

# Billings City Administrator Weekly Report

June 25, 2020

## 1. COVID-19 Information:

- Governor Bullock Announces \$8.7 Million in Emergency Grants to Education Entities
- Governor Bullock Announces Updated Directive for Visitation in Nursing Homes and Assisted Living Facilities

## 2. Public Safety Levy Education and Advocacy Guidelines - The bottom line – public time and money cannot be spent advocating for or against a ballot measure or candidate running for office. Public time and money can be spent to educate. Our staff team will do our absolute best to educate the community on the impacts of voting for or against the PS2 Levy, but we cannot advocate for or against.

As for elected officials, your situation is different than those of us who are fully employed by the city. You can advocate; however, you should not advocate during city council meetings or other formal City board meetings. See the enclosed guidance provided by our legal team and the State of Montana and Crowley, Haughey, Hanson, Toole & Dietrich PLLP.

## 3. Thank You Gavin! – Thank you for always leaning into ways to help improve Billings. Your time as Public Information Officer (PIO) for the COVID19 Pandemic was invaluable. Each member of our team greatly benefited from your professionalism and work ethic. Gavin exemplifies our core values of collaboration, integrity, service and stewardship.

Gavin's dual roll of Library Director and PIO for COVID19 end June 30 coinciding with the reopening of the City's library on July 1.

## 4. Rose Park Playground Design Voting Contest – Please see the attached flyer for the Voting Contest.

Have a great weekend.

**OFFICE OF THE GOVERNOR**  
STATE OF MONTANA

Steve Bullock  
GOVERNOR



Mike Cooney  
LT. GOVERNOR

**FOR IMMEDIATE RELEASE:**

Friday, June 12, 2020

**CONTACTS:**

Marissa Perry, Communications Director, Governor's Office, (406) 444-4514

Erin Loranger, Press Secretary, Governor's Office, (406) 444-9725

**Governor Bullock Announces \$8.7 Million in Emergency Grants to Education Entities**

*Governor's Emergency Education Relief Fund will provide grants to education related entities impacted by COVID-19*

MONTANA – Governor Steve Bullock today announced \$8.7 million in federal grants will be distributed to education entities across the state to ramp up remote learning opportunities, technology infrastructure, and workforce training opportunities.

**“Our teachers and professors across the state have remained committed to providing Montana students with a high quality education during these challenging times and this funding will provide schools and educators with the resources they need to continue doing so this fall,”** Governor Bullock said. **“Emergency grants will immediately address needs for students who may have fallen behind, upgrade critical technology infrastructure, and ensure students have access to remote learning opportunities.”**

The U.S. Department of Education created the Governor's Emergency Education Relief Fund and gave governors the authority to distribute the funds to local educational agencies, institutions of higher education, and other education related entities with emergency assistance to respond to COVID-19. Montana's allocation from the Governor's Emergency Education Relief Fund is \$8,764,495. This funding is separate from the \$1.25 billion Coronavirus Relief Fund.

The Montana University System received \$6.5 million in funding that will be used for the One-Two-Free program to offer free dual enrollment courses to high school students, fund technology upgrades, and offer workforce training.

The Montana Digital Academy received \$230,000 to expand enrollment opportunities for students, extend remote proctoring services for credit recovery students, identify and address mathematics gains and barriers to prepare students for the fall, and provide EdReady Montana support for the ACT test.

Several colleges received funding for remote learning and technology upgrades. Carroll College received \$500,000, Rocky Mountain College received \$60,000, and the University of Providence received \$30,000.

The Montana State Library received \$500,000 to expand its mobile hotspot and mobile device lending programs.

Grants were evaluated based on need and criteria considered included if entities experienced revenues declines, if they already received other forms of assistance, and if funds would assist in ensuring students have equitable access to learning.

K-12 schools in Montana have already been allocated \$41 million through the federal Elementary and Secondary School Relief Fund. The remaining \$944,495 will be reserved until the fall to address other potential issues that arise.

