

ELECTRONIC COMMUNICATIONS & PUBLIC RECORDS FOR LEGISLATORS

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THE LEGAL OBLIGATIONS

The Public Trust

Government is a trust, and the officers of the government are trustees; and both the trust and the trustees are created for the benefit of the people.

— Henry Clay

The holding of public office or employment is a public trust, created by the confidence that the electorate reposes in the integrity of public officers, legislators, and public employees. A public officer, legislator, or public employee shall carry out the individual's duties for the benefit of the people of the state.

— from § 2-2-103, Montana Code Annotated

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Montana Constitution

Art. II, sec. 8

Right of participation.

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.

Art. II, sec. 9

Right to know.

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.

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MT Constitution, Cont.

Art. II, sec. 10

Right of privacy.

The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.

Art. V, sec. 10

Organization and procedure.

...

(3) The sessions of the legislature and of the committee of the whole, all committee meetings, and all hearings shall be open to the public.

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“Public information” means 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.

“Public record” means public information that is:

(a) fixed in any medium and is retrievable in usable form for future reference; and

(b) designated for retention by the ... legislative branch[.]

**What
is a
public
record?**

**It's
about
the
content!**

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Why is this Important?

The Presumption of Openness:

- Under the state constitution and § 2-6-1003, individuals have a right to examine and take copies of public records - that includes the public records you create and store on your own email accounts with your own devices
- Exception: Records do not have to be made public when there is an individual privacy right that is implicated AND that right to privacy clearly exceeds the merits of public disclosure

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1. Does the constitutional right to know apply to the particular political subdivision against whom enforcement is sought?

The Legislative Branch is a public body subject to the provisions of Article II, section 9.

2. Are the documents in question “documents of public bodies” subject to inspection?

The Montana Supreme Court has broadly defined “documents of public bodies” to mean those documents “generated or maintained by a public body which are somehow related to the function and duties of that body.”

3. Is there a privacy interest present?

3a. If there is, does the demand of individual privacy clearly exceed the merits of public disclosure?

(A) Does the person have a subjective or actual expectation of privacy?

(B) Is society willing to recognize that expectation as reasonable?

Montana Supreme Court

3-Part
Balancing
Test

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What is Legislative Business?

Legislative business is related to your function and duties as a legislator and your role as an enactor of legislation.

During the Session:

- Legislative bills, amendments and resolutions
- Committee work
- Records related to the transaction of your legislative duties
 - Voting for bills or amendments
 - Communications with your constituents

During the Interim:

- Interim committee work
- Communications with your constituents

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What is Not Legislative Business?

Any written communication that does not contain content related to legislative business does not need to be managed or retained for a specific length of time

Examples may include communications related to:

- Personal business
- Political activity
- Your non-legislative employment
- Newsletters, invites, correspondence not related to official legislative business from organizations like NCSL, CSG, etc.

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MANAGING YOUR PUBLIC RECORDS

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Legislative Public Records

Records Managed by the Branch:

- Bills and resolutions
- Committee minutes
- Session journals
- Interim reports
- Legal opinions
- Correspondence related to legislative business that is routed through the Branch

Records to be Managed by You as a Legislator:

- Correspondence relating to legislative business that comes to or from you directly

