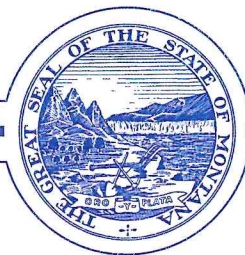


COMMISSIONER OF
POLITICAL PRACTICES



STATE OF MONTANA

CHRIS J. GALLUS
COMMISSIONER
TELEPHONE (406) 444-2942
FAX (406) 444-1643

1209 EIGHTH AVENUE
PO BOX 202401
HELENA, MONTANA 59620-2401
www.politicalpractices.mt.gov

February 16, 2024

Matthew G. Monforton
Monforton Law Offices, PLLC
32 Kelly Court
Bozeman, MT 59718

RE: COPP-2024-AO-001

Dear Mr. Monforton,

This letter is in response to your inquiry dated November 18, 2023, regarding state or local officials that are running for public office and their ability to read and/or respond to emails which have been directed to their government issued email account, in light of the public trust duty delineated in Montana's Code of Ethics. Montana Code Annotated (MCA) § 2-2-101, et seq. (2023).

Your request is addressed pursuant to the rulemaking authority under the Administrative Rules of Montana (ARM). ARM 44.11.102(2)(a) provides that "A person desiring an interpretation to determine the applicability of a rule or statute administered by the commissioner to the person's activity or proposed activity may request an advisory opinion" and lists the requirements to so request. Additionally, the commissioner may request from the inquirer, "a memorandum of authority containing basic research and points of law. . ." ARM 44.11.102(b). Your request meets the prescribed requirements and you effectively provided a memorandum by proactively including basic research and the applicable points of law. Following review of the provided information, I determined an advisory opinion would be appropriate and beneficial.

This analysis will be made available for the public to review on the COPP website but is limited to the particular circumstances presented in your request and binding and applicable only to you.

I have restated your question below and hereby issue the following Advisory Opinion.

QUESTION PRESENTED

Is a public official in violation of Montana’s Code of Ethics if they receive and subsequently read or respond to emails which reference a political campaign via their official government email account?

SHORT ANSWER

As a general matter, these instances are not problematic for officials if specific precautions are followed. Although political use of a government issued email account is prohibited, an official may read and respond to campaign related emails when such communications are approached judiciously, candidates use reasonable efforts to minimize the practice, and the expenditure of government resources is de minimis. While the Code of Ethics prohibits public officers from using public time, facilities, and equipment for political purposes, prohibiting a public official from reading emails that have been directed to their publicly available government e-mail account, merely because those emails may offer support to the official’s candidacy, is unnecessary and unworkable. Furthermore, as pointed out in your request, not responding to these emails would result in an untenable lack of communication between Montanans and their public officials. This opinion will first discuss the applicable law and then consider how it applies to your specific questions. Additionally, I take this opportunity to provide some guidelines on what constitutes appropriate communication under these circumstances, both substantively and procedurally.

DISCUSSION

The Montana Constitution mandates that the Legislature provide a code of ethics which “prohibit[s] conflict between public duty and private interest[.]” Mont. Const., Art. XIII, § 4. The Montana Legislature has duly enacted the Montana Code of Ethics in which it states: “The holding of public office or employment is a public trust, created by the confidence that the electorate reposes in the integrity of public officers, legislators, and public employees. . .[who] shall carry out the individual’s duties for the benefit of the state.” MCA § 2-2-103(1).

At issue here is the Code of Ethics' prohibition on the use of public resources for political purposes contained in Mont. Code Ann. (MCA) § 2-2-122.¹ Here the Legislature proscribes the use of “public time, facilities, [and] equipment. . . to solicit support for or opposition to any political committee, the nomination or election of any person to public office. . .” and provides exceptions if the activity is (a) “authorized by law” or (b) “properly incidental to another activity required or authorized by law, such as the function of a judicial officer, public officer, legislator, or public employee in the normal course of duties[.]”

The Administrative Rules of Montana (ARM) provides additional considerations by specifically addressing the use of telecommunication systems by public officials.

The facilities of the state's telecommunication systems are provided principally for the conduct of state business. In addition to state business, the state's telecommunications systems may be used by. . . (c) state employees and officials. . .for other essential personal business. The use of the state's telecommunication systems for essential person business must be kept to a minimum, and not interfere with the conduct of state business. ARM 2.13.102 (1)(c).

The Code of Ethics and Montana's telecommunications policy combine to strictly limit the use of a public officer's email account. While under certain circumstances the Code of Ethics allows for political uses that are 'properly incidental' to a required function, the Montana Supreme Court has gone so far as to hold that the state telecommunication policy prohibits any political use.²

Under the circumstances considered here, preventing public officials from addressing a campaign-related inquiry, or at the extreme, responding to such an email in any way, would inevitably reduce transparency and trust in Montana's public officials. When strict statutory interpretation would lead to such an untenable result, “It is the duty of judges to so construe the act. . . as to suppress the mischief and advance the remedy.” *John v. N. Pac. Ry. Co.*, 42 Mont. 18, 111 P. 632, 640 (1910).