###

OFFICE OF THE GOVERNOR  
STATE OF MONTANA

STEVE BULLOCK  
GOVERNOR



MIKE COONEY  
LT. GOVERNOR

**TO:** Montanans; all officers and agencies of the State of Montana  
**FROM:** Governor Steve Bullock  
**DATE:** June 25, 2020  
**RE:** Directive implementing Executive Orders 2-2020 and 3-2020 and providing measures related to senior living and assisted living facilities.

Executive Orders 2-2020 and 3-2020 declare that a state of emergency exists in Montana due to the global outbreak of COVID-19 Novel Coronavirus.

During a declared state of emergency, the Governor may “control ingress and egress to and from an incident or emergency or disaster area, the movement of persons within the area, and the occupancy of premises within the area.” Section 10-3-104(2)(c), MCA. In addition, the Department of Public Health and Human Services (DPHHS or Department), acting under the Governor’s direction, may “issue written orders for correction” of “conditions of public health importance” through measures including “isolation and quarantine” and “abatement of public health nuisances.” Section 50-1-202, MCA. A condition of public health importance includes any “disease . . . that is identifiable on an individual or community level and that can reasonably be expected to lead to adverse health effects in the community.” Section 50-1-101(2), MCA. The Department, under the Governor’s direction, may take action to correct public health deficiencies in “buildings or facilities where persons assemble.” Section 50-1-203, MCA. The Department, under the Governor’s direction, may also impose quarantine and isolation measures to protect public health. Section 50-1-204, MCA. Montana law provides that these authorities will be utilized to respond to an “outbreak of disease,” § 10-3-103(4), MCA, and to “limit the transmission of the communicable disease,” *see, e.g.*, § 50-1-101(6), MCA.

Since the initial March 15, 2020 Directive implementing Executive Orders 2-2020 and 3-2020, all non-essential visitation to nursing home facilities has been suspended. On April 22, 2020, I issued a Directive providing for the phased reopening of Montana. That Directive continued the suspension of visitation to senior and assisted living facilities. As a result, except for very narrow circumstances surrounding essential healthcare provider visitation and compassionate (*e.g.*, end-of-life) visitation, residents of Montana’s senior and assisted living facilities have been physically isolated from their family and friends.

On May 18, 2020, the Centers for Medicare and Medicaid Services (CMS) issued a guidance for nursing home reopening that lays out benchmarks for facilities to use to determine when outside visitation of residents can resume, and safeguards to be implemented to protect against transmission of COVID-19 into those facilities.<sup>1</sup> The Centers for Disease Control and Prevention (CDC) have also issued guidance for managing and preventing the spread of COVID-19 in nursing homes and skilled

---

<sup>1</sup> The CMS guidance, Ref. QSO-20-30-NH, is available at <https://www.cms.gov/files/document/qso-20-30-nh.pdf-0>. The safeguards against transmission toolkit is available at <https://www.cms.gov/files/document/covid-toolkit-states-mitigate-covid-19-nursing-homes.pdf>.

nursing facilities.<sup>2</sup> Both CMS and CDC guidance contemplate strict hygiene and other COVID-19 prevention measures to allow safe visitation, but also afford facilities the flexibility to decide whether and how visitation may resume given the individual circumstances of the facility and the community in which it is located. Now that Montana is in Phase II of reopening, Montanans requiring care in senior and assisted living facilities should have access to limited visitation, subject to these stringent safety and health measures. I have determined that these changes that align Montana with federal guidance and best practices are necessary to respond to the emergency.

Therefore, in accordance with the authority vested in me under the Constitution, Article VI, Sections 4 and 13, and the laws of the State of Montana, Title 10, Chapter 3 and Title 50, Chapter 1, MCA, and other applicable provisions of the Constitution and Montana law, I hereby direct the following measures be in place in the State of Montana, effective immediately:

- Subject to the conditions set forth in this Directive, senior and assisted living facilities may allow visitors after giving notice of the recommended safeguards to residents and family members.
  - Visitation should be conducted in accordance with the strict screening, physical distancing, sanitation, hygiene, and other infection control protocols set forth in the CMS and CDC guidance applicable to nursing homes.
  - Before permitting visitation, facilities should review the applicable CDC and CMS guidance and ensure that they are able to follow the recommendations contained therein.
- To the limited extent that the March 15, 2020 and April 22, 2020 Directives conflict with the provisions of this Directive, they are superseded. No other Directive is amended, rescinded, or superseded except as expressly provided here.

