



COMMISSIONER OF
POLITICAL PRACTICES

STATE OF MONTANA

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February 27, 2017

Daniel Brister, MS
Executive Director
Buffalo Field Campaign
P.O. Box 957
West Yellowstone, MT 59758
director@buffalofieldcampaign.org

Re: COPP-2017-AO-001
Lobbying Reporting and Disclosure Requirements

Dear Mr. Brister,

We write in response to your January 18, 2017, request for an Advisory Opinion from the Commissioner of Political Practices on the following matters.

FACTS PRESENTED BY BUFFALO FIELD CAMPAIGN

Issue One

"Buffalo Field Campaign is a tax-exempt 501(c)(3) nonprofit organization incorporated for public benefit in the state of Montana. Buffalo Field Campaign intends to place a billboard ad in Helena, Montana during the 2017 Montana legislative session. The billboard will be viewable to Helena-bound travelers and the public at large, including legislators and public officials.

The billboard ad message is: MONTANA
MANAGE WILD BUFFALO LIKE WILD ELK
REPEAL MCA 81-2-120
buffalofieldcampaign.org

The billboard's estimated cost is \$3,000. It is unknown if a bill to repeal MCA 81-2-120 will be introduced during the 2017 Montana legislative session."

Issue Two

"Buffalo Field Campaign does not intend to hire a lobbyist to promote or oppose official action before the 2017 Montana legislative session. Buffalo Field Campaign intends to rely on staff to promote or oppose official action impacting wild buffalo and the native species' habitat before legislators and public officials in Montana. Buffalo Field Campaign staff does not receive additional compensation for lobbying. Buffalo Field Campaign staff travel costs for lobbying are a reimbursable expense.

During the 2017 Montana legislative session, Buffalo Field Campaign staff may spend time in direct communication, testimony, and in research in anticipation of promoting or opposing official action before public officials and legislators. For any given month during the 2017 Montana legislative session, Buffalo Field Campaign staff may spend only a portion of their paid time in support of lobbying or lobbying. For example, one salaried staff member may spend 10% of paid time in support of lobbying in January. Another salaried staff member may spend 5% of paid time lobbying in February. Describe the rules on how to allocate staff salary spent on or in support of lobbying activity from other activity not connected with lobbying during the 2017 Montana legislative session."

Issue Three

"Buffalo Field Campaign communicates to our supporters in person and by phone, mail, email, social media, and web site. Public officials and legislators in Montana, and out-of-state, receive our communications. During the 2017 Montana legislative session, Buffalo Field Campaign intends to provide our supporters information on legislation impacting wild buffalo and the native species' habitat. The organization intends to include information for our supporters to support, oppose, or modify official action before public officials and legislators."

QUESTION PRESENTED BY BUFFALO FIELD CAMPAIGN

Issue One

Question 1: Is the billboard "the practice of promoting or opposing the introduction or enactment of legislation before the legislature or legislators; and the practice of promoting or opposing official action of any public official or the legislature" under Mont. Code Ann. § 5-7-102(11)(a)(i)–(ii)?

Question 2: Is the billboard a "Payment" under Mont. Code Ann. § 5-7-102(13)(a)? If so, what are the applicable state reporting requirements?

Question 3: Is the billboard expenditure "advertising" under Mont. Code Ann. § 5-7-208(5)(a)(ii)? If so, what are the applicable state reporting requirements?

Issue Two

Question 4: Is staff time spent traveling to and from Montana's 2017 legislative session to promote or oppose official action "lobbying activity" or "lobbying activities" under state law?

Question 5: Is staff time spent traveling in anticipation of lobbying reportable time under state law? 44.12.103 Admin. R. Mont.

Question 6: Is the organization considered a “Principal” under Mont. Code Ann. § 5-7-208? If so, what are the applicable state reporting requirements and forms that must be filed?

Question 7: If the organization’s combined costs to promote or oppose official action before the 2017 Montana legislature is below the payment threshold, would the Commissioner advise reporting the costs? 44.12.204 Admin. R. Mont.

