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Fire Suppression Interim Committee

60th Montana Legislature

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November 16, 2007

TO: Fire Suppression Committee

FR: Todd Everts, Legislative Legal Staff

RE: Fire Suppression Interim Committee Activities and the Open Meeting Requirements

During the Fire Suppression Interim Committee's (FSIC) October 2007 Meeting, Chairman Cobb requested a legal analysis of the open meeting laws in conjunction with FSIC activities to ensure that the FSIC is in compliance with those laws. Specifically, Chairman Cobb requested that I analyze whether FSIC subcommittee meetings, FSIC working group meetings, and FSIC membership attending other meetings, are subject to the open meeting law requirements. This legal memorandum does not represent any opinion or action on the part of the FSIC.

QUESTION: Are FSIC subcommittee meetings, FSIC working group meetings, and FSIC members attending other meetings, subject to the requirements under the open meeting laws?

SHORT

ANSWER: FSIC subcommittee meetings are subject to the open meeting law requirements. If the FSIC appoints a working group that consists FSIC members and other individuals, then those working group meetings are essentially subcommittee meetings and are therefore subject to the open meeting requirements. Working group meetings consisting of staff and other individuals are less likely to be subject to the open meeting law requirements, although I would error on the side of complying with the open meeting laws if the FSIC officially sanctions or appoints such a working group to convene on its behalf to make recommendations. Individual FSIC members attending other meetings, do not necessarily by themselves, trigger the open meeting law requirements.

LEGAL ANALYSIS:

The starting point for any analysis regarding the public's right to participate and observe governmental activities is the Montana Constitution. Two sections under Article II of the

Montana Constitution are applicable here:

Section 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.

Section 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.

These provisions of the Montana Constitution contain three components: the right to participate in governmental operations, the right to examine documents, and the right to observe the deliberations of public bodies and agencies. At the FSIC's direction, this memorandum will not analyze the issues associated with the right to examine documents.

The Montana Supreme Court has noted that Article II, section 9, is "unique, clear and unequivocal." Associated Press v. Board of Public Education, 246 Mont. 386, 804 P.2d 376 (1991). The Court has further held that Article II, sections 8 and 9, are linked in that if an individual is not provided with opportunity to observe public deliberations or examine public documents under Article II, section 9, then that individual cannot exercise his or her right to participate in the operations of agencies under Article II section 8. Bryan v. Yellowstone County Elementary School District No. 2, 312 Mont. 257, 60 P.3d 381 (2002).

The Legislature has implemented Article II, sections 8 and 9, by enacting Title 2, chapter 3, parts 1 and 2, MCA, respectively. Of interest to the FSIC are the relevant requirements under the open meeting laws set out below of which I have highlighted the pertinent parts.

2-3-201. Legislative intent -- liberal construction. The legislature finds and declares that public boards, commissions, councils, and other public agencies in this state exist to aid in the conduct of the peoples' business. It is the intent of this part that actions and deliberations of all public agencies shall be conducted openly. The people of the state do not wish to abdicate their sovereignty to the agencies which serve them. Toward these ends, the provisions of the part shall be liberally construed.

2-3-202. Meeting defined. As used in this part, "meeting" means the convening of a quorum of the constituent membership of a public agency or association described in 2-3-203, whether corporal or by means of electronic equipment, to hear, discuss, or act upon a matter over which the agency has supervision, control, jurisdiction, or advisory power.

2-3-203. Meetings of public agencies and certain associations of public agencies to be open to public -- exceptions. (1) All meetings of public or governmental bodies, boards, bureaus, commissions, agencies of the state, or any political subdivision of the state or organizations or agencies supported in whole or in part by public funds or expending public funds, including the supreme court, must be open to the public. (2) All meetings of associations that are composed of public or governmental bodies referred to in subsection (1) and that regulate the rights, duties, or privileges of any individual must be open to the public. (3) The presiding officer of any meeting may close the meeting during the time the

discussion relates to a matter of individual privacy and then if and only if the presiding officer determines that the demands of individual privacy clearly exceed the merits of public disclosure. The right of individual privacy may be waived by the individual about whom the discussion pertains and, in that event, the meeting must be open.