**Authorities:** Sections 10-3-104, -103, -302, and -305, MCA; §§ 50-1-202, -101, -203, and -204, MCA; Executive Orders 2-2020 and 3-2020; Montana Constitution, Art. VI, Sections 4 and 13; and all other applicable provisions of state and federal law.

### **Limitations**

- This Directive is effective immediately and expires at the end of the declared state of emergency in Executive Orders 2-2020 and 3-2020.
- This Directive shall be implemented consistent with applicable law and subject to the availability of appropriations.
- Nothing in this Directive shall be construed to limit, modify, or otherwise affect the authority granted by law to the Governor or any department, agency, political subdivision, officer, agent, or employee of the State of Montana, except as expressly provided in this Directive or other Directives now in effect implementing Executive Orders 2-2020 and 3-2020.
- This Directive is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the State of Montana, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

---

<sup>2</sup> The guidance is available at <https://www.cdc.gov/coronavirus/2019-ncov/hcp/long-term-care.html>.



# CITY OF BILLINGS

CITY ATTORNEY'S OFFICE

P.O. BOX 1178

BILLINGS, MONTANA 59103

(406) 657-8205

FAX (406) 657-3067

June 24, 2020

**To:** Chris Kukulski, City Administrator  
Kevin Iffland, Assistant City Administrator  
Rich St. John, Police Chief  
Bill Rash, Fire Chief  
Andy Zoeller, Financial Services Director  
Wyeth Friday, Planning and Community Development Director

**From:** Brent Brooks, City Attorney *BB*  
Gina Dahl, Assistant City Attorney

**Re:** Public Safety Mill Levy Election: Education v. Advocacy Rules and Restrictions for City Staff and Elected Officials

## BACKGROUND

On June 22, 2020, The Mayor and Council approved an ordinance and ballot language resolution submitting the Public Safety Mill Levy (PSML) to voters for approval in a special mail ballot election currently scheduled for September 15, 2020. If approved by voters, this mill levy will amend the City Charter by allowing 60 mills to be levied each year indefinitely into future years. The next step in this process concerns the rules and restrictions for City elected officials and City staff members as information is provided to City voters concerning the levy.

## PURPOSE of MEMORANDUM

This memorandum addresses the requirements to keep records and report expenses and time incurred regarding the mill levy election as required of Incidental Political Committees as defined by Montana election statutes.

## DUTY OF FILING REPORTS OF CONTRIBUTIONS AND EXPENDITURES:

Montana Code Annotated (MCA) §13-1-101(31) defines a political committee broadly:

(31)

(a) "Political committee" means a combination of two or more individuals or a person other than an individual who receives a contribution or makes an expenditure:

(i) to support or oppose a candidate or a committee organized to support or oppose a candidate or a petition for nomination;

(ii) to support or oppose a ballot issue or a committee organized to support or oppose a ballot issue; or

(iii) **to prepare or disseminate an election communication, an electioneering communication, or an independent expenditure.**

(b) Political committees include ballot issue committees, **incidental committees**, independent committees, and political party committees.

(c) A candidate and the candidate's treasurer do not constitute a political committee.

(d) A political committee is not formed when a combination of two or more individuals or a person other than an individual makes an election communication, an electioneering communication, or an independent expenditure of \$250 or less.

(emphasis added). An electioneering communication includes publicly distributed printed materials that do not support or oppose a ballot issue, that can be received by more than 100 recipients in the district that refers to a ballot issue or other question submitted to the voters. MCA § 13-1-101(16)

Section 13-1-101(23), MCA, defines an "incidental committee" as one that is not specifically organized or operating for the primary purpose of supporting or opposing candidates or ballot issues but that may incidentally become a political committee by receiving a contribution or making an expenditure.