Question 8: For 2017, what is the adjusted payment threshold that triggers state reporting requirements for a “Principal” under Mont. Code Ann. § 5-7-112?

Issue Three

Question 9: Is staff time spent communicating with the organization’s supporters to promote or oppose or modify official action before the Montana legislature “lobbying” or “lobbying activity” under state law?

ADVISORY OPINION

The Commissioner is limited to issuing advisory opinions that address lobbying reporting and disclosure questions within the Commissioner of Political Practices’ (COPP) jurisdiction, Mont. Admin. R. 44.11.102. The consideration of the questions and facts in this matter are limited to the information which was provided to the COPP by Buffalo Field Campaign (BFC) and information which is publically available and specifically referenced herein. Based upon the foregoing scope of information, the Commissioner issues the following Advisory Opinion:

DISCUSSION

In order to ease into the conversation of the obligations found in the Montana Lobbyist Disclosure Act and associated rules, we will start with the definitions of some of the terms which will be used throughout this opinion.

Lobbying is defined as “[t]he practice of promoting or opposing the introduction or enactment of legislation before the legislature or the members of the legislature,” Mont. Code Ann. § 5-7-102(11)(a). Former Commissioner Vaughey adopted an administrative regulation stating that reporting and disclosure regulations “only would be applied to legislative lobbying promoting or opposing the introduction of enactment of legislation before the legislature or legislators,” Mont. Admin. R. 44-12-101A(1) (Aug. 2004).

A lobbyist is “a person who engages in the practice of lobbying,” Mont. Code Ann. § 5-7-102(12)(a). Specifically exempted from the definition of a lobbyist are individuals who lobby on their own behalf, someone working for a principal who also employs a lobbyist if the person does not lobby on the principal’s behalf, and someone who

receives payments of less than the threshold in a calendar year (\$2,550¹ for the 2017-18 legislative session), Mont. Code Ann. §§ 5-7-102(12)(b) and 5-7-112.

A principal is a person or entity “who employs a lobbyist” or makes “payments for the purpose of lobbying,” Mont. Code Ann. §§5-7-201(15) and 5-7-208. A principal is only subject to reporting and disclosure to the COPP “if the principal makes total payments for the purpose of lobbying that exceed the” \$2,550 threshold during a calendar year of the 2017-18 legislative session, Mont. Code Ann. § 5-7-208.² The calendar for the reporting times can be found on the COPP’s website,³ along with the forms⁴ which are used for reporting and disclosure.

Issue One

As indicated by the facts presented by BFC, it is presently unknown whether or not during the 2017-18 legislative session a legislator will be lobbied to propose, draft, introduce or carry legislation of interest to BFC. It is clear that if no one from BFC engages in paid or reimbursed direct lobbying activity with a legislator requesting that they carry or oppose a bill, then the billboard is not a reportable expense, Mont. Admin. R. 44.12.101A. However, without knowing whether such legislation will be initiated by anyone else, it is difficult to determine if the billboard would then be considered advertising⁵ and a payment⁶ which would be reportable.

The answer to your question about the billboard is predicted by your request for advice in question 7. The best defense is a good offense. Best practice would be to assume that if a bill regarding the management of wild buffalo is requested, that someone will see the billboard and potentially file a complaint alleging a failure to report with the Commissioner, Attorney General, or appropriate County Attorney, Mont. Code Ann. § 5-7-305. By reporting and disclosing the billboard, BFC could eliminate a complaint made against them for failure to report.

Issue Two

BFC states that, at this time, it does not intend to employ a lobbyist to lobby the legislature or legislative committees on its behalf. However, BFC has indicated that it intends to use staff time “to promote or oppose official action ... before legislators” (Issue 2). Once BFC makes payments exceeding the \$2,550 threshold, it will become a principal that is required to report and disclose to the people of Montana, Mont. Code Ann. § 2-7-103(13)(a)(iii) and Mont. Admin. R. 44.12.101A, *et seq.*⁷

¹ Answer to Question 8.