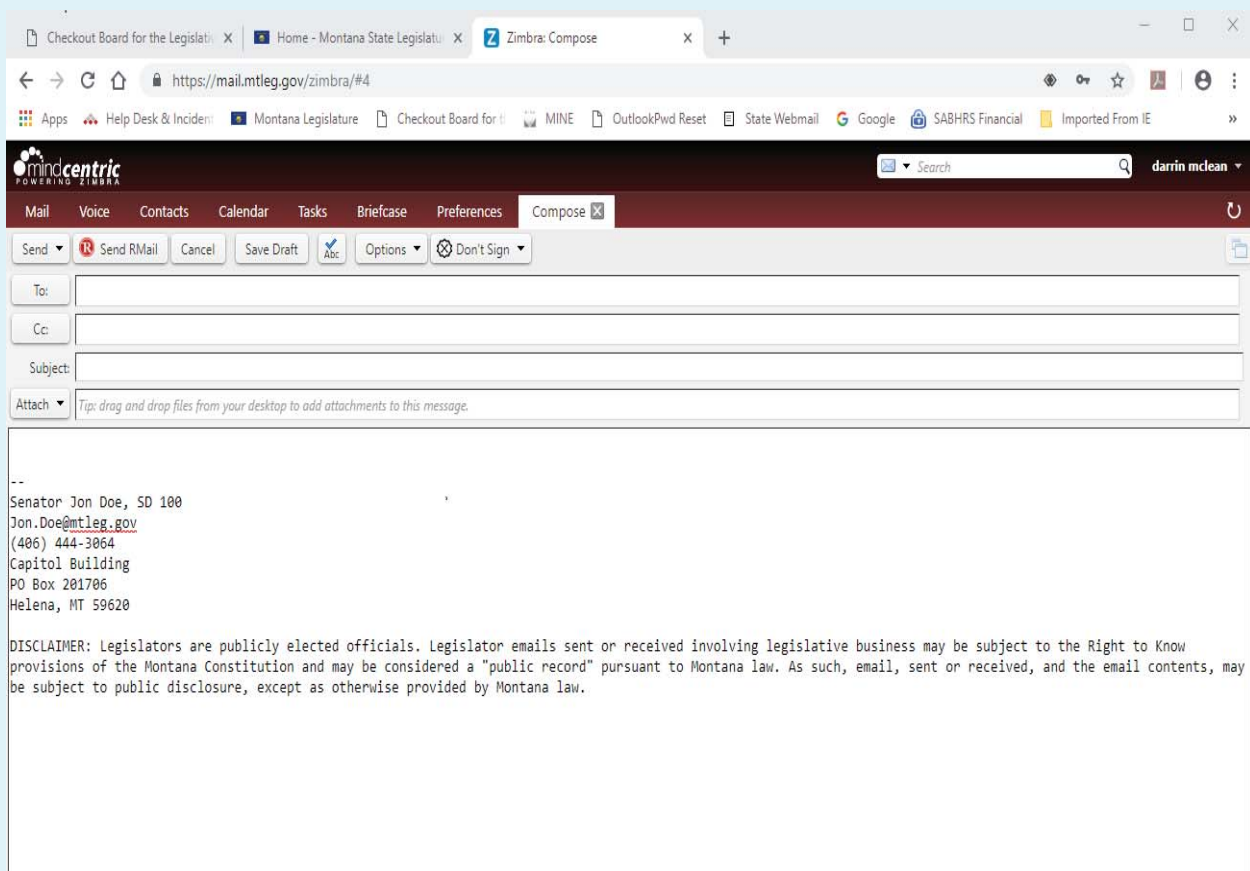
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How Do You Manage Your Public Records?

Best Practices Suggestions:

- **Have a separate email account dedicated solely to your legislative business; consider using an OLIS-administered Mindcentric account**
- **Save emails in that account for the retention period that is specified in the branch's record management policy**
- **If you have someone make a request for your records, contact the branch's Chief Legal Counsel or Executive Director for assistance in fulfilling that request**
- **Include an automatic disclaimer that notifies correspondents that emails may be subject to public records requests**

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Checkout Board for the Legislati... x Home - Montana State Legislati... x Zimbra: Compose x +

https://mail.mtleg.gov/zimbra/#4

Apps Help Desk & Incident Montana Legislature Checkout Board for MINE OutlookPwd Reset State Webmail Google SABHRS Financial Imported From IE

mindcentric POWERING ZIMBRA Search darrin mclean

Mail Voice Contacts Calendar Tasks Briefcase Preferences Compose

Send Send RMail Cancel Save Draft Options Don't Sign

To:

Cc:

Subject:

Attach Tip: drag and drop files from your desktop to add attachments to this message.

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DISCLAIMER: Legislators are publicly elected officials. Legislator emails sent or received involving legislative business may be subject to the Right to Know provisions of the Montana Constitution and may be considered a "public record" pursuant to Montana law. As such, email, sent or received, and the email contents, may be subject to public disclosure, except as otherwise provided by Montana law.

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USE THE FOLLOWING TO HELP YOU MANAGE, ARCHIVE, AND DELETE EMAILS APPROPRIATELY.

Is the email considered Public Information?