The Montana Commission on Political Practices (COPP) is a state agency which regulates political campaign practices and enforces Montana election laws. COPP has indicated that the election rules do apply to cities as they relate to ballot issues such as the PSML.

Because public monies may be expended in educating the public on the PSML ballot issue, the City must register with the COPP as an Incidental Political Committee and appropriately report expenditures.

## **INCIDENTAL POLITICAL COMMITTEE REGISTRATION PROCESS**

Our office will prepare and file the C-2 Form and then thereafter the C-4 will need to be prepared and filed under the schedule set by the COPP's rules. We suggest that Wynnette Maddox and a staff member primarily shepherd the process and coordinate the reporting, in conjunction with the Finance Department. Someone will need to assist in calendaring and reporting the information which is provided by those City officials or employees who work on the process, similar to that which is involved in lobbying the State Legislature. Attached in this regard is a template to use to track time and expenses that I we have modified for this purpose

In preparing the C-2 Form, I would suggest that Andy Zoeller be designated as the Incidental Committee Treasurer and perhaps Kevin Iffland as Deputy Treasurer, Please let me know your thoughts in this regard.

## **OTHER APPLICABLE STATUTORY PROVISIONS**

### **1. City Staff Member Restrictions: Education But Not Advocacy**

After registering as an Incidental Political Committee, City staff members will be authorized to expend time and public monies that are allowed under the following criteria provided in MCA §2-2-121(2):

(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 . . . 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), ... [w]ith 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;**

(Emphasis added)

## 2. Elected Officials

The above restriction in bold font is different with an elected official, such as the Mayor or Councilmembers. A 2005 Montana Attorney General's (AG) opinion provides some guidance on such use of public resources:

Although "public time" is not defined, a reasonable construction would be those hours for which an employee receives payment from a public employer. **Elected officials, of course, do not have specific hours of employment nor do they receive vacation leave or other time off duty. They receive annual salaries rather than hourly wages. Thus, they could be considered to be on "public time" at all times. However, as long as public facilities, equipment, supplies, or funds are not involved, elected officials are not restricted in the exercise of political speech by the provisions of Montana law.**

...

The presumption is that free speech rights are protected and only the very specific restrictions in Mont. Code Ann. § 2-2-121 can be invoked to limit a public officer's or public employee's right to political speech.

THEREFORE, IT IS MY OPINION:

**A public officer or public employee may engage in political speech so long as his or her speech does not involve the use of public time, facilities, equipment, supplies, personnel, or funds.**

51 Mont. Op. Atty. Gen. 1 (2005), P. 1 (emphasis added).

This AG opinion is attached here along with a 2002 memo from former Montana Attorney General Joseph Mazurek to a citizen group supporting a state-wide Initiative, for your review. As an example of a restriction, the Mayor and Council would not be authorized to advocate during Council meetings or City advisory board meetings since this is using public resources and staff time.



## **CONCLUSION:**

The City Attorney's Office has been advised of the stated desire to educate and inform the public as to the effects of passage or failure of the Public Safety Mill Levy ballot issue. Therefore, the City should complete the C-2 Form register as an Incidental Political Committee and report the activities, including staff time and costs expended.

As provided in § 2-2-121, City staff **should not** promote or oppose the Public Safety Mill Levy in the education efforts, but instead restrict their incidental activities to those related to determining and communicating to the public the impact of passage or failure of a ballot issue on City operations.

Undoubtedly there will be unpredictable issues and questions not addressed in this brief memorandum that arise as the education process proceeds and we will assist in answering them.

