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Legal Opinion 2020-013

TO: Mayor John Engen, City Council, Dale Bickell, Marty Rehbein, Kirsten Hands, Ginny Merriam

CC: Department Attorney

FROM: Jim Nugent, City Attorney

DATE August 7, 2020

RE: Public's constitutional and statutory rights to observe city council discussions and deliberations

FACTS:

Concerns have arisen that chat and Q & A have recently included communications that are occurring, that are not publically available to the ZOOM telephone participants, MCAT, Webcast, or You Tube viewers so that they are not able to observe and be timely informed about. There is also concern that citizens are using chat and Q & A to testify on matters the council is deliberating on, but all citizens observing the meeting cannot observe that part of the deliberations. Also, meeting body members have used chat to communicate about technical issues or non-substantive issues like excusing themselves from a meeting.

ISSUE(S):

Do legal concerns potentially exist with respect to the current usage of chat and Q & A during city council ZOOM meetings?

CONCLUSION(S):

The public has both a constitutional as well as a statutory right to observe the deliberations of the city council. Those rights are not able to be timely complied with pursuant to current use of chat or Q & A on deliberative matters before the body. Meeting body members may use chat to communicate technical issues to the meeting host. However, with respect to substantive comments, posting chat and Q&A comments after a meeting has adjourned is not legally sufficient. Meeting body members may use chat to communicate process and procedural items with the meeting host about technical issues or to excuse themselves from a meeting so the chair may note their departure for the record.

LEGAL DISCUSSION:

Montana's Constitution pursuant to Article II, section 9, RIGHT TO KNOW, creates a mandatory constitutional right for the public to be able to observe the deliberations of a public body, such as a city council. Article II, section 9 states as follows:

“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. (emphasis added)

Also, Montana's open meeting state laws set forth in title 2, chapter 3, part 2, MCA provide pursuant to section 2-3-201 MCA “THAT ACTIONS AND DELIBERATIONS OF ALL PUBLIC BODIES SHALL BE CONDUCTED OPENLY” (emphasis added).

These Montana Constitutional and statutory public citizen rights must be able to be timely exercised; especially with respect to any substantive action, deliberation or discussion that is occurring. Minor process and procedural items such as requesting a recess, departing a meeting early, scheduling meetings, etc. are not substantive actions or deliberations decision making by the public body city council.

A purpose of the public's ability to observe deliberations is to be able to timely observe deliberations and discussions and possibly even publicly respond; so that the public may be timely informed as to those actions, discussions or deliberations. Subsequently belatedly entering a copy of any substantive actions, discussions or deliberations into the public record is not a timely observation of the deliberations and does not comply with either the Montana Constitution or Montana state open meeting law.

Montana state law expressly empowers the city council to determine the rules of its proceedings. Both sections 7-5-4103 as well as 7-5-4121 MCA statutorily state that the city council determines or prescribes the rules of its proceedings. Therefore, it is recommended that legally if chat and Q & A are to continue to be available and their usage legal, the city council needs to establish process and procedures for its usage that complies with Montana's Constitution and statutory rights to observe the actions, discussions and deliberations of the city council.

CONCLUSION(S):

The public has both a constitutional as well as a statutory right to observe the deliberations of the city council. Those rights are not able to be timely complied with pursuant to current use of chat or Q & A on deliberative matters before the body. Meeting body members may use chat to communicate technical issues to the meeting host. However, with respect to substantive comments, posting chat and Q&A comments after a meeting has adjourned is not legally sufficient. Meeting body members may use chat to communicate process and procedural items with the meeting host about technical issues or to excuse themselves from a meeting so the chair may note their departure for the record.

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/s/

Jim Nugent, City Attorney

JN:jb