2-6-1002(11): Public information is "information relating to the transaction of official business, regardless of form, except for confidential information that must be protected against public disclosure under applicable law"

Yes

THE CONTENT OF THE EMAIL RELATES TO YOUR DUTIES OR YOUR POSITION AS A LEGISLATOR

RETENTION POLICY

Emails distributing official committee documents such as agendas, reports, or committee bill drafts are retained and maintained by legislative branch staff so can be deleted by a legislator

DELETE

Emails that are tangentially related to your duties or position as a legislator, such as a newsletter from NCSL, are transitory records and can be deleted

DELETE

Emails containing discussions about legislative business must be kept for 5 years following the conclusion of the legislation cycle in which they were sent or received (see page 7 for further explanation).

5 YEARS

This guidance reflects legislator email retention policy adopted by the Legislative Council March 15, 2018.

No

THE CONTENT OF THE EMAIL RELATES TO NONLEGISLATIVE BUSINESS

Examples may include communications related to:

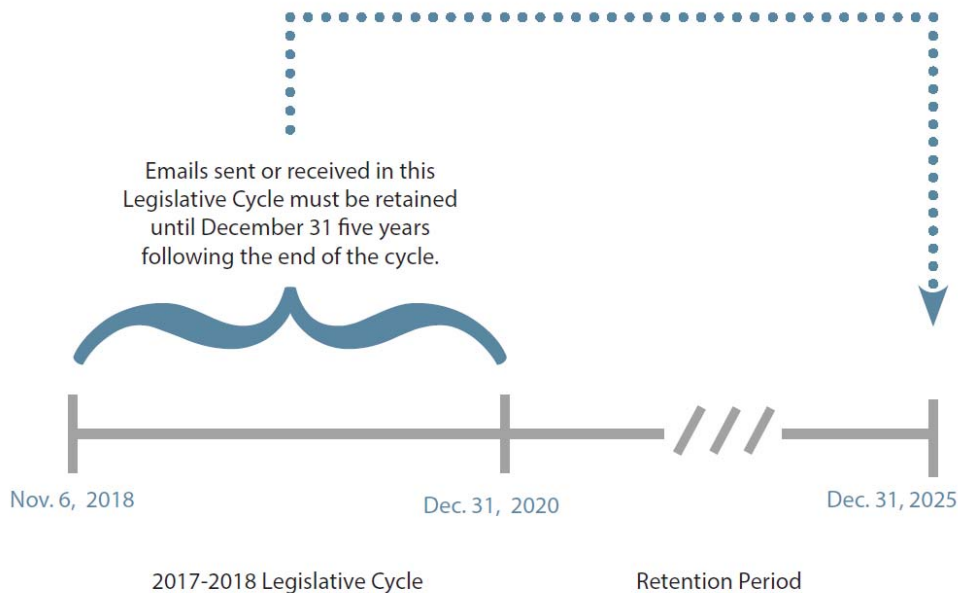
- Personal business
- Political activity
- Your non-legislative employment

Since these are **nonrecords**, you can **delete** these emails as soon as you are done with them

DELETE

Email Retention Policy

Emails sent or received in this Legislative Cycle must be retained until December 31 five years following the end of the cycle.



If You Decide to Use an OLIS-administered Mindcentric Email Account

Unique Features of a Mindcentric Email Account

- Accounts should be used primarily for state legislative business → usage for “for-profit” or “non-profit” activities is not allowed
- Email addresses are standard: Firstname.Lastname@mtleg.gov
- Inbox size is 25 GB
- Each Mindcentric email account has an Archive associated with it, no need to manually archive
- No requirement for changing passwords
- Email is accessible from a web-based browser, laptop, tablet, or smartphone
- Legislative Services OLIS staff can assist you with “right to know” requests

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HOW THE BRANCH RESPONDS TO REQUESTS FOR INFORMATION

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Branch procedure for requests for public information

1. General branch information, such as policies, procedures, and request forms, is easily accessible on the branch website
2. Requests for information are directed to the Executive Director or the Legal Services Director → if you get a request directly, you may refer the request to Susan or Todd for assistance
3. If the branch receives the request directly, you will be informed of the request
4. The branch will review the request and may contact you for clarification or greater specificity

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Procedure, Cont.

5. If the request applies to your private email account, you will be responsible for fulfilling the request; you may seek legal advice or other assistance from the Legal Services Office
6. If the request applies to a Mindcentric email account, the Executive Director will work with you and with OLIS staff to fulfill the request
7. The Legal Services Office will review any emails with you as necessary prior to delivering them to the requestor; you may also request a copy of all materials sent to the requestor

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**CONTACT
INFO**