Attachments

51 Mont. Op. Atty. Gen. No. 1 (Mont.A.G.), 2005 WL 273513

Office of the Attorney General

State of Montana  
Opinion No. 1  
January 31, 2005

**HELD: A public officer or public employee may engage in political speech so long as his or her speech does not involve the use of public time, facilities, equipment, supplies, personnel, or funds.**

**\*1 PUBLIC EMPLOYEES** - Right to exercise political speech;

**PUBLIC OFFICERS** - Right to exercise political speech;

**STATUTORY CONSTRUCTION** - Construing plain meaning of words of statute;

**MONTANA CODE ANNOTATED** - Section 2-2-121, (3), (a), (b), (c).

Mr. Mathew J. Johnson  
Jefferson County Attorney  
P.O. Box H  
Boulder, MT 59632

Dear Mr. Johnson:

You have requested my opinion on a number of questions concerning public officers and political speech. I have rephrased your questions as follows:

Does [Mont. Code Ann. § 2-2-121](#) limit a public officer's or employee's right to support or oppose a political candidate or passage of a ballot issue?

[Mont. Code Ann. § 2-2-121](#) sets forth the rules of conduct for public officers and employees. Subsection (3) includes a prohibition against the use of public time and resources for political speech, as well as a provision protecting a public officer or employee's freedom to express personal political beliefs. It provides:

(3)(a) 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 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 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.

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

(Emphasis added.)

It is not personal political speech that is prohibited by subsection (3)(a); rather, it is the use of public time or resources in the presentation or furtherance of political speech. While a public officer or employee is not required to shed his public persona in order to exercise his right to free speech, he may not use public resources when expressing personal political beliefs.

**\*2** Your questions pose scenarios involving elected officers, like county commissioners and sheriffs, whose unique positions require them to work a schedule outside of the typical 8 to 5 schedule of most public employees. You ask, for instance, what of the county commissioner who receives phone calls at home in the evenings, or the sheriff who is on call 24 hours a day?

In [Keyishian v. Board of Regents of Univ. of State of N.Y.](#), 385 U.S. 589, 605-606 (1967), the Supreme Court stated, “a government employee does not relinquish all First Amendment rights otherwise enjoyed by citizens just by reason of his or her employment.” Likewise, a county commissioner or sheriff (or any other public employees or officers) does not relinquish her First Amendment rights by the mere fact that she may be a public official. Pursuant to the plain language of [Mont. Code Ann. § 2-2-121\(3\)\(a\)](#), so long as a public officer or employee is not using “public time, facilities, equipment, supplies, personnel, or funds” she may engage in political speech. See [Dahl v. Uninsured Employers’ Fund](#), 1999 MT 168, ¶ 16, 295 Mont. 173, 983 P.2d 363.

Although “public time” is not defined, a reasonable construction would be those hours for which an employee receives payment from a public employer. Elected officials, of course, do not have specific hours of employment nor do they receive vacation leave or other time off duty. They receive annual salaries rather than hourly wages. Thus, they could be considered to be on “public time” at all times. However, as long as public facilities, equipment, supplies, or funds are not involved, elected officials are not restricted in the exercise of political speech by the provisions of Montana law.

You also ask if subsection (3) prohibits a public employee or officer from signing a letter to the editor with his official title or prevents a law enforcement officer from wearing a uniform to campaign for a political issue or candidate. I conclude that, for the reasons stated above, subsection (3)(c) allows a public official to sign a letter to the editor, expressing personal political beliefs, with his official title, so long as public resources were not used to create the letter. Moreover, a sheriff would not be prohibited from wearing a uniform while campaigning for a political issue or candidate. In my opinion, neither activity would be prohibited by subsection (3).

Again, subsection (3)(a) only prevents use of “public time, facilities, equipment, supplies, personnel, or funds” in the furtherance of personal political speech. A title or a uniform is simply an accouterment of a public employee’s or officer’s position. A sheriff is not required to shed all associations, including his uniform, with his official position in order to exercise his protected right to express personal political beliefs.

The presumption is that free speech rights are protected and only the very specific restrictions in [Mont. Code Ann. § 2-2-121](#) can be invoked to limit a public officer’s or public employee’s right to political speech.

