

**BEFORE THE COMMISSIONER OF POLITICAL PRACTICES  
STATE OF MONTANA**

In Re the Ethics Complaint of M v. M	Cause No. COPP 2018-ETH-002  <b>DECISION DISMISSING ETHICS COMPLAINT</b>
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On November 2, 2018, Matthew Monforton lodged an Ethics Complaint (EC) with the Commissioner of Political Practices (COPP) against Jonathan Motl, the former COPP. The current COPP, Jeff Mangan, recused himself from participating in this matter pursuant to Mont. Code Ann. § 13-37-111(3), and appointed the undersigned as Deputy Commissioner of Political Practices to preside over this matter. On November 14, 2018, I directed Mr. Motl to provide an answer to the EC, as allowed by Mont. Code Ann. § 2-2-136(1), within 21 days. Mr. Motl lodged his response (ECR) on November 28, 2018.

In November 2018, the Office of the Commissioner of Political Practices revised the Ethics Complaint Procedures, stating in part:

...the Commissioner will issue an initial determination accepting or rejecting the lodged ethics complaint for filing within 60 days of receipt of the complaint unless the Commissioner notifies the parties in writing to explain additional time is necessary...

The revised procedure did not address the timeframe for this initial determination when a response is lodged to a complaint. The Deputy Commissioner determined that a reasonable interpretation of the procedure was that the initial determination generally will be made within 60 days of receipt of all materials – both the complaint and the response – necessary to make that determination. The Deputy Commissioner finds, and hereby notifies the parties, that 65 days from the filing of the response was necessary to prepare this decision.

### **JURISDICTION**

The Commissioner of Political Practices has subject matter jurisdiction to hear and decide complaints lodged under Montana’s Code of Ethics against state employees. Mont. Code Ann. § 2-2-136(1)(a). Mr. Monforton asserted, “The Commissioner of Political Practices has jurisdiction over this matter pursuant to Mont. Code Ann. §§ 2-2-104 & 2-2-136(1)(a).” EC, ¶ 1. Mr. Motl denied that jurisdiction exists. ECR, p. 2. The assertion that jurisdiction exists pursuant to Mont. Code Ann. § 2-2-104 is not supported by further analysis in the EC. Nowhere does the EC identify a subsection of that statute that may apply or that alleges facts that clearly apply to that statute. Having failed to advance an argument that jurisdiction exists under Mont. Code Ann. § 2-2-104, the Deputy Commissioner determines that Mr. Monforton has waived this assertion. Therefore, Mont. Code Ann. § 2-2-104 is denied as a basis for jurisdiction for this EC.

The assertion that jurisdiction exists pursuant to Mont. Code Ann. § 2-2-136(1)(a)

is supported by the EC. That subsection provides in relevant part, “A person alleging a violation of this part by a state officer, legislator, or state employee may file a complaint with the commissioner of political practices.” Mr. Monforton alleges that Mr. Motl violated Mont. Code Ann. § 2-2-121(3)(a). EC ¶ 36. This allegation provides subject matter jurisdiction under Mont. Code Ann. § 2-2-136(1)(a). Mr. Motl was, at all times relevant to the allegations in the EC, a state government public employee, as defined in Mont. Code Ann. § 2-2-102(7).<sup>1</sup> This fact provides personal jurisdiction under Mont. Code Ann. § 2-2-136(1)(a). Therefore, Mont. Code Ann. § 2-2-136(1)(a) establishes as a basis for jurisdiction for this EC.

Having determined that subject matter and personal jurisdiction exist, the Deputy Commissioner must next determine whether to accept the lodged EC for filing. Unless a complaint is dismissed as frivolous, or for failing to state a claim of a potential violation of the code, the Commissioner “shall hold an informal contested case hearing.” Mont. Code Ann. § 2-2-136(1)(c). Having reviewed the EC and the ECR, the Deputy Commissioner determines that no additional factual development is necessary. Accordingly, the Deputy Commissioner issues the following decision without holding a contested case hearing on the EC.