(4) (a) Except as provided in subsection (4)(b), a meeting may be closed to discuss a strategy to be followed with respect to litigation when an open meeting would have a detrimental effect on the litigating position of the public agency.

(b) A meeting may not be closed to discuss strategy to be followed in litigation in which the only parties are public bodies or associations described in subsections (1) and (2).

(5) The supreme court may close a meeting that involves judicial deliberations in an adversarial proceeding.

(6) Any committee or subcommittee appointed by a public body or an association described in subsection (2) for the purpose of conducting business that is within the jurisdiction of that agency is subject to the requirements of this section.

2-3-211. Recording. Accredited press representatives may not be excluded from any open meeting under this part and may not be prohibited from taking photographs, televising, or recording such meetings. The presiding officer may assure that such activities do not interfere with the conduct of the meeting.

2-3-212. Minutes of meetings -- public inspection. (1) Appropriate minutes of all meetings required by 2-3-203 to be open shall be kept and shall be available for inspection by the public.

(2) Such minutes shall include without limitation:

(a) date, time, and place of meeting;

(b) a list of the individual members of the public body, agency, or organization in attendance;

(c) the substance of all matters proposed, discussed, or decided; and

(d) at the request of any member, a record by individual members of any votes taken.
(emphasis added)

The provisions of the open meeting laws are to be liberally construed. (2-3-201, MCA). See also Assoc. Press v. Crofts, 321 Mont. 193, 89 P3d 971 (2004). Bryan v. Yellowstone County Elementary School District No. 2, 312 Mont. 257, 60 P.3d 381 (2002). Common Cause v. Statutory Committee to Nominate Candidates for Commissioner of Political Practices, 263 Mont. 324, 868 P.2d 604 (1994).

Section 2-3-302, MCA requires that all meetings of public or governmental bodies, boards, bureaus, commissions, agencies of the state, or any political subdivision of the state or organizations supported in whole or in part by public funds or expending public funds must be open to the public.

The initial question here is whether the FSIC is a "public or governmental body" and therefore subject to the requirement that its meetings be open to the public. The Montana Supreme Court has previously determined that a legislative committee that is created and organized by state statute to perform a governmental function is considered a "public or governmental body" under 2-3-203(1), MCA. See Common Cause supra, 263 Mont. at 328. FSIC is a legislative interim committee that was created and organized under House Bill #1 (September 2007 Special Legislative Session) and the FSIC is required under House Bill #1 to perform a "governmental

function" in terms of conducting a study of fire suppression methods and costs and making recommendations to the 61st Legislature. Unequivocally, the FSIC is an entity that is subject to the open meeting requirements assuming that the FSIC is holding a "meeting" within the meaning of 2-3-202, MCA.

Section 2-3-202, MCA, defines a "meeting" as the convening of a quorum of the constituent membership of a public agency or association described in section 2-3-203, MCA, to hear, discuss, or act upon a matter over which the agency has supervision, control, jurisdiction, or advisory power. A quorum is the majority of the an entire body when members are acting as a group and not merely as individuals. The Court in Common Cause, noted that a meeting was held within the meaning of the open meeting laws when three members of the four-member legislative committee met to discuss the committee's recommendation. See Common Cause supra, 263 Mont. at 331. The Court has also held that if a body's membership was not fixed, the quorum of any body of an indefinite number consists of the members who attend a meeting. All that is required under 2-3-202 is that a quorum of the membership convene to conduct public business, not that the meeting produces some particular result or action or that a vote be taken. See Crofts supra, 321 Mont. at 203.