**\*3 THEREFORE, IT IS MY OPINION:**

A public officer or public employee may engage in political speech so long as his or her speech does not involve the use of public time, facilities, equipment, supplies, personnel, or funds.

Very truly yours,

Mike McGrath  
Attorney General

---

51 Mont. Op. Atty. Gen. No. 1 (Mont.A.G.), 2005 WL 273513

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.



**CROWLEY, HAUGHEY, HANSON, TOOLE & DIETRICH P.L.L.P.**  
ATTORNEYS AT LAW

100 NORTH PARK AVENUE • SUITE 300 • HELENA, MONTANA 59601-6287

P.O. BOX 797 • HELENA, MONTANA 59624-0797

TEL (406) 449-4165 • FAX (406) 449-5149

www.crowleylaw.com

STEPHEN M. BARRETT  
BARBARA C. BERRY  
\* COLBY L. BRANCH  
\* ALAN C. BRYAN  
ASHLEY HUNTERSON  
MICHAEL J. CAVALIERE  
\* PAUL C. COLLINS  
GARY M. CONNELLEY  
KEVIN L. COFFOCK  
MARCIA DAVIDOFF  
JASON A. DELMUE  
MICHAEL E. BOCKERY  
JOHN B. DICKER, JR.  
\* JON T. DYER  
MAKY SCHMIDT DYER  
SCOTT A. FISK

\* DAVID A. FREDERICKSON  
KELLIE M. GASTON  
MICHAEL W. GREEN  
ROBERT C. GRUNY  
PETER F. HARRIS  
KEVIN P. HEANEY  
\* KENNETH G. HEDGE  
JAMES R. HOLT  
LARRY A. HOLLE  
DANIEL D. JONES  
JOEL L. KALEVA  
ALLAN L. KARELL  
KEELY KEANE  
PETER M. KIRWAN  
MICHAEL B. LAKE  
WILLIAM D. LAMOND, III

\* JOHN R. LEE  
JEREMY A. LEFEBER  
JARED M. LEYKIE  
STEVEN J. LERMAN  
KARL L. LEWIS  
DENISE D. LINFORD  
CHRIS MANGIN, JR.  
WILLIAM J. MATTIK  
JOE C. MAYNARD, JR.  
JOHN R. MAYNARD  
JOSEPH F. MAZUREK  
IAN MINTOSH  
DANIEL M. MCLEAN  
\* MATTHEW F. MCLEAN  
ROBERT G. MICHELOTTI, JR.  
STEVEN R. MILCH

EMERLY E. MOORE  
DONALD R. MURRAY, JR.  
KRISTIN L. OMYE  
\* JEFFERY J. OVEN  
\* SHAHE D. PETERSON  
NICHOLE K. PIERCE III  
\* FRED C. RAYBERT  
STEVEN RUTATTO  
JAMES P. SITES  
\* BARTHA M. SUE  
LEONARD H. SMITH  
LESLIE K. THOMSON  
\* CHRISTOPHER C. VORST  
DAVID M. WAGNER  
\* STEVEN T. WALL  
NEIL G. WESTERMAN

OF COUNSEL  
GEORGE C. DALTON  
JOHN M. DIETRICH  
JAMES HECKATHORN  
DAVID L. JOHNSON  
NEIL E. KEEFER  
CAROL P. KRIED  
ARTHUR LANEY, JR.  
\* LOUIS R. MOORE  
MYLES J. THOMAS  
\* FRED E. WISEMAN  
KEMP J. WILSON  
  
\* RETIRED  
NORMAN HANSON  
JAMES M. HAUGHEY  
BRUCE T. TOOLE

500 TRANSWESTERN PLAZA II  
400 NORTH 31<sup>ST</sup> STREET  
P.O. BOX 2589  
BILLINGS, MT 59103-2589  
PHONE (406) 253-2441  
  