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<sup>1</sup> The fact that Mr. Motl was the COPP at all times relevant to the allegations in the EC does not affect the jurisdictional analysis. Mr. Motl had left that position prior to the EC being lodged. As a result, the alternate process in Mont. Code Ann. § 2-2-136(1)(a) for complaints against “the commissioner or another individual employed in the office of the commissioner” does not apply. Mr. Motl has not been the commissioner or otherwise employed in the office of the commissioner since before the EC was lodged.

## **CONTENTIONS**

Mr. Monforton contends that Mr. Motl violated the Montana Code of Ethics through statements Mr. Motl made to news media in early November 2016, shortly before the 2016 general election. Specifically, Mr. Monforton contends that Mr. Motl engaged in improper election advocacy in violation of Mont. Code Ann. § 2-2-121(3)(a) when Mr. Motl made statements about Representative Brad Tschida, about an ethics complaint lodged by Rep. Tschida with Mr. Motl (as COPP) about Governor Steve Bullock and a state employ, and about Rep. Tschida's public disclosure of that ethics complaint. Mr. Motl admits that he made the statements but contends that he did not engage in improper election advocacy.

## **FINDINGS OF FACT**

1. In September 2016, Representative Brad Tschida, a member of the Montana House of Representatives from House District 97 (a Missoula legislative district) lodged an ethics complaint against Governor Steve Bullock and a member of his cabinet.
2. By November 1, 2016, Mr. Motl, who was the COPP at that time, had not made any decision on whether to accept Rep. Tschida's ethics complaint for filing.
3. On the evening of November 1, 2016, Rep. Tschida emailed a copy of the ethics complaint to other legislators.
4. On November 2, 2016, Mr. Motl spoke with a reporter for the Great Falls Tribune for an article that the Tribune published late in the afternoon that day.
5. Mr. Motl participated in that Great Falls Tribune interview on public time while using public facilities and public equipment, including a state office and state telephone.

6. During that interview, Mr. Motl stated:

There is no exception that allows a complaint to escape confidentiality,” [Mr. Motl] said. “If a sitting legislator has released an ethics complaint, it is a violation of law and it’s outrageous anybody would breach a state statute in the last week of campaign.

7. Mr. Motl stated, “[Rep. Tschida] breached confidentiality in the last week of the election in specific violation of state law. This is a serious breach. It is serious because of the timing of it.”

8. Mr. Motl stated, “There is an absolute statutory confidentiality that Mr. Tschida cannot waive. He broke confidentiality laws and broke state law, he can’t do that.”

9. Mr. Motl also stated, “His issue is not larger than the requirements of the law. Mr. Tschida is not God.”

10. During the interview Mr. Motl discussed a penalty for the alleged violation, which the Great Falls Tribune reported as, “Motl said he would seek a severe penalty.”

11. Mr. Motl admits making the statements during the Great Falls Tribune interview but denies Mr. Monforton’s characterization of those statements in the EC. Mr. Motl denies stating “he would seek a severe penalty”; that statement in the Great Falls Tribune article did not quote Mr. Motl.

12. On November 3, 2016, Mr. Motl spoke during an interview broadcast on KGVO, a radio station in Missoula.

13. Mr. Motl participated in that KGVO interview on public time while using public facilities and public equipment, including a state office and state telephone.

14. During that interview, Mr. Motl stated:

Mr. Tschida, by releasing an ethics complaint violated a specific section of state law to which there is no exception.

...

Mr. Tschida, as a sitting legislator, chose to violate a specific section of state statute and he did it in the last days of a campaign, which I think magnifies the seriousness of what he did.

...

And Mr. Tschida, in complete violation of the specific directions in state

law to which there – I just read it to your listeners – I don't think there can be any doubt about what that law says. Release the complaint, I would presume for political purposes in the last days of a political campaign, and he doesn't have any authority to do that. His legislative status – he's not in the session, he's not speaking on the floor, there's nothing – no bill that's pending, and he has no special status as a citizen that gives him a right to decide which laws he's going to follow and laws he doesn't. And, so I think it's a....That's our stance – that it's just outrageous that he did what he did at the time that he did it.