The Court in Crofts, noted that there were at least seven factors to consider when determining whether a meeting should be open to the public:

- (1) whether committee members are public employees acting in their official capacities;
- (2) whether the meetings are paid for with public funds;
- (3) the frequency of meetings;
- (4) whether the committee deliberates rather than simply gathers facts and reports;
- (5) whether the deliberations concern matters of policy rather than merely administrative or ministerial functions;
- (6) whether committee members have executive authority and experience; and
- (7) the results of the meetings. See Crofts supra, 321 Mont. at 200.

According to the Court in Crofts, this list of factors is not exhaustive, and each factor may not be present in every instance of a meeting that must be open to the public. See Crofts supra, 321 Mont. at 200.

So if the FSIC is subject to the open meeting laws, are FSIC appointed subcommittees, working groups, and individuals FSIC members attending other meetings subject to the open meeting laws?

If the FSIC were to appoint a subcommittee, that subcommittee's meetings would be subject to the open meeting laws. Section 2-3-302 (6), MCA, requires that any committee or subcommittee appointed by a public body for the purpose of conducting business that is within the jurisdiction of that agency is subject to the requirements of the opening meeting laws. Note that there is no restriction on the number of members that constitute a subcommittee under 2-3-302(6), MCA. See also Crofts supra, 263 Mont. at 200.

If the FSIC were to appoint a working group that consisted of a member or members of the FSIC and other individuals for the purposes of conducting a governmental or public purpose (i.e., making policy recommendations to the full FSIC), that working group's meetings would likely be subject to the open meeting requirements. See Great Falls Tribune v. Day, 289 Mont.

155, 959 P.2d 508 (1998); Crofts supra, 321 Mont. at 201; Bryan supra, 312, at 263.

If a working group was made up of legislative staff and other individuals that were not FSIC members, those types of working group meetings are less likely, according to the Montana Supreme Court, be subject to the open meeting laws. See SJL of Mont. Associates Ltd. Partnership v. City of Billings, 263 Mont. 142, 867 P.2d 1084 (1993). Under SJL, the television station argued that it had the right to have one of its television reporters cover a meeting between the public works director, the city engineer, and individuals representing a private contracting company. The court held that the open meeting statutes require agencies to have open meetings and that "agencies" do not include meetings of individual employees. See SJL supra, 263 Mont. at 148. However, I would be cautious, given the Court's holdings in Day, Crofts, and Bryan noted above.

Individual members of the FSIC attending meetings other than FSIC meetings, do not by themselves trigger the open meeting law requirements. Individual FSIC members that collectively attend for example, an educational conference or other fact finding meeting would not, by themselves, necessarily trigger the open meeting law requirements. See Crofts supra 321 Mont. at 201.

So, if the open meeting law requirements are ultimately triggered, what is the responsibility of the entity holding a public meeting? The Court has held that the open meeting laws require public notice and that without public notice, a meeting is open to the public in theory only, not in practice. See Common Cause supra, 263 Mont. at 331. In addition, 2-3-212, MCA requires that minutes of the meeting must be kept and made available for inspection by the public. The minutes must include the date, time, and place of the meeting; a list of people in attendance at the meeting; the substance of all matters, proposed, discussed, or decided; and a record by individual members of any votes taken. See 2-3-212, MCA. Finally, accredited press representatives may not be excluded from any open meeting under the open meeting laws and those members of the press may not be prohibited from taking photographs, televising, or recording such meetings. See 2-3-211, MCA.

CONCLUSION:

Given that the FSIC itself is unequivocally subject to the open meeting law requirements, FSIC subcommittee meetings are also subject to those requirements as well. If the FSIC appoints a working group that consists FSIC members and other individuals, then those working group meetings are essentially subcommittee and are therefore subject to the open meeting requirements. Working group meetings consisting of staff and other individuals are less likely to be subject to the open meeting law requirements, although I would error on the side of complying with the open meeting laws if the FSIC officially sanctions or appoints such a working group to convene on its behalf to make recommendations. Individual FSIC members attending other meetings, do not necessarily by themselves, trigger the open meeting law requirements.

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