

OFFICE OF THE CITY ATTORNEY

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Legal Opinion 2019-030

TO: Mayor John Engen; Dale Bickell; Ginny Merriam; Donna Gaukler; Betsy Willett; Marty Rehbein; Kirsten Hands; Kelly Elam; Jane Kelly; Karen Gasvoda

CC: Department Attorney

FROM: Jim Nugent, City Attorney

DATE October 30, 2019

RE: Park Board Working Groups are committees or subcommittees that shall be open to the public. Knowingly conducting a meeting of a public body in violation of Montana's open meeting laws is potentially a criminal offense

FACTS:

City Clerk Office concern has been expressed that some city park board members desire to meet as a working group without complying with Montana open meeting laws.

ISSUE(S):

- (1) Are all public body committees and subcommittees, including working groups required to be open to the public and comply with Montana public participation laws?
- (2) If a Montana municipal elected or appointed official, officer or employee "knowingly" conducts a meeting of a municipal government public body in violation of Montana's public open meeting laws is it potentially a criminal offense?

CONCLUSION(S):

- (1) Yes, pursuant to Article II, Sections 8 and 9 of the Montana Constitution, as well as Sections 7-1-4141 and 2-3-203 MCA, all meetings of Montana municipal government bodies, as well as their respective committees, subcommittees, or other entities created by a municipality shall be open to the public and shall comply with Montana's public participation laws.
- (2) Yes, pursuant to subsection 45-7-401(1)(e) MCA if a public servant "knowingly conducts a meeting of a public agency in violation of Montana's open meeting laws it could be a criminal offense. Pursuant to Montana Criminal Law definitions the term, "public servant" includes someone who has been designated (appointed) to be a public servant.

LEGAL DISCUSSION:

- (1) Montana's Constitution, pursuant to Article II, Sections 8 and 9, establishes a Montana Constitutional right for public participation and right to know and observe deliberations of public bodies. These two Montana Constitutional provisions state:

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.

Pursuant to section 7-1-4141, MCA, Montana municipal government state laws statutorily require that all meetings of Montana municipal governing bodies, boards, authorities, committees, or other entities created by a municipality shall be open to the public. Section 7-1-4141, MCA, is entitled, "PUBLIC MEETING REQUIRED", and provides:

7-1-4141. Public meeting required. (1) All meetings of municipal governing bodies, boards, authorities, committees, or other entities created by a municipality shall be open to the public except as provided in **2-3-203**.
(2) Appropriate minutes shall be kept of all public meetings and shall be made available upon request to the public for inspection and copying.

Title 2, chapter 3, MCA, is entitled, "PUBLIC PARTICIPATION IN GOVERNMENTAL OPERATIONS". Part 2 of this title and chapter is entitled "OPEN MEETINGS". Section 2-3-203, MCA, also provides that all meetings of public government bodies shall be open to the public and specifically also notes that all committees and subcommittees appointed by a public body shall be open to the public as well.

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) It is also important that public body elected officers, officers and employees be aware of the potential penalty for any public servant “knowingly” violating Montana’s open meeting laws. Pursuant to subsection 45-7-401((1)(e), MCA, if any public servant “knowingly” conducts a meeting of a public agency in violation of section 2-3-203, MCA, Montana’s public open meeting law, it could constitute a criminal offense. Section 45-7-401, MCA, states:

45-7-401. Official misconduct. (1) A public servant commits the offense of official misconduct when in an official capacity the public servant commits any of the following acts:

(a) purposely or negligently fails to perform any mandatory duty as required by law or by a court of competent jurisdiction;

(b) knowingly performs an act in an official capacity that the public servant knows is forbidden by law;

(c) with the purpose to obtain a personal advantage or an advantage for another, performs an act in excess of the public servant's lawful authority;

(d) solicits or knowingly accepts for the performance of any act a fee or reward that the public servant knows is not authorized by law; or

(e) knowingly conducts a meeting of a public agency in violation of **2-3-203.**

(2) A public servant convicted of the offense of official misconduct shall be fined not to exceed \$500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.

(3) The district court has exclusive jurisdiction in prosecutions under this section. Any action for official misconduct must be commenced by an information filed after leave to file has been granted by the district court or after a grand jury indictment has been found.

(4) A public servant who has been charged as provided in subsection (3) may be suspended from office without pay pending final judgment. Upon

final judgment of conviction, the public servant shall permanently forfeit the public servant's office. Upon acquittal, the public servant must be reinstated in office and must receive all back pay.

(5) This section does not affect any power conferred by law to impeach or remove any public servant or any proceeding authorized by law to carry into effect an impeachment or removal. (emphasis added)

Montana's state criminal code defines the term, "public servant", in subsection 45-2-101 (64), MCA, as follows:

(64) (a) "Public servant" means an officer or employee of government, including but not limited to legislators, judges, and firefighters, and a person participating as a juror, adviser, consultant, administrator, executor, guardian, or court-appointed fiduciary. The term "public servant" includes one who has been elected or designated to become a public servant.

(b) The term does not include witnesses. (emphasis added)

CONCLUSION(S):

- (1) Yes, pursuant to Article II, Sections 8 and 9 of the Montana Constitution, as well as Sections 7-1-4141 and 2-3-203 MCA, all meetings of Montana municipal government bodies, as well as their respective committees, subcommittees, or other entities created by a municipality shall be open to the public and shall comply with Montana's public participation laws.
- (2) Yes, pursuant to subsection 45-7-401(1)(e) MCA if a public servant "knowingly conducts a meeting of a public agency in violation of Montana's open meeting laws it could be a criminal offense. Pursuant to Montana Criminal Law definitions the term, "public servant" includes someone who has been designated (appointed) to be a public servant.

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/s/

Jim Nugent, City Attorney

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