

COMMISSIONER OF  
POLITICAL PRACTICES



STATE OF MONTANA

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January 29, 2014

Jordan Knudsen  
Deputy County Attorney  
Roosevelt County  
PO Box 816  
Wolf Point, MT 59201

**COPP-2014-AO-002**

**Re: Public Official Acts**

Dear Mr. Knudsen:

You contacted this Office on December 31, 2013 with the specific concern addressed below. You explained that the incumbent sheriff of Roosevelt County has, during the tenure of his Office, placed his name on county patrol cars. The sheriff is now running for reelection and you asked whether continued placement of his name on patrol cars constitutes a campaign activity such that it needs to be discontinued.

**ADVISORY OPINION**

It is the opinion of this Office that the Sheriff of Roosevelt County may continue listing his name on patrol cars during the time of his candidacy for reelection. The pertinent law and application of that law supporting this Opinion is discussed in that certain attorney general opinion of January 31, 2005 that accompanies this advisory opinion. Please review that Attorney General Opinion as to a general discussion of applicable law.

While the accompanying AG Opinion does not specifically address the use of a Sheriff's name on a patrol car it does say that: "[a] title or a uniform is

simply an accouterment of a public employee's or officer's position. A sheriff is not required to shed all associations, including his uniform, with his official position in order to exercise his protected right to express personal political beliefs." This Office has applied that reasoning to determine that an incumbent Public Service Commissioner is not prohibited from using a photographic image depicting him at work in his public office. See *Matter of Fasbender v. Toole*, Ethics Opinion, February 21, 2012 (the Honorable Thomas Honzel, Deputy Commissioner). A copy of the Fasbender Decision also accompanies this letter.

In making this opinion, the Commissioner recognizes that the patrol cars are public property. The Commissioner also recognizes that an elected Official, such as the Sheriff, is on "public time" at all times. See, AG opinion, January 31, 2005. The Sheriff determined, pre-election, that there was value to the public by declaring his responsibility, as a public officer, for the actions of law enforcement taken by officers under his supervision. Running for reelection does not turn that pre-election purpose into a campaign purpose. Law enforcement actions, and the clear statement of the name of the public official responsible for the proper conduct of the officers involved, will continue up to and through the election. Further, placement of a sheriff's name on a patrol car is not inconsistent with similar actions of another public official who may place his or her name on an office website or stationary.

#### LIMITATIONS ON ADVISORY OPINION

This letter is an advisory opinion based on the specific written facts and questions as presented above. This advisory opinion may be superseded, amended, or overruled by subsequent opinions or decisions of the Commissioner of Political Practices or changes in applicable statutes or rules. This advisory opinion is not a waiver of any power or authority the Commissioner of Political Practices has to investigate and prosecute alleged violations of the Montana laws and rules over which the Commissioner has jurisdiction, including alleged violations involving all or some of the matters discussed above.

Sincerely,

A handwritten signature in black ink, appearing to read "Jonathan R. Motl", written over a circular stamp or mark.

Jonathan R. Motl

Commissioner of Political Practices

VOLUME NO. 51

OPINION NO. 1

PUBLIC EMPLOYEES - Right to exercise political speech;  
PUBLIC OFFICERS - Right to exercise political speech;  
STATUTORY CONSTRUCTION - Construing plain meaning of words of statute;  
MONTANA CODE ANNOTATED - Section 2-2-121, (3), (a), (b), (c).

HELD: A public officer or public employee may engage in political speech so long as his or her speech does not involve the use of public time, facilities, equipment, supplies, personnel, or funds.

January 31, 2005

Mr. Mathew J. Johnson  
Jefferson County Attorney  
P.O. Box H  
Boulder, MT 59632

Dear Mr. Johnson:

You have requested my opinion on a number of questions concerning public officers and political speech. I have rephrased your questions as follows:

Does Mont. Code Ann. § 2-2-121 limit a public officer's or employee's right to support or oppose a political candidate or passage of a ballot issue?