113 EAST BROADWAY  
P.O. BOX 1206  
WILLISTON, ND 58002-1206  
PHONE (701) 572-2200  
  
431 FIRST AVENUE WEST  
P.O. BOX 799  
KALISPELL, MT 59903-0799  
PHONE (406) 753-6644  
  
43 DISCOVERY DRIVE  
SUITE 200, P.O. BOX 10008  
BOZEMAN, MT 59713-0008  
PHONE (406) 556-1450

Attorneys are licensed in Montana unless otherwise noted; \* not licensed in Montana; \* also licensed in North Dakota; \* also licensed in Wyoming

**MEMORANDUM**

**DATE:** September 3, 2002

**TO:** Tammy Johnson, Campaign Manager, Taxpayer's Against I-145

**FROM:** Joseph P. Mazurek, Counsel to Committee

**RE:** Ethics Considerations for Local Officials Regarding Ballot Issues

We have prepared this memo in an attempt to address some of the ethical issues that a public official might face in educating his or her constituents about ballot issues that impact the official's community. Montana's ethics statutes attempt to strike a balance between public officials' duty to work in the best interests of those they serve, while preventing the improper use of public resources to further a political or personal agenda.

In 1995, the Montana Legislature enacted Senate Bill 136 which provided comprehensive ethics statutes for a variety of public officials and employees. SB 136 was codified at §§2-2-101, et seq., MCA. In 2001, the Legislature passed Senate Bill 205 which clarified the class of people covered by the ethics statutes and the activities prohibited. For purposes of the ethics statutes the definition of public officers and employees include elected officers and employees and any temporary or permanent employees of a local government. §2-2-102, MCA. A local government includes a "county, a consolidated government, an incorporated city or town, a school district, or a special district." §2-2-102, MCA. Currently §2-2-121, MCA prohibits public officers and employees from using:

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.

September 24, 2002

Page 2

§2-2-121(3)(a), MCA. The statute further defines the activities that are properly incidental to activities authorized by law relative to ballot issues as "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." §2-2-121(3)(b), MCA. A breach of the restrictions of this statute is "proof the public official has breached public duty." §2-2-121(1), MCA. Any complaints regarding a violation by an official or employee of a local government are handled by the county attorney of the county where the local government is located. §2-2-144, MCA. The county attorney can assess fines of \$50 to \$1,000 and can bring criminal charges if warranted. *Id.* If the county attorney does not bring any action, the complainant can file a civil suit in district court against the official or employee in which a prevailing complainant can recover a civil fine of \$50 to \$1,000. *Id.*

Senator Larry Baer (R-Bigfork) sponsored SB 136 in 1995. The records of the legislative hearings regarding SB 136 show that Senator Baer intended SB 136 to prevent public officials and employees from using public resources to influence elections. He cited as the primary example public school districts using school district resources to support school mill levies.<sup>1</sup> Further testimony and discussions during the legislature's consideration of SB 136 indicates that the proponents believed that public officials should not be allowed to use public resources to influence public elections in any way. In response to a questions by Senator Dorothy Eck, Representative Matt Denny testified to his belief that a public official cannot use public resources to influence a ballot issue even if he or she believes it will be beneficial for the community. However, even the proponents of SB 136 were clear to point out that nothing in SB 136 prohibited a public official from campaigning for a ballot issue on his or her own time.<sup>2</sup>

The statute expressly states that nothing in §2-2-121, MCA should be construed as denying public officers or employees their right of free speech. This simply means that public officers and employees are not prohibited from speaking out about ballot issues on their own time, or with their own resources. The prohibitions imposed by the statute just prevent the use of public resources.

The ultimate goal of the statute appears to be the elimination of the use of public funds from influencing campaigns. The rationale behind this policy seems to be that public officials should not be able to influence campaigns through the use of public resources that are not available to the opposition. Thus, even if a public officer believes a ballot issue will have a devastating effect on his or her government and constituents, public resources should not be used to oppose a ballot measure. However, in an effort to prevent abuse, the statute arguably has the potential to deny the public access to the public officers or employees who are likely to have the best information regarding the issue. In an attempt to mitigate this problem to some extent, the statute expressly permits public officers and employees to use public resources to determine the impact of a ballot measure on the local government which the officer or employee serves. While not expressly stated, the obligation to educate the public regarding the impacts is implicit in determining the impact. A public official who embarks on an investigation to determine the impacts of a ballot measure and who does not share the fruits of that investigation with his or her constituents has arguably breached an even higher duty to the public.

