Subject: Open Meeting Analysis to Commission Quorum Activities - ATTORNEY/CLIENT COMMUNICATION -- LITIGATION SENSITIVE

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to Briggs, Joe, Larson, James, Grulkowski, Rae, Racki, Joshua, Marcinek, Phoebe

Commissioners –

Legal has been asked to issue an opinion regarding the applicability of the open meeting laws to the below-referenced Commission activities:

1. County Commission meetings every other Monday with Department Heads;
2. Commission meetings with individual Department Heads; and
3. Email communications with and between County Commissioners.

As the Commission is aware, the Montana Constitution and the Montana Open Meetings Laws codified in statute require that "actions and deliberations of all public agencies shall be conducted openly" (MCA 2-3-201, emphasis added). Further, MCA 2-3-103(1)(a) provides that the public be permitted to "participate in agency decisions that are of significant interest to the public" and that there be "public participation before a final agency action is taken that is of significant interest to the public" (emphasis added). However, MCA 2-3-112(3) exempts decisions of the commissioners "involving no more than a ministerial act" from the public participation and public comment requirements.

Taking an excerpt from Jones v. County of Missoula, 2006 MT 2 (¶ 16), 330 Mont. 205, 127 P.3d 406 to further elaborate on this matter, the Court explained, to wit:

*The term "significant public interest" is not defined in the Montana Public Meeting Act. This Court has not previously defined the term in the context of § 2–3–103(1), MCA. However, in 1998, the Attorney General addressed this issue, and concluded that "any non-ministerial decision or action of a county commission which has meaning to or affects a portion of the community requires notice to the public and the opportunity for the public to participate in the *210 decision-making process." 47 Mont. Op. No. 13 Atty. Gen. at 6. The Attorney General reasoned that the term significant public interest, as it applies to public participation in agency actions, is limited by § 2–3–112(3), MCA, which excepts a decision involving no more than a ministerial act from the requirements of § 2–3–103(1), MCA. 47 Mont. Op. No. 13 Atty. Gen. at 5. The Attorney General opined that a ministerial act was one performed pursuant to legal authority, and requiring no exercise of judgment. 47 Mont. Op. No. 13 Atty. Gen. at 5.*

Specific to the conduct of county government, MCA 7-5-2122(4) provides that "[t]he presence of a quorum of members of the board at an event or meeting of another entity or organization or traveling in the same vehicle does not constitute a meeting of the board as long as no issues over which the commission has supervision, control, jurisdiction, or advisory power are discussed or heard. County business may only be conducted during a meeting as defined in 2-3-202 for which notice has been

properly given." Elaborating further, the Court in Associated Press v. Crofts, 2004 MT 120, ¶ 22, 321 Mont. 193, 200–01, 89 P.3d 971, 975–76 opined:

Consideration of Montana's particular constitutional and statutory schemes leads us to the conclusion that Crofts' interpretation of what constitutes a public body is too narrow. We conclude that under Montana's constitution and statutes, which must be liberally interpreted in favor of openness, factors to consider when determining if a particular committee's meetings are required to be open to the public include: (1) whether the committee's members are public employees acting in their official capacity; (2) whether the meetings are paid for with public funds; (3) the frequency of the meetings; (4) whether the committee deliberates rather than simply gathers facts and reports; (5) whether the deliberations concern matters of policy rather than merely ministerial or administrative functions; (6) whether the committee's members have executive authority and experience; and (7) the result of the meetings. This list of factors is not exhaustive, and each factor will not necessarily be present in every instance of a meeting that must be open to the public. A proper consideration of these factors does not mandate that every internal department meeting meet the requirements of the open meeting laws. Meetings where staff report the result of fact gathering efforts would not necessarily be public. Deliberation upon those facts that have been gathered and reported, and the process of reaching decisions would be open to public scrutiny. The guiding principles are those contained in the constitution; that is "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," and "all meetings of public or governmental bodies ... supported in whole or in part by public funds ... must be open to the public." Art. II, Sec. 9, Mont. Const.; § 2–3–203(1), MCA (2001).

(Emphasis added).

Further guidance in interpreting and determining whether and to what extent a conversation became a deliberative decision making process is expounded on in the matter of Common Cause of Montana v. Statutory Comm. to Nominate Candidates for Com'r of Pol. Pracs., 263 Mont. 324, 326–27, 868 P.2d 604, 606 (1994). Specifically, the Court pronounced:

Due to an impending vacancy in the office in 1993, the Committee held several phone conversations in November of 1992 to discuss the qualifications of the individuals who had applied for the position. During a meeting held November 20, 1992, Mazurek, Crippen and Mercer discussed the individuals they would recommend for the position. Harper did not attend. The meeting was not announced to the public and was not attended by members of the public.

The Court ruled that a conversation among a quorum of the Committee to Nominate Candidates for the Commissioner of Political Practices (Committee) was a public meeting which necessitated public notice and held open to the public.