15. Mr. Motl also stated, “[Tschida] has personal responsibility for his actions; and so he'll need to deal with the consequences of breaking state law.”

16. Mr. Motl engaged in an exchange with the interviewer for KGVO, as follows:

Interviewer: And what are those consequences?

Mr. Motl: There's, uh, the main consequence that befalls an official who, um, violates a mandatory duty is official misconduct.

Interviewer: And that would be a charge in civil court?

Mr. Motl: No, it's criminal court.

Interviewer: It's a criminal court charge?

Mr. Motl: Yes.

Interviewer: And so will the – will your office be bringing a...

Mr. Motl: It is inappropriate for me to – to say what anything in particular in the timing that we've got left here. And I – I simply won't do it. And I wouldn't expect anybody would consider bringing something for or against Mr. Tschida until –

Interviewer: Until after the Eighth?

Mr. Motl: Yes.

17. Representative Tschida was a candidate for re-election to Montana's House of Representatives and his name was on the ballot in November 2016.

18. Mr. Motl admits making the statements during the KGVO interview but denies Mr. Monforton's characterization of those statements in the EC.

19. Mr. Motl was upset when he spoke to the press concerning Rep. Tschida's disclosure.

20. Mr. Motl claimed that in making the statements during the Great Falls Tribune and KGVO interviews he was “defending a statute on behalf of the people of Montana.”<sup>2</sup>
21. The general election was held on November 8, 2016.

### CONCLUSIONS OF LAW

1. Montana Code Ann. § 2-2-121(3) provides in relevant part

(3) (a) Except as provided in subsection (3)(b), a public officer or public employee may not use public time, facilities, equipment, supplies, personnel, or funds to solicit support for or opposition to any political committee, the nomination or election of any person to public office, or the passage of a ballot issue unless the use is:

(i) authorized by law; or

(ii) properly incidental to another activity required or authorized by law, such as the function of an elected public officer, the officer’s staff, or the legislative staff in the normal course of duties.

(b) As used in this subsection (3), “properly incidental to another activity required or authorized by law” does not include any activities related to solicitation of support for or opposition to the nomination or election of a person to public office or political committees organized to support or oppose a candidate or candidates for public office.

2. The Montana Code of Ethics does not provide a specific definition of the phrase “support for or opposition to,” so it is reasonable to look to other definitions in statute. Mont. Code Ann. § 1-2-107. It is appropriate to apply the definition of “support or oppose” in Mont. Code Ann. § 13-1-101(50)(b), which provides in relevant part:

(50) “Support or oppose”, including any variations of the term, means:

(b) otherwise referring to or depicting one or more clearly identified candidates, political parties, or ballot issues in a manner that is susceptible of no reasonable interpretation other than as a call for the nomination, election, or defeat of the candidate in an election, the election or defeat of the political party, or the passage or defeat of the ballot issue or other question submitted to the voters in an election.

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<sup>2</sup> Mr. Motl’s explanation was provided during his deposition in litigation regarding the same underlying facts. That litigation and its resolution did not address the Montana Code of Ethics issues presented in the EC.