¹ MCA § 2-2-121(3)(a), the statute referenced in your complaint has been renumbered as MCA § 2-2-122 (2023).

² *Molnar v. Fox* is clearly distinguished from the issue here. Molnar, as a Public Service Commissioner, solicited potential supporters by publishing his government email account on all his campaign materials and used materials produced for official use in his campaign. *Molnar v. Fox*, 2013 MT 132.

Here, the mischief to be suppressed is clearly stated in the constitutional directive that gave rise to the Code of Ethics – Mont. Const., Art. XIII, § 4. The Montana Constitution’s prohibition on conflict between public duty and private interest is not advanced if the remedy causes a public officer to neglect their duty, which requires transparent communication with those they serve. Courts have accordingly interpreted statutes contrary to the plain meaning to avoid such an absurd legal conclusion. “Statutory construction should not lead to absurd results if a reasonable interpretation can avoid it.” *State v. Letasky*, 2007 MT 51, ¶ 11.

When a candidate is also a public officer, their government email account is almost certain to be available to the public via a government website. Responding to emails sent to this account is properly incidental to an officer’s duties, and to determine otherwise would create exactly the absurd result referenced above. Accordingly, COPP has applied the reasonable interpretation that under the circumstances presented, de minimis use of government email accounts is permissible if the use is ‘infrequent and accidental’ and the expenditure of public resources is limited. While the situation addressed here is not ‘accidental,’ it is inadvertent and can be considered a ‘mistake’ as there is no reasonable expectation that the sender would be aware of the law.

‘Infrequent and accidental’ and the use of state resources.

While the discrete question you present has not been addressed by COPP, similar issues have arisen when candidates solicit support from government officers or employees by addressing correspondence to their workplace emails. Commissioner Vaughey held that “infrequent and accidental” contact by a public employee of prospective supporters via their government email was permissible because the Mazurek campaign “voluntarily restricted the practice” by attempting to purge government addresses from their mailing list. *Mackin v. Mazurick*, Vaughey, 2010.

While Mazurek was a public employee at the time of the complaint, when a candidate that was neither a public officer nor an employee purchased a list of official government email addresses for the same purpose, COPP found the use to be de minimis because the public employee time required to respond to these emails “was no more than that involved in any junk email that slips into a government address.” *Thomas v. Gianforte*, COPP-2016-CFP-001, p. 5. Notably, this activity was neither infrequent nor accidental, but COPP relied on the lack of the

use of government resources in determining this email use to be de minimis and therefore allowed. *Id. See also, Kratina v. Gianforte*, COPP-2016-038.

The situation at issue here is distinct from these prior decisions because the candidate-officer in question would be sending campaign-related emails *from* their government email account rather than directing them *to* government email accounts. While this distinction is important, similarly to the circumstances in *Mazurick*, if a public officer makes reasonable efforts to restrict any campaign discussion via email, the resulting interactions can be considered ‘infrequent and accidental.’ If an officer voluntarily restricts the communication by never initiating a campaign discussion and judiciously limits their response to redirecting the sender, these instances of ‘infrequent and accidental,’ or inadvertent communication, will be de minimis.

While some state resources are expended when a public officer responds to a campaign inquiry via email, if done so properly, state resources will ultimately be conserved as inquiries are redirected to a more appropriate avenue. The alternative, to ignore such inquiries without directing the sender elsewhere, would undoubtedly result in more emails and possibly phone calls or even in-person visits to the officer’s workplace.

Consequently, although responding to a campaign inquiry directed to their government account cannot be considered “infrequent and accidental” such actions do not violate the Code of Ethics or Montana’s telecommunication policy if the officer makes reasonable efforts to limit the activity, any expenditure of state resources is de minimis, *and* the following restrictions are applied.

Solicit

While answering emails is undoubtedly ‘properly incidental’ to the function of a public officer, as required by the Code of Ethics, the statute specifically precludes any activity that is “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 to public office.” MCA § 2-2-122(1)(2) *emphasis added*. Therefore, it is incumbent upon any candidate that is also a public officer to consider whether a response may potentially be considered solicitation.

No definition of ‘*solicit*’ is provided by the Montana legislature in relation to election law or the Code of Ethics. However, MCA § 1-2-206 maintains: “Whenever the meaning of a word

or phrase is defined in any part of this code, such definition is applicable to the same word or phrase wherever it occurs, except where a contrary intention plainly appears.” Therefore, we first consider the only definition provided by MCA in Title 45. Here, “[S]olicit” or “solicitation” means to command, authorize, urge, incite, request, or advise another to commit an offense.” MCA 45-2-101(69). While parts of this definition may provide some insight, it is written for the criminal code and cannot be readily applied to the set of facts provided. A more workable definition is provided by the Code of Federal Regulations governing the Federal Election Commission and is applicable to the situation at hand where the Code of Ethics and Montana campaign finance laws intersect.

