, or other means.

A special meeting may be scheduled by a majority of members at any meeting or may be called, with at least 24-hour notice to the members, by the presiding officer or a majority of a committee. A special meeting may not include agenda items that require a public hearing.

*Rules, Procedures, and Guidelines for Legislative Interim Committees and Activities*, Legislative Council, May 29, 2019.

Likewise, the Commission should formalize its own meeting notice provisions by formally adopting notice provisions within its rules of procedure.

### **3. Subcommittees**

The Commission may choose to appoint a temporary or standing subcommittee to make investigations or perform other functions. Statute provides that [a]ny . . . subcommittee appointed by a public body . . . for the purpose of conducting business that is within the jurisdiction of that [body] is subject to [public meeting requirements]." Section 2-3-203, MCA. There is no restriction on the number of members or type of members that constitute a subcommittee under 2-3-302(6), MCA. Thus, if the Commission were to appoint a subcommittee for the purpose of conducting a governmental or public purpose, (e.g. making policy recommendations to the full Commission), the subcommittee would also be subject to the open meeting laws. *See e.g. Great Falls Tribune v. Day*, 289 Mont. 155, 959 P.2d 508 (1998).

### **4. Minutes**

Statute requires that appropriate minutes of a public meeting "must be kept and must be available for inspection by the public." Section 2-3-212, MCA. Minutes must include:

- (a) the date, time, and place of the meeting;
- (b) a list of the individual members of the public body, agency, or organization who were in attendance;
- (c) the substance of all matters proposed, discussed, or decided; and
- (d) at the request of any member, a record of votes by individual members for any votes taken.

*Id.*

## **II. The Right of Participation**

Article II, section 8, of the Montana Constitution, provides, "The public has the right to expect governmental agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision as may be provided by law."

This constitutional section is narrower than Article II, section 9, discussed above. Unlike Article

II, section 9, which applies to "all public bodies or agencies of state government and its subdivisions", Article II, section 8, applies specifically to "governmental agencies", and it allows the Legislature to set the standards for citizen participation.

The Legislature has provided for public participation standards in Title 2, chapter 3, part 1. There, the legislative definition of "agency" for the purposes of that part excludes the "legislature and any branch, committee, or officer thereof." Section 2-3-102, MCA. Likewise, the Montana Supreme Court has found that the Commission "is not a 'governmental agency' and is therefore not subject to the requirements of Section 8." *Willems*, 2014 MT 82, ¶ 30, 374 Mont. 343, 351, 325 P.3d 1204, 1210.

As a result of this finding, the Montana Supreme Court has held that the Commission is "exempt from the statutes promulgating the right of participation". *Id.*, 374 Mont. 343, 325 P.3d 1204. Nevertheless, the Court noted that "even though the Commission was exempt from the participation statutes," the Commission had still encouraged public participation "by holding multiple public meetings and by allowing the public to actively engage in the redistricting process." *Id.* at 30, 374 Mont. 343, 351-352, 325 P.3d 1204, 1210.

Thus, although the Commission is not legally required to adhere to Article II, section 8, the historical practice of past Commissions is to hold numerous public meetings and solicit public comment to ensure the transparency and success of proposed plans.

Furthermore, other legislative branch committees voluntarily adhere, when reasonably possible, to the provisions of section 2-3-103, MCA. That section provides that each agency must develop procedures for permitting and encouraging the public to participate in agency decisions that are of significant interest to the public, and the procedures must ensure adequate notice and assist public participation before the agency takes action. Furthermore, that section specifies that [t]he agenda for a meeting . . . must include an item allowing public comment on any public matter that is not on the agenda of the meeting and that is within the jurisdiction of the agency conducting the meeting." In addition, "the agency may not take action on any matter discussed unless specific notice of that matter is included on an agenda and public comment has been allowed on that matter. . . ." *Id.*

The Legislative Council has adopted the following guidelines for interim legislative committees to voluntarily adhere to the requirements of Title 2, chapter 3, part 1:

- (1) Except as provided in subsection (2) and in accordance with subsection (3), public comment must be accepted on agenda items. Public comment may be taken in person or through written communication.
- (2) Public comment is not accepted over the phone or via teleconferencing.
- (3) Public comment provided in person to the committee is a public record that is videotaped, archived, and available on the website. Public comment submitted in writing at a committee meeting is a public record that will be posted to the legislative website as part of the minutes log for the committee meeting.

To manage the committee's time and agenda, the presiding officer of a committee may limit individual public comment in a manner that allows equal and fair opportunity for public comment.

Submission of written comments is encouraged. Written comments are accepted at any time through electronic or regular correspondence and will be copied to all committee members and entered into the record.

*Rules, Procedures, and Guidelines for Legislative Interim Committees and Activities*, Legislative Council, May 29, 2019.

Although not binding on the Commission, the Commission may wish to adopt similar provisions to those promulgated by the Legislative Council.

In addition, the Commission should be aware that statute requires the Commission to hold at least one public hearing on each plan. Specifically, section 5-1-108, MCA, provides:

- (1) Before the commission files its final congressional redistricting plan with the secretary of state, the commission shall hold at least one public hearing on it.
- (2) Before the commission submits its legislative redistricting plan to the legislature, it shall hold at least one public hearing on the plan at the state capitol.
- (3) The commission may hold other hearings as it deems necessary.

Thus, while Article II, section 8, of the Montana Constitution may not apply to the Commission's work, the Commission may wish to voluntarily adhere to its provisions when reasonably possible. In any event, the Commission should ensure that it holds the required public hearings as provided by section 5-1-108, MCA.

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