Mont. Code Ann. § 2-2-121 sets forth the rules of conduct for public officers and employees. Subsection (3) includes a prohibition against the use of public time and resources for political speech, as well as a provision protecting a public officer or employee's freedom to express personal political beliefs. It provides:

(3)(a) 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

Mr. Mathew J. Johnson  
January 31, 2005  
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course, do not have specific hours of employment nor do they receive vacation leave or other time off duty. They receive annual salaries rather than hourly wages. Thus, they could be considered to be on "public time" at all times. However, as long as public facilities, equipment, supplies, or funds are not involved, elected officials are not restricted in the exercise of political speech by the provisions of Montana law.

You also ask if subsection (3) prohibits a public employee or officer from signing a letter to the editor with his official title or prevents a law enforcement officer from wearing a uniform to campaign for a political issue or candidate. I conclude that, for the reasons stated above, subsection (3)(c) allows a public official to sign a letter to the editor, expressing personal political beliefs, with his official title, so long as public resources were not used to create the letter. Moreover, a sheriff would not be prohibited from wearing a uniform while campaigning for a political issue or candidate. In my opinion, neither activity would be prohibited by subsection (3).

Again, subsection (3)(a) only prevents use of "public time, facilities, equipment, supplies, personnel, or funds" in the furtherance of personal political speech. A title or a uniform is simply an accouterment of a public employee's or officer's position. A sheriff is not required to shed all associations, including his uniform, with his official position in order to exercise his protected right to express personal political beliefs.

The presumption is that free speech rights are protected and only the very specific restrictions in Mont. Code Ann. § 2-2-121 can be invoked to limit a public officer's or public employee's right to political speech.

THEREFORE, IT IS MY OPINION:

A public officer or public employee may engage in political speech so long as his or her speech does not involve the use of public time, facilities, equipment, supplies, personnel, or funds.

Very truly yours,

MIKE McGRATH  
Attorney General

mm/anb/jym

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

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<b>IN THE MATTER OF THE ETHICS</b>	)	
<b>COMPLAINT OF MICHAEL FASBENDER</b>	)	<b>FINAL ORDER</b>
<b>AGAINST KEN TOOLE</b>	)	<b>and</b>
	)	<b>DECISION</b>
	)	

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Complainant Michael Fasbender (Fasbender) has filed an ethics complaint against Respondent Ken Toole (Toole), alleging that Toole violated Section 2-2-121(3)(a), MCA. The facts are not in dispute and the case has been submitted on briefs. Having fully considered the matter, I conclude that Toole did not violate the statute.

**BACKGROUND**

On August 20, 2010, Fasbender filed his complaint against Toole who was running for reelection to the Montana Public Service Commission (PSC). By letter dated September 16, 2010, Dennis Unsworth, who was the Commissioner of Political Practices, notified both Fasbender and Toole that the complaint appeared to meet the requirements of 44.10.604 and 44.10.607, ARM, and that an informal contested case proceeding would be initiated in conformance with 44.10.607, ARM. Nothing further was done until August 23, 2011, when David B. Gallik, who then was the Commissioner of Political Practices, appointed me Deputy Commissioner/Hearing Examiner for this case because he had a conflict of interest. At the scheduling conference held

violated Section 2-2-121(3) (a), MCA. That section states:

(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.

In 2010 Toole was a public officer. The PSC conference room is a public facility. Campaign brochures are produced and used to garner support for a candidate's election. That, however, does not necessarily lead to the conclusion that the inclusion of a photograph, such as the one here, in an incumbent's campaign brochure automatically constitutes a violation of Section 2-2-121(3) (a), MCA.

The purpose of the Code of Ethics is set out in Section 2-2-101, MCA.

The purpose of this part is to set forth a code of ethics prohibiting conflict between public duty and private interest as required by the constitution of Montana. This code recognizes distinctions between legislators, other officers and employees of state government, and officers and employees of local government and prescribes some standards of conduct common to all categories and some standards of conduct adapted to each category. The provisions of this part recognize that some actions are

from the campaign materials of a current state senator who is running for attorney general. Included in those materials is a photograph of him on the Senate floor. There certainly is nothing wrong with that. However, another candidate is an assistant attorney general. Under the position advocated by Fasbender, she would be precluded from using a photograph of herself in the Attorney General's office, the State Justice Building, or a courtroom.