3. Mr. Monforton argues that Mr. Motl violated Mont. Code Ann. § 13-1-101(50)(b) because, “[Mr.] Motl made his statements [during the Great Falls Tribune and KGVO interviews] in such a manner that was susceptible of no reasonable interpretation other than as a call for the defeat of Rep. Tschida in the election subsequently held on November 8, 2016.”
4. Mr. Motl’s statements were made using public time, public facilities, and public equipment, including a state-owned office building and state telephone.
5. Mr. Monforton argues that Mr. Motl violated Mont. Code Ann. § 2-2-121(3)(a) when he made the statements using public time, public facilities, and public equipment.
6. Mr. Monforton argues that no exception under Mont. Code Ann. § 2-2-121(3)(a) exists, such as Mr. Motl’s statements being “properly incidental to another activity required or authorized by law.”
7. In short, Mr. Monforton argues that Mr. Motl engaged in improper election advocacy in violation of the Montana Code of Ethics.
8. Mr. Motl argues that a “reasonable alternative purpose” existed for his statements, which was his “defense of statute” as the COPP. Mr. Motl argues this purpose was “consistently articulated, without any contradiction, through following litigation.” Mr. Motl further argues that the EC offers “no facts ... that challenge [Mr. Motl’s] stated reasonable alternative purpose....”
9. Mr. Motl’s “reasonable alternative purpose” argument addresses the “no reasonable interpretation” provision of Mont. Code Ann. § 13-1-101(50)(b).
10. Mr. Motl also argues that even if his statements met the requirements of Mont. Code Ann. § 13-1-101(50)(b), those statements were “authorized by law” and, thus, not a violation of Mont. Code Ann. § 2-2-121(3)(a).
11. In short, Mr. Motl argues that he did not engage in improper election advocacy in violation of the Montana Code of Ethics and that even if his statements could be interpreted only as advocacy those statements were permissible.
12. There are no material facts in dispute about the substance of Mr. Motl’s statements. No further hearing or other evidentiary development is necessary to reach a decision in this matter. The only issue remaining for decision is the



interpretation of Mr. Motl's statements, which requires the application of Montana law to the undisputed facts.

13. Mr. Motl's statements neither supported nor opposed Rep. Tschida's candidacy because a reasonable interpretation of those statements was that they were made in defense of the statutes governing Mr. Motl's work as COPP.
14. Mr. Motl consistently explained the "defense of statute" purpose for his statements, including under oath during his deposition.
15. Mr. Motl's "defense of statute" explanation was directed at the confidentiality provision in Mont. Code Ann. § 2-2-136(4), which provides in relevant part:

[A] complaint and records obtained or prepared by the commissioner in connection with an investigation or complaint are confidential documents and are not open for public inspection. The complainant and the person who is the subject of the complaint shall maintain the confidentiality of the complaint and any related documents released to the parties by the commissioner until the commissioner issues a decision.
16. Montana Code Ann. § 2-2-136(4) was, and is, the law in Montana at all times relevant to the EC, even though enforcement of the confidentiality provision for ethics complaints against elected officials was subsequently and permanently enjoined in *Tschida v. Mangan*, No. CV-16-102-H-BMM (D. Mont., December 15, 2017).
17. Mr. Motl characterizes his statements "as taken in protection of the confidentiality provision of Montana's principal ethics statute. An action taken in protection of the ethics statute, falls squarely within the COPP's published mission of promoting and protecting the 'fair' campaign/governance conduct of Montana candidates and public officials." Mr. Motl's "defense of statute" characterization of his statements is reasonable where, as here, Montana law contained a confidentiality provision that Rep. Tschida breached. That breach, the circumstances surrounding that breach, and the potential enforcement consequences of that breach were at the heart of Mr. Motl's statements.
18. Mr. Motl did not engage in any express advocacy in support of or in opposition to Rep. Tschida's re-election.
19. The EC characterizes Mr. Motl's statements as being "in opposition to Rep. Tschida" and asserted that they were made "in such a manner that was susceptible

of no reasonable interpretation other than as a call for the defeat of Rep. Tschida in the election subsequently held on November 8, 2016.” This characterization and assertion are inconsistent with the reasonable interpretation that the statements were in defense of the statutes applicable to the COPP.