<sup>1</sup> i.e. Minutes of Senate Judiciary Committee, Feb. 6, 1995 p. 6.

<sup>2</sup> i.e. Minutes of Free Conference Committee on Senate Bill 136, April 11, 1995.

The issue that is not resolved by this statute is where determination of and education about the impacts of a ballot issue which are permissible become impermissible advocacy. Clearly, commissioning a study of the effects of I-145 on the local property tax base would fall under the former, while a county commission authorizing the expenditure of county resources to campaign against I-145 would fall under the latter. However, the area between those two extremes seems to be varying shades of gray. Further complicating the matter for public officers and employees is their own right of free speech. Obviously, a local official using his or her official telephone or claiming mileage or using a government vehicle to travel to a meeting to oppose a ballot measure would run afoul of the statute. However, an official giving a speech to a civic group on his or her own time would be exercising a personal right of free speech.

In evaluating what an officer or employee can and cannot do, the person must determine first if he or she is using public resources to carry out the action. If not, then the right of free speech permits almost any activity. If public resources are used, then the person must determine if the activity is advocacy or simply an effort to determine the impacts and educate the public. With these factors in mind, we believe there are activities that are clearly permissible and impermissible under §2-2-121, MCA.

First, virtually any efforts by a local official to determine the effects of I-145 on the local government would be properly incidental to the official duties. Making that information available to the public, to the extent it requires the use of public resources, would also be properly incidental. Thus, a local officer could request public employees to determine and report about the impact of I-145 on the local tax base and future revenue projections. Further, it is our belief that such a report could and should be shared with the public. This report must be impartial, and presented as facts rather than advocacy. We further believe that it falls within the duty of a local official or employee to respond in an impartial way to requests for information from members of the public and press. So long as the information is presented in a neutral way and available to opponents and proponents of I-145 alike, we believe that local governments can and must carry out their duty to keep their constituents informed.

Second, public officers have very broad freedoms to oppose I-145 on their own. Such opposition could include activities such as speaking to civic groups, signing petitions, providing testimonials to be used by private opponents in advertising campaigns, or otherwise actively participating in any opposition activity, so long as the participation is on the official's personal time.

As for prohibited activities, we believe the statute prohibits a local government from taking formal action, such as passing a resolution opposed to I-145. Similarly, the statute prohibits the use of public funds to campaign against I-145. Thus, a local government could not contribute funds, services, or other resources to the campaign against I-145.

Local government officers and employees who have questions about these issues may want to consult with their local county attorney.

## Rose Park Playground Design Voting Contest

We couldn't decide what playground designs we liked best, so we thought the community should decide!

The Parks and Recreation Department is hosting a voting contest to help choose the next playground design that will be installed at Rose Park. The Rose Park Playground will be a destination playground that is sure to be one of the favorites in town! This contest will provide a fun opportunity for the community to provide their input and help shape what the future playground at Rose Park will look like. Community members will be able to participate in the contest by finding voting links on our website and department Facebook page.



**Rose Park Playground Renovation**

Vote to choose your favorite playground design for each pod!

There are 3 different playground pods to vote on. The winning playground design from each pod will be installed at Rose Park!

There are three 3 playground pods to vote on, each with two options from top playground manufacturers. The software we are using for the contest limits each person to one vote to prevent individuals from voting multiple times. This contest will not only allow the community to have a say which playground design is installed at the park, but will be a fun outreach tool that will engage the community and create excitement for the project!

Vote on your favorite design by going to: <https://roseparkplayground.shortstack.com/cTXRbG> or by scanning the QR code below with your mobile device.