At the local level, it probably would not be uncommon for a clerk in a county treasurer's office to run for that office if the incumbent decided not to run. She, however, could not use a photograph of herself in the courthouse, but her opponent could. Similarly, an attorney running against an incumbent county attorney could use a photograph of himself in the courtroom, but the incumbent could not.

As these examples illustrate, a photograph of a public officer or public employee taken in a public building where the officer or employee works would not equate to using a public facility to solicit support for the person's election to a public office. The photograph would be no different than a legislator using a picture of him or herself in the Capitol or a legislative chamber in his/her campaign materials.

While the photograph Toole used pointed out that he was the incumbent and the Commission's vice-chairman, those were facts

BEFORE THE COMMISSIONER OF  
POLITICAL PRACTICES  
STATE OF MONTANA

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In the Matter of the Complaint of	)	FINDINGS OF FACT
L. David Frasier Against	)	AND
Barb Charlton and Mark Simonich	)	CONCLUSIONS OF LAW

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I. BACKGROUND

On December 3, 2004, Mr. L. David Frasier (Frasier) filed a complaint alleging that Ms. Barb Charlton and Mr. Mark Simonich (Charlton and Simonich) violated Montana Code Annotated §§ 2-2-103 and 2-2-104 of the Montana Code of Ethics (Montana Code Annotated §§ 2-2-101, *et seq.*).<sup>1</sup> The Code prescribes ethical standards for public sector employees. In this matter, the terms “public employee” and “state officer” defined in Montana Code Annotated § 2-2-102(7) and (11), respectively, include Charlton and Simonich.

Pursuant to Montana Code Annotated § 2-2-136, an informal contested case hearing was held on March 31, 2005, to consider evidence and testimony regarding the alleged violations of Montana Code Annotated §§ 2-2-103 and 2-2-104. Frasier appeared without counsel in this matter and he was advised at all times that he had the burden of proving that Charlton and Simonich had violated the Code of Ethics. Frasier called only himself to testify during his case-in-chief. Following Frasier's testimony and cross-examination by counsel for Charlton and Simonich, Charlton's and Simonich's motion for entry of judgment was granted.

II. FINDINGS OF FACT

1. Charlton and Simonich, as the Management Services Division Administrator and former Director of the Department of Commerce, respectively, are public

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<sup>1</sup> Frasier's Pre-Hearing Order added an allegation to the original complaint by stating that Charlton and Simonich violated Montana Code Annotated § 2-2-104(1)(b). In Frasier's initial complaint, he alleged only that Charlton and Simonich misused state resources for personal or private business gain.



circumstances. The State of Montana Employee Handbook, April 2005, Electronic Mail Policy, No. ENT-NET-042, November 2002, and the Internet Acceptable Use Policy, No. ENT-INT-011, August 2001, all contain a provision stating “[t]he State provided Internet, intranet and related services are not to be used for: 1) “for-profit” activities, 2) “non-profit” or public, professional or service organization activities that aren’t related to an employee’s job duties, or 3) *for extensive use for private, recreational, or personal activities*” (emphasis added).

7. “Extensive use for private, recreational, or personal activities” is not defined in the Montana Code Annotated, Administrative Rules of Montana, the Montana Operating Manual, the State Employee Handbook, or the Information Technology Enterprise policies.

### III. DISCUSSION

#### **Montana Code Annotated §2-2-103**

Montana Code Annotated §2-2-103(1) contains the legislature's broad public policy statement that public servants have a duty to perform their day-to-day activities for the benefit of the public and that engaging in certain prohibited activities results in a violation of the public trust. Montana Code Annotated § 2-2-104 and other sections of the Code then establish specific rules of conduct for legislators, state employees, public officials, and employees of local governments. The specific rules of conduct in the Code reflect the legislature’s decision to urge the avoidance of conflicts of interest or the performance of an official act (issuing a permit or approving a contract or program) that would allow a public official or public employee to benefit personally. The prohibitions in the Code of Ethics are primarily designed to prevent a public employee or public official from receiving a personal financial benefit as a result of being in a position of authority, engaging in activity that would cause economic or personal harm to others as a result of some official action while benefiting the public official or employee, or using public resources for political purposes or for personal business purposes.

