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Legal Opinion 2007-017

TO: City Council; Mayor John Engen; Bruce Bender, CAO; Marty Rehbein, City Clerk; Nikki Rogers, Deputy City Clerk

cc: Legal Staff

FROM: Jim Nugent, City Attorney

DATE October 15, 2007

RE: Substantive deliberations about agenda items by electronic communications between city council members during city council meetings

FACTS

Currently there is a controversy occurring among city council members pertaining to several city council members electronically deliberating with each other about pending city council agenda items during city council meetings. Reportedly an example of potential deliberations involved proposing an amendment to a motion to a pending city council agenda item during a city council meeting. Concern is also being expressed by members of the public, outside the city organization regarding this issue.

Some city council members are also concerned about a majority of a quorum of city council members present at a city council meeting reportedly deliberating substantively by email during city council meetings; what constitutes a meeting; as well as the publics' constitutional right to know and observe city council deliberations and constitutional public participation right issues. Concern was expressed whether Montana open meeting laws were potentially being violated.

City council member emails during city council meetings about city council agenda items are public records.

The purpose of this legal opinion is to attempt to identify provisions of law that city council members should be aware of and informed about as a guide for the future. City council members should direct their energy and focus on how to address these matters in the future. It will not be a purpose of this legal opinion to attempt to evaluate or review any specific email(s), nor will this legal opinion attempt to conclude whether or not there was a legal problem with any actual specific email(s).

As a cautionary note, city council members should recognize that there may be additional city council actions or conduct that may cause city council members and/or members of the public to express concern, criticism and/or outcry based on appearance or perception of inappropriate or unfair city council member action or conduct. The perception may exist even though the conduct or action may be lawful. For example, conflict of interest perceptions or assertions some times generate concerns or criticisms even though no illegal conflict of interest exists. City council substantive, deliberative emails during city council meetings have the potential to generate an appearance of inappropriate, unfair conduct or action that may cause city council member or public concern or criticism even though the conduct or action may not violate the law.

ISSUES:

1. What is a quorum with respect to a group or body, such as a city council?

2. Pursuant to Montana state law is it possible to convene a quorum of a membership of a body and conduct a meeting by means of electronic equipment?

3. Should substantive deliberation and discussion of city council agenda items be conducted openly in a public setting to facilitate public observation of city council deliberations?

4. What is the general statutory remedy if a court determines that a violation of Montana's public participation, open meeting laws has occurred?

CONCLUSIONS:

1. A quorum is the minimum number of members of a group or body that must be present in order for the group or body to be able to legally transact business, such as taking action or deciding issues. Generally a quorum is a majority of the currently qualified members of the body who are eligible to vote to make the group or body's actions valid.

2. Yes. Pursuant to Montana state law a meeting is defined in Montana's public participation laws as including the convening of a quorum of a constituent membership "by means of electronic equipment."

3. Yes. Pursuant to Montana's Constitutional right to know provision in art. II, § 9 as well as Montana open meeting statutes, city council "substantive deliberation" of agenda items should be conducted openly so the constitutional and statutory public right to observe deliberations of the city council is ensured.

4. Pursuant to Mont. Code Ann. § 2-3-213 if a court determines that a violation of Montana's public participation open meeting law has occurred the court may declare the challenged decision void.

LEGAL DISCUSSION:

Issue 1.

Black's Law Dictionary, p. 1284, defines the term quorum for parliamentary law purposes as "the minimum number of members who must be present for a deliberative assembly to legally transact business." (Bryan A. Garner ed., 8th ed., West 1999).

The Missoula City Council utilizes *Mason's Manual of Legislative Procedure* as the primary source of its operating rules governing its meetings. *Mason's*, part V, chapter 44 entitled *Quorum* p. 335 identifies a quorum as:

> 1. A quorum of any deliberative body, whether a legislative body, an administrative board or a court, must be present in order to transact business and to make its acts valid. 2. The majority of the membership of a body constituted of a definite number of members constitutes a quorum for the purpose of transacting business.

