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Legal Opinion 2012-011

TO: John Engen, Mayor; City Council; Bruce Bender, Marty Rehbein,
Department/Division Heads City Boards, Commissions, Committees,
Subcommittees, Bureaus, and Agencies.

CC: Legal Department Staff

FROM: Jim Nugent, City Attorney

DATE September 14, 2012

RE: Not legal pursuant to public citizen right to participate and right to know for
public bodies, boards, commissions, bureaus, committees, subcommittees, and
agencies to conduct votes of approval by email.

FACTS:

Recently a public body that has some City of Missoula public officials as members, was considering having its members by email, vote approval of a transportation related matter in order to meet federal and state deadlines and regulations. This was a cause of legal concern to a city representative on the public entity.

ISSUE(S):

Is it legally appropriate in Montana for a public body entity to conduct a vote of approval of a matter by electronic email?

CONCLUSION(S):

A public body's electronic email vote of approval by its members, likely is unlawful and violates Article II, sections 8 and 9 of Montana's Constitution as well as Montana state laws establishing the public's right to public participation and public right to know and observe the deliberations of the public body.

LEGAL DISCUSSION:

Article II, sections 8 and 9 of the Montana Constitution pertaining to the public "RIGHT OF PARTICIPATION" and the public "RIGHT TO KNOW" provide as follows:

“Section 8. RIGHT OF PARTICIPATION. The public has the right to expect governmental agencies TO AFFORD REASONABLE OPPORTUNITY FOR CITIZEN PARTICIPATION in the operation of the agencies PRIOR TO THE FINAL DECISION as may be provided by law. (emphasis added)

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.

The public right to observe both the actions as well as the deliberations of a public body or agency is also established as a statutory right in Montana state law. Title 2, chapter 3, part 2 MCA is entitled “OPEN MEETINGS”. Section 2-3-201 MCA provides:

“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 people’s 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 this part SHALL BE LIBERALLY CONSTRUED.” (emphasis added)

Section 2-3-203 MCA specifically pertains to “open meetings”. Pertinent subsections 2-3-203(1), (2) and (6) MCA provide:

“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.

....

(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. (emphasis added)

Several provisions of Montana state law, such as sections 2-3-101, 2-3-103, 7-1-4142 and 7-1-4143 MCA establish provisions of Montana state law requiring that the public citizen be afforded a reasonable opportunity to participate in public entity decision making prior to a final decision being made.

Section 2-3-101 MCA provides:

“2-3-101. LEGISLATIVE INTENT. The legislature finds and declares pursuant to the MANDATE OF ARTICLE II, SECTION 8, OF THE 1972 MONTANA CONSTITUTION that legislative guidelines SHOULD BE ESTABLISHED TO SECURE TO THE PEOPLE OF MONTANA THEIR CONSTITUTIONAL RIGHT TO BE AFFORDED REASONABLE OPPORTUNITY TO PARTICIPATE IN THE OPERATION OF GOVERNMENTAL AGENCIES PRIOR TO THE FINAL DECISION OF THE AGENCY.” (emphasis added)

Subsection 2-3-103(1)(a) MCA provides in pertinent part as follows:

“2-3-103. PUBLIC PARTICIPATION –GOVERNOR TO ENSURE GUIDELINES ADOPTED. (1) (a) Each agency SHALL DEVELOP PROCEDURES FOR PERMITTING AND ENCOURAGING THE PUBLIC TO PARTICIPATE IN AGENCY DECISIONS THAT ARE OF SIGNIFICANT INTEREST TO THE PUBLIC. THE PROCEDURES MUST ENSURE ADEQUATE NOTICE AND ASSIST PUBLIC PARTICIPATION BEFORE A FINAL AGENCY ACTION IS TAKEN THAT IS OF SIGNIFICANT INTEREST TO THE PUBLIC. (emphasis added)

Montana state municipal government law pertaining to public participation in municipal government operations provide:

“7-1-4142. PUBLIC PARTICIPATION. EACH MUNICIPAL GOVERNING BODY, COMMITTEE, BOARD, AUTHORITY OR ENTITY, IN ACCORDANCE WITH ARTICLE II, SECTION 8 OF THE MONTANA CONSTITUTION AND TITLE 2, CHAPTER 3, SHALL DEVELOP PROCEDURES FOR PERMITTING AND ENCOURAGING THE PUBLIC TO PARTICIPATE IN DECISIONS THAT ARE OF SIGNIFICANT INTEREST TO THE PUBLIC. (emphasis added)

“7-1-4143. PARTICIPATION. In any meeting required to be open to the public, the governing body, committee, board, authority, or entity shall adopt rules for conducting the meeting AFFORDING CITIZENS A REASONABLE OPPORTUNITY TO PARTICIPATE PRIOR TO THE FINAL DECISION. (emphasis added)

Section 2-3-202 MCA sets forth a definition of “meeting” that is applicable to both state and local governments in Montana. Section 2-3-202 MCA defines “meeting” as including hearing, discussing or acting upon a matter over which the public entity has supervision, control, jurisdiction or advisory power. Section 2-3-202 MCA states:

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.
(emphasis added)

The reference to “electronic equipment” in the statutory definition recognizes and facilitates persons participating in meetings pursuant to telephone or interactive television, internet video, etc.

Email voting is not conducive to establishing either the required open meeting public participation public right or more importantly providing the mandated Montana Constitutional and statutory right to observe the actions and deliberations of the public body that is voting a final decision approval. Further, email also does not easily facilitate timely discussion, debate and deliberations even among the membership of the public body membership that is voting and the members are not able to observe the other members and note such things as body language, facial expressions, verbal emphasis on certain words, etc. that in some instances could be an important part of discussion, debate and/or deliberations. Most importantly for the public citizen’s constitutional and statutory rights, email voting does not afford the public citizen timely reasonable opportunity for timely public observation of deliberations and/or public participation prior to the final decision vote of approval by the membership.

There also are several significant Montana Supreme Court decisions pertaining to the determination as to what constitutes a “meeting” of a public body membership. Pursuant to Board of Trustees, Huntley Project School District No. 24 v. County Commissioners of Yellowstone County, 186 M 148, 606 P. 2d 1069 (1980) a telephone conversation between two of three county commissioners approving a preliminary plat of a subdivision was a meeting and was determined to be required to be an open public meeting pursuant to Montana public open meeting laws. The Montana Supreme Court determined that the two county commissioners failed to follow statutory notice procedures and the county commissioner decision was nullified.

The Montana Supreme Court in Common Cause of Montana v. Statutory Committee to Nominate Candidates for Commissioner of Political Practices. 263 M 324, 868 P. 2d 604 (1994) indicated that Montana’s open meeting/public meeting law requires public notice of a meeting subject to the open meeting law and that without public notice a meeting is open to the public in theory only, not in practice.

Pursuant to Associated Press v. Crofts, 2004 MT 120, 321 M 193, 89 P. 3d 971 (2004) the Montana Supreme Court determined that policy meetings between the Commissioner of Higher Education for the University system and other university system senior employees was required to be subject to Montana’s open meeting laws. The Montana Supreme Court in that decision also identified some of the factors to be considered in determining whether a meeting should be subject to Montana’s open meeting laws. These Montana Supreme Court identified factors were a non-inclusive list that included:

- (1) Whether members attending the meeting were public employees acting in their official public capacities;
- (2) Whether the meetings were paid for or supported with public funds;
- (3) The frequency of the meetings;

- (4) Whether the members deliberate toward decision making rather than merely gather facts and reports;
- (5) Whether deliberations pertain to determining matters of policy or decision making rather than merely administrative or ministerial functions or whether members have executive authority or experience;
- (6) The results of the meeting with respect to decisions made; etc.;

The Montana Supreme Court in Crofts, Supra, indicated that this was not an all inclusive identification, nor did every factor identified have to be present in each instance in order to consider the meeting a public meeting subject to Montana's open meeting laws.

CONCLUSION(S):

A public body's electronic email vote of approval by its members, likely is unlawful and violates Article II, sections 8 and 9 of Montana's Constitution as well as Montana state laws establishing the public's right to public participation and public right to know and observe the deliberations of the public body.

OFFICE OF THE CITY ATTORNEY

/s/

Jim Nugent, City Attorney

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