² Answer to Question 6. *See also* footnotes 3 and 4.

³ <http://www.politicalpractices.mt.gov/4lobbying/calendar.mcpX>

⁴ <http://www.politicalpractices.mt.gov/4lobbying/forms.mcpX>

⁵ Answer to Question 3.

⁶ Answer to Question 2.

⁷ In calculating the initial payment threshold which triggers reporting and disclosure with the COPP, two important items are omitted from the total. Payments made to lobbyists or individuals who engage in lobbying activities, excluding any payment or reimbursement made for “personal and necessary living expenses” and “travel

"Official action" is defined as "a vote, decision, recommendation, approval, disapproval, or other action, including inaction, that involves the use of discretionary authority by the legislature or a member of the legislature concerning the introduction or enactment of legislation," Mont. Admin. R 44.12.102(7).

"Lobbying activity" or "lobbying activities" are defined as "actions or efforts by a lobbyist or an individual to lobby or to support or assist lobbying, including preparation and planning activities after a decision has been made to support or oppose official action, and research and other background work that is intended, at the time it is performed, for use in lobbying or to support or assist lobbying activities," Mont. Admin. R. 44.12.102(4)(emphasis added).

It is important to note the time-based definition of lobbying activity: any action taken that becomes reportable depends on the intent of the organization at the time the action was *taken*. Although BFC states that "no additional compensation" is provided to its staff for their lobbying activities, BFC staff most likely receive compensation through receipt of payment of their salaried or hourly work, Mont. Admin. R. 44.12.203.

"Compensation" includes all direct or indirect payment of salaries, fees, wages, and benefits by a principal to ... an individual engaged in lobbying activities to lobby or support or assist a lobbying activity. The term includes, but is not limited to, all payments made to ... an individual engaged in lobbying activities to lobby or to support or assist a lobbying activity for overtime, compensatory time, retirement, health insurance, membership fees for social, civic and professional organizations, life insurance, professional liability insurance, unemployment, worker's compensation, personal use of a vehicle, rental car payments, disability insurance and other benefits..." not including payments for "personal living expenses of ... an individual engaged in lobbying activities that are reimbursed by a principal.

Mont. Admin. R. 44.12.102(1).

To the extent that BFC uses the paid time of its staff to engage in or support lobbying or lobbying activity, the proportional compensation that the staff receives is a payment under the Montana Lobbyist Disclosure Act. Please also pay attention to the costs of the office overhead (Mont. Admin. R. 44.12.207), reimbursed expenditures (*id.*, 44.12.205), entertainment and social events (*id.*, 44.12.209), etc.

expenses," Mont. Admin. R. 44.12.202(1)(a). However, once payments or reimbursements exceed the \$2,550 threshold, all expenditures made to date for travel which are reimbursed by the principal are reportable, Mont. Code Ann. § 5-7-102(13)(a)(i) and (ii).

Given those "sideboards,"⁸ the amount of BFC paid staff time spent traveling either in anticipation of or to engage in lobbying activity with the legislature or legislators is a payment which is reportable under the Montana Lobbyist Disclosure Act, Mont. Code Ann. § 5-7-102(a)(iii).⁹ To the extent any BFC staff voluntarily donate their travel time to the cause, there would not be a payment made by BFC to that staff member to support of a lobbying activity, Mont. Code Ann. §§ 5-7-102(12)(b)(i) and (13)(a).

Issue Three

BFC asks whether staff time spent communicating to "its supporters" would qualify as lobbying or lobbying activity.¹⁰ Without further clarification as to who "its supporters" are, the Commissioner provides the following guidance:

Staff time spent gathering and communicating information directly to legislators by any means, including those listed in the facts presented by BFC, constitute "lobbying" and "lobbying activities" under Montana law. "'Direct communication' includes face-to-face meetings, telephone conversations, and written or electronic correspondence or communication with" a legislator or legislative committee, Mont. Admin. R. 44.12.101A, 44.12.102(2) and (4). Lobbying also includes time spent preparing for and delivering oral or written testimony, and signing the sign-in sheet as a proponent or opponent at a legislative committee hearing, Mont. Admin. R. 44.12.102(3)(a) through (c) (summarized).