Mason's § 502, p. 339, provides "ordinarily, a 'quorum' means a majority of all entitled to vote." *Mason's* § 505, p. 344, provides "no question can be decided and no official action can be taken in the absence of a quorum, except to order a call or to adjourn."

While no legal authority was located discussing the issue or concern of a majority of a quorum discussing agenda items by email during the public body's meeting, it should be noted that this could be a potential legal concern because a majority of a quorum present at a meeting if the majority acts together could control the action(s) or decision(s) made during the meeting. In essence the majority could be engaging in a de facto meeting even though the majority member email discussion is not formally or legally noticed or recognized as a "meeting." Also, it should be noted that the Missoula City Council pursuant to city council rules, specifically Rule 21 (A), allows city council committee deliberations and recommendations to occur without a quorum present. However, the city council rule provides that the public record for the committee is to indicate that a quorum was not present at the time deliberations occurred and any recommendation may have been made. The city council rule provision states in pertinent part "a committee may conduct business in the absence of a quorum but when it does so, the fact shall be noted in the report or recommendation." (Emphasis added.)

Black's Law Dictionary, p. 459, defines deliberation as "the act of carefully considering issues and options before making a decision or taking some action." (Bryan A. Garner ed., 8th ed., West 1999.)

Issue 2.

Mont. Const. art. II, §§ 8 and 9 are entitled *Right of participation* and *Right to know.* These constitutional provisions provide:

> **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. (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. (Emphasis added.)

The Montana Supreme Court indicated that the right to participate demands compliance with the right to know. Bryan v. Yellowstone County Elementary School District No. 2, 2002 MT 264, 312 Mont. 257, 60 P.3d 381.

The 1971-1972 Montana Constitutional Convention Bill of Rights Committee's proposal comments pertaining to art. II, § 9, setting forth the right to know, including the right to observe deliberations of public bodies, provide in pertinent part:

> The committee, with two dissenting votes, and after considerable reflection, adopted this provision explicitly establishing a public right to know. . . . It is a companion to the preceding right of participation. Both arise out of the increasing concern of citizens and commentators alike that government's sheer bigness threatens the effective exercise of citizenship. The committee notes this concern and believes that one step which can be taken to change this situation is to Constitutionally presume the openness of government documents and operations. The provision stipulates that persons have the rights to examine governmental documents and deliberations of all public bodies or agencies except to the extent that the demands of individual privacy outweigh the needs of the public right of disclosure. The provision applies to state government and its subdivisions. The committee intends by this provision that the deliberations and resolution of all public matters must be subject to public scrutiny. It is urged that this is especially the case in a democratic society wherein the resolution of increasingly complex questions leads to the establishment of a complex and bureaucratic system of administrative agencies. The test of a democratic society is to establish full citizen access in the face of this challenge.
>
> The committee approvingly cites section 82-3401 of the Revised Codes of Montana, 1947, which provides: "It is the intent of this act (the open meeting law) 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. (Emphasis added.)

Montana Constitutional Convention 1971-1972, vol. II, p. 631, committee report dated (2/23/1972).

Thus, the 1972 Montana Constitutional Convention delegates approvingly cited an existing state open meeting statute as an example of then current law to create a constitutional right for the public "to observe the deliberations of public bodies."

Title 2, chapter 3, part 2, Montana Code Annotated is entitled *Open Meetings*. Mont. Code Ann. § 2-3-201, the first section of this part entitled *Legislative intent-liberal construction*, provides in pertinent part:

> 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.)

The next section, Mont. Code Ann. § 2-3-202, of Montana's public participation and open meeting law defines a meeting as:

> **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.)

