

# Commissioner of Political Practices Policies and Procedures

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## Office Management Policy 2.2 Confidentiality of Investigative Documents

Adopted 4/17/07

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### Preamble

The Commissioner's mandate is to ensure that campaign and lobbying contributions and expenditures are accurately disclosed to the public in a timely way. Formal complaint investigations require examination of documents and information not typically disclosed in campaign or lobbying reports.

Historically, those who are investigated by the Commissioner have requested that certain documents provided during an investigation not be publicly disclosed. They may demand an assurance of confidentiality as a condition of providing sensitive documents (e.g., campaign strategy or coordination documents).

The Commissioner is constitutionally obligated to balance the public's right to know with individual privacy rights under Article II, Sections 9 and 10 of the Montana Constitution. With this policy, we intend to balance a host of constitutional, statutory, and other public policy directives in determining when or if documents, files, or information obtained during an investigation may be publicly disclosed.

### Policy

Upon receipt of a complaint alleging a violation of campaign finance and practices or lobbying laws or rules, the Commissioner will review the complaint to identify any potential claims of privacy, privilege, or confidentiality. If the review does not reveal any potential claims, the complaint will be publicly disclosed. The commissioner's determinations concerning the validity of a complaint under 44.10.307 or 44.12.213, ARM will also be publicly disclosed.

Following an investigation of a formal complaint provided for in 44.10.307 or 44.12.213, ARM, the signed *Summary of Facts and Statement of Findings* is sent to the complainant and the respondent and subsequently disclosed to the public.

Information from investigative documents and files deemed relevant to the determination of whether a violation of applicable statutes and rules has occurred may be discussed and disclosed in the Commissioner's *Summary of Facts and Statement of Findings*. But investigative documents, files, and information are confidential and will not be publicly disclosed except as provided in this policy statement.

### Protection of confidential documents

1. Access to investigative documents, files, and information is restricted to authorized staff of the Commissioner, the Commissioner's authorized agents (e.g. investigators), and the appropriate county attorney (as specified in section 2), at least until such time as investigative documents, files, and information are publicly disclosed as provided in this policy statement.

2. The Commissioner may release investigative documents, files, and information to the appropriate county attorney so that a county attorney may exercise the powers conferred under sections 13-37-124 and 13-37-125, MCA.
3. Documents that have been previously disclosed to the public are not entitled to confidentiality and will be available for public review.
4. Investigative documents for which no claim of privacy, privilege, or confidentiality can reasonably be asserted will be available for public review subject to the procedures in sections 8-13 of this policy statement.
5. If a person who provides documents or other written information as part of an investigation executes a written waiver of any right of privacy, confidentiality, or privilege that may apply, the documents covered by the written waiver will be available for public review subject to a determination made under section 9 (b).
6. If a court of competent jurisdiction issues an order directing that investigative documents, files, or information be publicly disclosed, the documents, files, and information covered by the order will be available for public review.
7. Further, investigative documents, files, or information may be offered into evidence or otherwise disclosed by the Commissioner as part of an enforcement proceeding or litigation in a court of competent jurisdiction subject to any applicable protective order issued by the court.

### **Procedures for resolving disputes**

8. If a request for public disclosure or access is received, the Commissioner will contact each person who provided documents, files, or information during the investigation. The Commissioner will request that each person state in writing:
  - a. Whether the person asserts a privacy right that would preclude public disclosure;
  - b. Whether the person asserts that a privilege, law, or public policy precludes the disclosure of specific documents; and
  - c. Whether the person waives any right of privacy, privilege, law, or public policy that would prevent the Commissioner from disclosing specific documents and information.
9. After reviewing a written response provided under section 8, the Commissioner will:
  - a. Identify which documents, if any, are subject to a claim of privacy, privilege, or confidentiality by the person who provided them.
  - b. Identify which documents, if any, involve a claim of privacy, privilege, or confidentiality of a person other than the person who provided the documents.
  - c. Documents for which no claim of privacy, privilege, or confidentiality has been asserted or determined under sections 9 (a) or 9 (b) will be disclosed.
10. For documents or information subject to a claim of privacy, privilege, or confidentiality by the person who provided them, the Commissioner will determine:
  - a. Whether a claim of confidentiality based on a right of privacy is reasonable under Article II, Sections 9 and 10 of the Montana Constitution or any other applicable statutory or constitutional provision, or court decision; or

- b. Whether a claim of confidentiality based on privilege, law, or public policy is reasonable based on applicable constitutional provisions, statutes, and case law.
11. After making the determinations in sections 9 (b) and 10, the Commissioner will provide the person asserting a claim of privacy, privilege, or confidentiality with a list identifying those items entitled to confidentiality, as well as those the Commissioner has determined should be publicly disclosed. If the person who provided the investigative documents, files, or information agrees with the Commissioner's determination, the Commissioner will:
  - a. Disclose to the person requesting access to the investigative documents, files, or information copies of any documents the Commissioner has determined should be publicly disclosed.
  - b. Simultaneously disclose to the person requesting access to the investigative documents, files, or information the list identifying those items that the Commissioner has determined should *not* be publicly disclosed and state the reasons why confidentiality is required.
  - c. The Commissioner and the person who provided the investigative documents, files, or information may also agree to a revised determination regarding the public disclosure/confidentiality. Any such revised determination is subject to the disclosure/confidentiality requirements of sections 11 (a) and 11 (b).
12. If, after complying with the procedures specified in sections 9 and 10 of this policy statement, the person who provided the investigative documents, files, or information disagrees with the determination regarding public disclosure and/or confidentiality, the Commissioner will:
  - a. Advise the person who provided the items and the person requesting access to them that the Commissioner will publicly disclose those items the Commissioner has determined should be publicly disclosed.

Public disclosure will occur not less than ten and not more than fifteen days after giving notice under this subsection, unless a court of competent jurisdiction orders otherwise. The Commissioner will also simultaneously disclose the list identifying the items that the Commissioner has determined should not be publicly disclosed and state the reasons why. Under this provision only those documents that are the subject of a dispute between the provider and COPP will be withheld. Documents not subject to dispute will be promptly disclosed.
  - b. In the alternative, notice will be given of the Commissioner's intent to seek judicial *in camera* review of the determinations made under this section before publicly disclosing any investigative documents, files, or information. The Commissioner will assert any applicable privacy rights, privilege, law, or public policy deemed appropriate when seeking such judicial *in camera* review.
13. If attempts to contact a person who provided investigative documents, files, or information are unsuccessful or a person does not respond to the Commissioner's inquiry under section 8, the Commissioner will:
  - a. Make the determinations specified in sections 9 (b),
  - b. Give notice of his or her determination to the person requesting access to the investigative documents, files, or information, and
  - c. Comply with the disclosure/confidentiality requirements of sections 11 (a) and 11 (b).
  - d. In the alternative, the Commissioner may seek a judicial *in camera* review of his or her disclosure/confidentiality determinations as provided in section 12 (b).