Activities specifically excluded from "lobbying activity" are (a) information or testimony provided to the legislature in response to a legislative subpoena; (b) actions of certain public officials, (c) and (d) certain media activity for news stories or editorials, (e) communication with members of an organization or corporation, (f) certain compelled information or testimony, and (g) follow up information provided to a legislative committee or the legislature in response to an oral or written request of a legislator, so long as the information or testimony provided does not support or oppose the official action under consideration. Mont. Admin. R. 44.12.102(4)(a) through (g) (summarizing exclusions). As excluded lobbying activities, BFC is not required to report and disclose any payments made to BFC staff for the above-summarized activities.

The Buffalo Field Campaign is a corporation organized under the laws of Montana, with a 501(c)(3) federal tax.¹¹ As a corporation, BFC staff time spent communicating to the corporation's "members, shareholders, or employees," would be excluded from reporting as a lobbying activity, Mont. Admin. R. 44.12.102(4)(e). Consistent with the limitation set forth by Mont. Admin. R. 44.12.101A(2), that "the rules will not be applied to non-legislative activities," the Commissioner would not

⁸ The 2017 Montana Legislature's favorite catchphrase, in my subjective opinion.

⁹ Answer to Questions 4 and 5.

¹⁰ Discussion regarding Question 9.

¹¹ Montana Secretary of State Website, and <http://www.buffalofieldcampaign.org/who-we-are/about-buffalo-field-campaign>.

consider staff time spent in communications with the BFC's "supporters" who are not Montana legislators to be a reportable lobbying activity.^{12, 13}

CONCLUSION

As both Commissioner Motl and former Commissioner Vaughey have stated, Montana's Lobbyist Disclosure Act is an area in which work is needed to accomplish the Act's purposes for the people of Montana. All parties who participate with the legislative branch have a right to know and understand their reporting and disclosure responsibilities. We appreciate the opportunity to discuss how the Act applies to efforts to lobby the legislature during a legislative session.

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.

NOTICE: A copy of this decision is being sent on this date to Montana Attorney General Tim Fox and to Lewis and Clark County Attorney Leo Gallagher pursuant to Mont. Code Ann. § 5-7-305(3), which confers concurrent jurisdiction to prosecute violations of the Montana Lobbyist Disclosure Act with COPP as well as the Attorney General or the County Attorney of the county in which an alleged violation takes place.

¹² Former Commissioner Vaughey, *In Re Blue Cross Blue Shield of Montana*, in April 2001, held that a principal who employs a lobbyist is required to report and disclose staff time spent on "grassroots lobbying efforts ... undertaken to support or assist [the principal's] lobbying activity." *Id.* at 21 (discussing *U.S. v. Harriss*, 347 U.S. 612 (1954); *Montana Automobile Assoc. v. Greely*, 193 Mont. 378, 632 P.2d 300 (1981)). The limitations set forth in that Decision were subsequently revised in April of 2004 by Mont. Admin. R. 44-12-101A(1).

¹³ Please also note that the Commissioner shares concurrent jurisdiction over enforcement of alleged violations of the Montana Lobbyist Disclosure Act with the Attorney General and the County Attorney. Additionally, if action is not undertaken by the named public officials, after certain notice provisions are met, a private citizen may initiate a court action in the name of the State, Mont. Code Ann. § 5-7-305(2) through(4).

Sincerely,



Jaime MacNaughton
Attorney for the
Commissioner of Political Practices

I agree with this Advisory Opinion and afford it the full weight of the Commissioner's authority.

DATED 27th day of February, 2017.



Jonathan R. Motl
Commissioner of Political Practices

cc. Attorney General, Tim Fox
Lewis and Clark County Attorney, Leo Gallagher