Thus, pursuant to Montana law, a meeting can occur by means of electronic equipment. No Montana Supreme Court cases or Montana Attorney General Opinions could be found addressing the issue of elected official emails potentially constituting a meeting. However, a Virginia Supreme Court decision indicates that the key feature to determine whether email communications between local government officials constitutes a meeting is the "simultaneity" of the email communications with each other. Beck v. Shelton (2004) 267 Va. 482, 593 S.E. 195; 2004 Va. LEXIS 40.

Beck involved contentions of multiple incidents of the mayor, vice mayor, two city council members and three city council members-elect allegedly avoiding public scrutiny pursuant to the Virginia Freedom of Information Act (FOIA) by knowing, willful, and deliberate attempts to hold "secret meetings" by holding email "secret meetings", to discuss public business and decide city issues without the input of all of the city council members and the public. Plaintiffs also complained about a street gathering at a street intersection attended by three city council members.

The Circuit Court of the City of Fredericksburg held that Virginia FOIA did not apply to city council members elect prior to their taking elected office but did hold that the email

communications involved did constitute a meeting. On a separate issue the circuit court also held that a gathering of citizens and three city council members at a street intersection for information gathering was not a meeting because there was no discussion among the city council members present with each other or otherwise with the citizens. It appears from the Virginia Supreme Court discussion that pursuant to Virginia statutory language for its open meeting laws, a meeting of four of the city council members would constitute a quorum of the city council. However, also pursuant to the statutory language an assemblage of three city council members implicated the Virginia open meeting requirements. In Beck, with the elimination of the three city council members elect, there were only two actual city council members involved so the open meeting statute was not implicated on the basis of the number of actual city council members present because only two were involved.

In Beck the supreme court agreed with the circuit court that city council members elect were not yet members of the city council as well as agreed that an informational street gathering of citizens and three city council members was not a meeting because the three city council members did not discuss city business with each other or otherwise with citizens. Also, the reason for the gathering was an informational forum about traffic issues on a specific street and the issue of traffic controls was not likely to come before the city council in the future so it was not a matter pending before the city council.

However, Beck held that the circuit court decision on the specific facts that the emails constituted a meeting was error. The Beck decision held that the specific email communications involved lacked "simultaneity" because the shortest interval between an email and a response to it was more than four hours and the longest interval was more than two days.

The Virginia Supreme Court held in pertinent part:

> Consequently, the key to resolving the question before us is whether there was an 'assemblage'. The term 'assemble' means 'to bring together' and comes from the Latin simul, meaning 'together, at the same time.' Webster's third New International Dictionary 131 (1993). The term inherently entails the quality of simultaneously. . . .
>
> As previously stated, the key difference between permitted use of electronic communication, such as email, outside the notice and open meeting requirements of FOIA, and those that constitute a 'meeting' under FOIA, and those that constitute a 'meeting' under FOIA, is the feature of simultaneity inherent in the term 'assemblage'. (Emphasis added.)

Beck, supra pp. 490 and 491.

Since the shortest interval of time between an email and a response with respect to the complained about emails was more than four hours, there was no "simultaneity" in the

specific facts of the Beck case and therefore no email meeting according to the Virginia Supreme Court.

It is also interesting to note that the Virginia statute also contained a provision indicating that the open meeting statute shall not be construed to prohibit separately contacting the membership of any public body for the purpose of ascertaining the member's position with respect to the transaction of business, whether such contact is done in person, telephone or electronic communication provided that the contact is done on a basis that does not constitute a meeting as defined by Virginia law.

Issue 3.

Pursuant to Mont. Const. art. II, § 9, public right to know, city council deliberations pertaining to city council agenda items should be conducted openly in public so that the public has an opportunity to observe the deliberations. The public's right to observe city council deliberations is important for complying not only with Montana's public right to know law but also for facilitating the public's right to public participation by allowing the public to observe deliberations so as to monitor them and potentially participate to support, take issue with, note flawed reasoning, etc.

A California attorney general opinion can serve as a helpful guide to city council members as to the importance of ensuring the public's ability to observe city council deliberations while noting and emphasizing legal problems associated with "substantive discussion" emails between members of a local public body with respect to their actions.