Frasier asserts that 2-2-103(1) must be literally applied as a rule of conduct to all public employees and officials. The practical and legal effect of Frasier's assertion is that every act by a public employee or a public official while on the job or at the place of public employment must benefit the people of the state. Any act of a personal nature

matter (non-government matters) while on the job or while using equipment, office space, or supplies purchased or leased with public funds.<sup>4</sup> The State of Montana has clearly chosen to regulate and prohibit certain activity by public employees and public officials under the Code of Ethics. However, the exercise of that regulatory power cannot unduly infringe on protected freedoms or be so indefinite that a person of ordinary intelligence does not have fair notice that his or her conduct is forbidden. *Montana Automobile Association v. Greely*, 193 Mont. 378, 387 & 393, 632 P.2d 300 (1981).

Public employees and public officials do not forfeit all of their constitutional rights at their place of public employment or while on the job as a government employee. The State of Montana's computer use policies authorize state employees to use state-owned computers for limited personal use. The Information Technology Service Division has established several policy statements identifying appropriate and inappropriate use of state information technology resources, including the User Responsibility Policy, No. ENT-SEC-081, the Electronic Mail Policy, No. ENT-NET-042, and the Internet Acceptable Use Policy, No. ENT-INT-011. Each document addresses a specific area of information technology, but they are designed to be complementary. For the purposes of this matter, the principal language in policy statements ENT-INT-011 and ENT-NET-042 is that information technology resources may not be used for "extensive use for private, recreational, or personal activities."

The User Responsibility Policy provides some additional guidance by stating that users of State information technology resources must recognize the importance the resource has on the effective operation of state government. That realization brings with it an obligation to use the resource in an acceptable, responsible, and ethical manner. The existence of such state computer use policies and the evidence introduced at the hearing illustrate the over-breadth of Frasier's interpretation of Montana Code Annotated §2-2-103(1).

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<sup>4</sup> Under Frasier's literal interpretation of 2-2-103(1), a public employee would violate the Code of Ethics if the employee placed or received a phone call using publicly-owned telephones to deal with child care problems, the scheduling of a dental appointment, medical or family emergencies, school issues, or any other personal matter not involving a public employee's official public duties.

frustrated by Frasier's inconsistent interpretation of 2-2-103 and his willingness to overlook his use of public resources for personal matters.

This opinion illustrates the need for the Montana Legislature to take a hard look at and specifically define when the use of public resources by a public servant for personal matters constitutes a violation of the Montana Code of Ethics. It is essential that a well-defined and consistent "personal use of public resources" rule be adopted under the Code of Ethics if the legislature and the public want an enforceable policy and one that accomplishes the purposes of the Ethics Code -- preventing conflicts between public duty and private interest (2-2-101), maintaining public confidence in the integrity of public servants, and ensuring that public employees and public officials carry out their duties for the benefit of the people (2-2-103).

#### **Montana Code Annotated § 2-2-104**

Frasier alleges that Charlton and Simonich gave themselves a gift in violation of Montana Code Annotated § 2-2-104(1)(b)(i) and (ii) when they asked for and received personal computer services from agency employees. This allegation cannot be sustained under the Code of Ethics for two reasons:

First, my predecessor, Commissioner Linda Vaughey, has correctly determined that the term "gift" used in 2-2-104(1) means that "something [is] voluntarily transferred by one to another without compensation" or for value that is far less than the item or service received. See Commissioner Vaughey's September 25, 2002 Decision *In the Matter of the Complaint of the Montana Democratic Party Against Judy Martz*, pp. 16 & 17. The gift giving prohibited by Montana Code Annotated § 2-2-104(1)(b)(i) and (ii) requires that someone other than the public servant who received the gift has given a gift that violates the express provisions of 2-2-104(1).

Second, Frasier did not allege and he offered no proof that Simonich and Charlton asked for or accepted the computer services provided by the Department of Commerce employees in violation of Montana Code Annotated § 2-2-104(1)(b)(i) and (ii). These Code provisions require Frasier to prove that Simonich and Charlton asked for or accepted the computer services knowing that the services were provided to

Dated this \_\_\_\_\_ day of May, 2005.

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Gordon Higgins  
Commissioner

**NOTICE:** This is a final decision in a contested case. The parties have the right to seek judicial review of this decision pursuant to the provisions of Montana Code Annotated §§ 2-4-701 through 2-4-711.