As there is no question that the Commission and their Department Heads are public officials and employees acting in their official capacity and paid for with public funds, the remaining factors to evaluate in determining whether and to what extent the Monday morning meetings with Department Heads, Commission meetings with individual Department Heads, and email communications with and between Commissioners constitute a "meeting" under the Open Meetings Laws, necessitates an

examination of the specific activity taking place, including but not limited to whether the Commissioners are deliberating and not just simply gathering facts and receiving reports. If the Commissioners are deliberating, do the deliberations concern matters of policy rather than merely ministerial or administrative functions. Importantly, what constitutes a discussion and information gathering dialogue is a very slippery slope and subject to interpretation wherein Cascade County and the Commission will have the burden of proof in establishing that no deliberations and/or decision making occurred and therefore legal strongly advises that the prudent course of action is to err on the side of treating the meetings as public meetings.

As the County Attorney's Office does not participate in the Monday morning meetings with Department Heads, we do not have personal knowledge as to the substance of such meetings. However, the general understanding is that the Commissioners invite their Department Heads to the meeting and during the course of the meeting call individually on each Department Head to provide an update to the Commissioners and all other attendees of the notable happenings within their individual Department, so that there is a measure of collective knowledge and information amongst the Department Heads and the Commissioners as to what each Department is doing, working on, addressing, etc. Assuming this general understanding is correct and there are no actions or deliberations of the Commissioners in any decision that is of significant interest to the public, then this Monday morning meeting is not a "meeting" as defined by MCA 2-3-202. Again, what constitutes a discussion and information gathering dialogue is a very slippery slope and subject to interpretation wherein Cascade County and the Commission will have the burden of proof in establishing that no deliberations and/or decision making occurred and therefore legal strongly advises that the prudent course of action is to err on the side of treating the meetings as public meetings.

As the County Attorney's Office does not participate in Commission meetings with individual Department Heads, we do not have personal knowledge as to the substance of such meetings. However, the general understanding is that the Commissioners meet with each Department Head individually so that the Department Head can provide more specific and detailed information to the Commissioners about matters specific to that Department and that such meetings are designed as fact gathering and reporting meetings and that deliberations, if any occur at that time, are limited to ministerial or administrative feedback and direction. Assuming this general understanding is correct and there are no actions or deliberations of the Commissioners on any decision that is of significant interest to the public, then this activity is not a "meeting" as defined by MCA 2-3-202. Again, what constitutes a discussion and information gathering conversation is a very slippery slope and subject to interpretation wherein Cascade County and the Commission will have the burden of proof in establishing that no deliberations and/or decision making occurred and/or that the topic was not "ministerial" and therefore legal strongly advises that the prudent course of action is to err on the side of treating the meetings as public meetings.

Identical to the analysis provided in the previous paragraphs, email communications with and between County Commissioners follow the same analysis. Fact gathering and reporting from, with, by and between the Commission and/or county personnel does not constitute a "meeting" as defined by MCA 2-3-202. Deliberations, if any occur at that time, so long as they are limited to ministerial or administrative feedback and direction, do not transform the email information exchange into a "meeting" as defined by MCA 2-3-202. Again, what constitutes a discussion and information gathering dialogue is a very slippery

slope and subject to interpretation wherein Cascade County and the Commission will have the burden of proof in establishing that no deliberations and/or decision making occurred and/or that the topic was not "ministerial" and therefore the most prudent course of action is to refrain from utilizing this form of communication as a quorum except in limited discrete instances where the dialogue is unquestionably fact gathering or reporting and the subject is clearly not of significant public interest.

The Board of County Commissioners need to always be alert to and cognizant of the Open Meetings Laws to ensure that they are not deliberating and making decisions on matters that are of significant interest to the public without notice, as conversations can transform and veer off into unanticipated directions. In such an event, the dialogue on that topic needs to cease in its entirety until such time as proper public notice can be posted. Alternatively, the quorum needs to be disbanded at which time further discussion with individual members of the Commission may occur. Please note, too, that MCA 7-5-2122(5) contemplates instances where an unanticipated meeting occurs and provides the following directive:

If a quorum of commissioners is present at an event or meeting or is traveling in the same vehicle when it was not possible to provide public notice under 7-1-2123 and issues over which the commission has supervision, control, jurisdiction, or advisory power are discussed or heard, the commissioners present shall provide a report at the commission's next regularly scheduled public meeting. The report must include the name of the event or meeting, the name of the persons involved, the date and location of the event or meeting, and a brief summary of the issues discussed or heard. If the commissioners' presence at the unnoticed meeting or event is reasonably expected to precipitate ensuing consideration of any issue by the board of county commissioners, details associated with the issue discussed or heard must also be included in the report.

(Emphasis added). Ultimately, as the Commissioners are aware, pursuant to MCA 2-3-213, unnoticed meetings which violate the Open Meetings Laws not only violate the law and the public's trust but may result in litigation before the district court to have any decision or action taken during the "meeting" declared void by a court of law. If the Commission is merely "fact finding" in their communications, emails, and gathering reports, there is no public meeting. However, the Open Meeting Laws are broadly construed, along with the public's "right to know" provisions of Montana's constitution and so we reiterate that prudence dictates that the Commission err on the side of caution, consider the activity of the quorum to be a meeting pursuant to MCA 2-3-202 and publicly notice the discussion and decision.

Please note that the County Attorney and I are happy to sit down with the Commission to discuss this issue should there be any questions. Have a nice evening.

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