The California attorney general concluded:

> A majority of the board members of a local public agency may not e-mail each other to develop a collective concurrence as to action to be taken by the board without violating the Ralph M. Brown Act even if the e-mails are also sent to the secretary and chairperson of the agency, the e-mails are posted on the agency's Internet website, and a printed version of each e-mail is reported at the next public meeting of the board. (Emphasis added.)

2001 Cal. AG LEXIS 6; 84 Op. Atty Gen. Cal. 30.

California's Ralph M. Brown Act generally requires legislative bodies of local public agencies to hold their meetings open to the public. The issue being addressed by the California attorney general was that a majority of board members of a local board were sending emails to each other pertaining to their agenda action items. The California attorney general noted:

> The purposes of the Brown Act are thus to allow the public to attend, observe, monitor, and participate in the decision-making process at the local level of government. Not only are the actions taken by the legislative body to be monitored by the public but also the deliberations leading to the actions

taken. (See *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 373, 375; *Frazer v. Dixon Unified School Dist.* (1993) 18 Cal.App.4th 781, 795-797; *Stockton Newspaper, Inc. v. Redevelopment Agency* (1985) 171 Cal.App.3d 95, 100; *Sacramento Newspaper Guild v. Sacramento County Bd. of Suprs.* (1968) 263 Cal.App.2d 41, 45.) "The term 'deliberation' has been broadly construed to connote 'not only collective discussion, but the collective acquisition and exchange of facts preliminary to the ultimate decision.' [Citation.]" (*Rowen v. Santa Clara Unified School Dist.* (1981) 121 Cal.App.3d 231, 234; see *Roberts v. City of Palmdale, supra*, 5 Cal.4th at p. 376.)

The question presented for resolution concerns e-mail messages between members of the board of a local public agency. May a majority of the members e-mail each other to develop a collective concurrence as to action to be taken by the board without violating the Brown Act if the e-mails are sent to the secretary and chairperson of the agency, the e-mails are posted on the agency's Internet website, and a printed version of each e-mail is reported at the next public meeting of the agency? We conclude that such conditions would not be sufficient to prevent a violation of the Brown Act. (Emphasis added.)

2001 Cal. AG LEXIS 6; 84 Op. Atty Gen. Cal. 30, p. 2.

California's governing statute prohibited "communication, personal intermediaries, or technological devices" that were "employed by a majority of the members of the legislative body to develop a collective concurrence as to action to be taken on an item by the members of the legislative body." The California attorney general noted that the governing statute does not cover situations involving "less than a majority" of those covered by the statute.

The California attorney general went on to explain the legal reasoning for the conclusion that the email communications posed legal problems for the board members:

As for the requirement that the e-mails be employed "to develop a collective concurrence as to action to be taken on an item," we note that such activity would include any exchange of facts (see Roberts v. City of Palmdale, supra, 5 Cal.4th at pp. 375-376; Frazer v. Dixon Unified School Dist., supra, 18 Cal.App.4th at p. 796) or, as we have previously explained in our pamphlet on the Brown Act, substantive discussions "which advance or clarify a member's understanding of an issue, or facilitate an agreement or compromise amongst members, or advance the ultimate resolution of an issue" (Cal. Dept. of Justice, The Brown Act, Open Meetings For Local Legislative Bodies (1994), p. 12) regarding an agenda item.

We find no distinction between e-mails and other forms of communication such as leaving telephone messages or sending letters or memorandums. If e-mails are employed to develop a collective concurrence by a majority of board members on an agenda item, they are subject to the prohibition of section 54952.2, subdivision (b). Application of the statute in

such circumstances furthers the "broad policy of the act to ensure that local governing bodies deliberate in public." (Roberts v. City of Palmdale, supra, 5 Cal.4th at p. 373; see Frazer v. Dixon Unified School Dist., supra, 18 Cal.App.4th at pp. 794-795; Stockton Newspapers, Inc. v. Redevelopment Agency, supra, 171 Cal.App.3d at p. 100; Sacramento Newspaper Guild v. Sacramento County Board of Suprs., supra, 263 Cal.App.3d at p. 45).