20. The EC’s characterization of Mr. Motl’s statements as being “disparaging remarks about Rep. Tschida’s character, qualifications, and fitness for office, culminating in an accusation that Rep. Tschida committed a crime” is disputed by Mr. Motl. Mr. Motl’s characterization of his statements as a “defense of statute” is disputed by Mr. Monforton. Any individual reading the Great Falls Tribune article or listening to the KGVO broadcast might reasonably interpret the statements either way, or perhaps another way unaddressed by the parties, depending upon that individual’s experiences and predispositions. The question of how any specific individual might have interpreted Mr. Motl’s statements is not determinative where, as here, the statements as a matter of law could reasonably have been interpreted either way.
21. Mr. Motl’s statements did not constitute “opposition” to Rep. Tschida’s re-election as that term is defined in Mont. Code Ann. § 13-1-101(50) because those statements *were* susceptible to multiple, reasonable interpretations, which excludes the statements from the definition of “opposition” pursuant to Mont. Code Ann. § 13-1-101(50)(b). By definition, and as a matter of law, Mr. Motl’s statements did not constitute improper election advocacy in opposition to the re-election of Rep. Tschida, even though some individuals may reasonably have interpreted the statements to oppose Rep. Tschida’s re-election.
22. Because Mr. Motl’s statements did not constitute improper election advocacy, the issue of whether Mr. Motl violated Mont. Code Ann. § 2-2-121(3)(a) must be answered in the negative. Mr. Motl did use public facilities and public equipment, including a state office and state telephone, to discuss Rep. Tschida’s disclosure of the ethics complaint, but that use was not in opposition to the re-election of Rep. Tschida as the term “opposition” is defined in statute.
23. The EC fails to state a claim for a potential violation of the Montana Code of Ethics that may be filed pursuant to Mont. Code Ann. § 2-2-136(1)(a).
24. The EC lodged by Mr. Monforton is dismissed pursuant to Mont. Code Ann. § 2-2-136(1)(b) and, therefore, not accepted for filing.
25. This decision is the final decision of the Deputy Commissioner in this matter.

## ORDER

1. Jurisdiction is DENIED pursuant to Mont. Code Ann. § 2-2-104 as Mr. Monforton has waived that contention;
2. Jurisdiction is ACCEPTED pursuant to Mont. Code Ann. § 2-2-136(1)(a);
3. The lodged EC is DISMISSED without filing pursuant to Mont. Code Ann. § 2-2-136(1)(b) for failure to state a claim for a potential violation of the Montana Code of Ethics.

## NOTICE

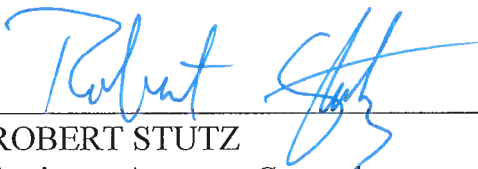
The parties are hereby notified, pursuant to Mont. Code Ann. § 2-2-136(3), that this dismissal is a final agency order, and either party may seek judicial review of the Deputy Commissioner's determination pursuant to Mont. Code Ann., Title 2, Chapter 4, part 7.

The parties are further informed that, having now issued a decision on this matter, the Complaint, record established, and Decision are available for public inspection, Mont. Code Ann. § 2-2-136(4).

ORDERED this 1 day of February, 2019.

AGENCY LEGAL SERVICES BUREAU  
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Helena, MT 59620-1440

DEPUTY COMMISSIONER OF POLITICAL PRACTICES

By:   
ROBERT STUTZ  
Assistant Attorney General

**CERTIFICATE OF SERVICE**

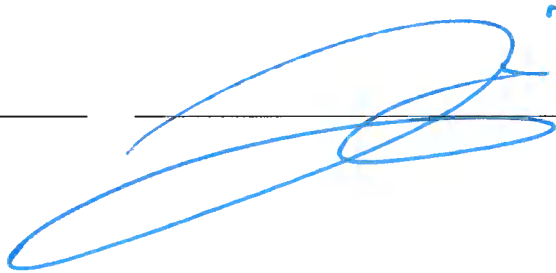
I hereby certify that I caused a true and accurate copy of the foregoing to be mailed  
to:

Matthew Monforton  
32 Kelly Court  
Bozeman, MT 59718

Jonathan Motl  
3755 Juniper Drive  
Helena, MT 59602

DATED: \_\_\_\_\_

2/1/19

A large, stylized handwritten signature in blue ink, written over a horizontal line. The signature is cursive and appears to be the name of the certifier.