We recognize that the three conditions of (1) concurrently sending copies of the e-mails to the secretary and chairperson of the agency, (2) concurrently posting the e-mails on the agency's Internet website, and (3) reporting the contents of the e-mails at the agency's next public meeting would allow the deliberations to be conducted "in public" to some extent. Nevertheless, the deliberations would not be conducted as contemplated by the Brown Act. Members of the public who do not have Internet access would be unable to monitor the deliberations as they occur. All debate concerning an agenda item could well be over before members of the public could be given an opportunity to participate in the decision-making process. (See Frazer v. Dixon Unified School Dist., supra, 18 Cal.App.4th at p. 794; Cal. Dept. of Justice, The Brown Act, Open Meetings For Local Legislative Bodies, supra, p. 12.) Subdivision (b) of section 54952.2 is straightforward and unambiguous. The proposed conditions satisfy neither the specific language nor all the critical purposes of the statute.

We thus conclude that a majority of the board members of a local public agency may not e-mail each other to develop a collective concurrence as to action to be taken by the board without violating the Brown Act even if the e-mails are also sent to the secretary and chairperson of the agency, the e-mails are posted on the agency's Internet website, and a printed version of each e-mail is reported at the next public meeting of the board. (Emphasis added.)

2001 Cal. AG LEXIS 6; 84 Op. Atty Gen. Cal. 30, p. 3.

Issue 4.

Generally, the statutory legal remedy for violating Montana's public participation open meeting laws is that pursuant to Mont. Code Ann. § 2-3-213 a court may void the decision made by the public body.

2-3-213. Voidability. Any decision made in violation of 2-3-203 may be declared void by a district court having jurisdiction. A suit to void a decision must be commenced within 30 days of the date on which the plaintiff or petitioner learns, or reasonably should have learned, of the agency's decision. (Emphasis added.)

The 2007 Montana State Legislature amended Mont. Code Ann. § 2-3-213 effective October 1, 2007, pursuant to Senate Bill 177, at the end of the statutory provision striking

the word "decision" and inserting the new language "date on which the plaintiff or petitioner learns, or reasonably should have learned of the agency's decision." This amendment extends the time in which a petition may be filed with the district court to set aside an agency decision made in violation of the public participation in government statutes in Title 2, chapter 3, parts 1 and 2 Montana Code Annotated.

Mont. Code Ann. § 2-3-203, which is cross-referenced in § 2-3-213 quoted above, provides:

> **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. (Emphasis added.)

As noted earlier, the public perception or the perception by other city council members that city council action or conduct is inappropriate, improper, unfair, unlawful, etc. even if the action or conduct is legal could cause citizen and/or city council member concern, complaint and outcry that could generate public, news media or other entity coverage, comment or concern. The city council could address some potential issues by addressing or clarifying them through the city council adopted rules so that some source of authority may be referenced if an issue arises.

CONCLUSIONS:

1. A quorum is the minimum number of members of a group or body that must be present in order for the group or body to be able to legally transact business, such as taking action or deciding issues. Generally a quorum is a majority of the currently qualified members of the body who are eligible to vote to make the group or body's actions valid.

2. Yes. Pursuant to Montana state law a meeting is defined in Montana's public participation laws as including the convening of a quorum of a constituent membership "by means of electronic equipment."

3. Yes. Pursuant to Montana's Constitutional right to know provision in art. II, § 9 as well as Montana open meeting statutes, city council "substantive deliberation" of agenda items should be conducted openly so the constitutional and statutory public right to observe deliberations of the city council is ensured.

4. Pursuant to Mont. Code Ann. § 2-3-213 if a court determines that a violation of Montana's public participation open meeting law has occurred the court may declare the challenged decision void.

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