. . . [T]o solicit means to *ask, request, or recommend*, explicitly or implicitly, that another person make a contribution, donation, transfer of funds, or otherwise provide anything of value. 11 CFR. § 300.2(m), *emphasis added*.

Clearly, if a public officer reads an email that offers support for his campaign, he has not asked, requested, or recommended any action described above. However, as you point out, a more delicate situation arises when the candidate replies to that email. If the email regards something other than the campaign and only asks about the campaign in a cursory manner, should the recipient be expected to reply to the substantive portion and ignore any mention of their campaign? Alternatively, if the email’s primary purpose is to acquire information about the campaign, should the recipient ignore it entirely?

Neither of these options provides a viable course of action to a public servant for whom communication is a significant portion of their duties. A public officer must respond to correspondence in a timely manner and ignoring inquiries regarding candidacy would only serve to alienate the sender and lead to a lack of faith in representative and responsive government.

Consequently, a public official must maintain good communication while simultaneously taking care not to inadvertently solicit support for or opposition to any campaign. 11 C.F.R. § 300.2(m)(2) provides numerous of examples of what the FEC considers solicitation. As you addressed in your request, the referenced federal code provides reasonable and appropriate guidance.

Support or oppose

While a candidate must take care that any email does not lend itself to the provided definition of solicit, they should additionally avoid any language that fits Montana Law's definition of support or oppose. The legislature does not provide a definition for the phrase 'support or oppose' within the Code of Ethics, but previous decisions of the COPP have held "support or oppose" in reference to election law also applies to the Code of Ethics. *Cooper v. Johnson*, COPP-2016-ETH-007.

"[S]upport or oppose", including any variation on the theme, means; (a) using express words, including but not limited to "vote", "oppose", "support", "elect", "defeat", or "reject", that call for the nomination, election or defeat of one or more clearly identified candidates. . . (b) otherwise referring to or depicting one or more clearly identified candidates. . . in a manner that is susceptible of no reasonable interpretation other than as a call for nomination, election, or defeat of the candidate. . . MCA 13-1-101(54).

The above definitions of 'support', 'oppose', and 'solicit' are definitions COPP will apply when determining if an officer's actions are prohibited by the Code of Ethics. The following provides more specific alternatives that a candidate may employ.

De minimis

The legislature has not provided a definition of de minimis regarding the Code of Ethics, but as previously discussed, a definition provided elsewhere in the code applies if a contrary intent is not present. MCA § 1-2-106. Again, campaign finance and ethics laws intersect in this particular instance so using Montana's Title 13 definition is appropriate.

"De minimis act" means an action, contribution, or expenditure that is so small that it does not trigger registration, reporting, disclaimer, or disclosure obligations under Title 13, chapter 35 or 37, or warrant enforcement as a campaign practices violation under Title 13, chapter 37."
MCA § 13-1-101

The act of replying to an email that references an official's campaign will be considered de minimis and therefore will not warrant enforcement, if the sender carefully abides by the following guidelines.

While a public official cannot *solicit support for or opposition to* any campaign, they may alternatively *direct* an inquirer to a campaign website or email.

[T]o *direct* means to guide, directly or indirectly, a person who has expressed an intent to make a contribution, donation, transfer of funds, or otherwise provide anything of value, by identifying a candidate, political committee or organization, for the receipt of such funds, or things of value. 11 C.F.R. § 300.2(n) *emphasis added*.

Directing an inquirer to an alternative email or website must be done judiciously. 11 C.F.R. § 300.2(m)(1)(iii) specifies that identifying a Web page that is “specifically dedicated to facilitating the making of a contribution or donation” is solicitation, while identifying a Web page that is “not specifically dedicated to facilitating the making of a contribution or donation” is not.

While redirecting an inquiry to a campaign website or email is generally not equivalent to soliciting, it could potentially be construed as *asking, requesting, or recommending*, and ‘providing anything of value’ could be broadly interpreted as more than donations but even simply hits on a website. Therefore, when directing inquires to an alternative line of communication, the official should take care not to use words that might suggest the official is seeking support or opposition. As provided by MCA 13-1-101(54), words of express advocacy such as “vote”, “oppose”, “support”, “elect”, “defeat”, or “reject” must be avoided.

Notably, a communication might avoid specific language but still be the ‘functional equivalent’ of express advocacy. *Federal Election Com’n v. Wisconsin Right to Life, Inc.*, provides an applicable test for advertising which COPP has applied to the Code of Ethics. “[A] court should find the functional equivalent of express advocacy only if the ad is susceptible to no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” *FEC v. WRTL*, 551 U.S. 449 at 470 (2007). *See also Cooper v. Johnson*, COPP-2016-ETH-007, *Montana Democratic Party v. Stapleton*, COPP-2019-ETH-001.

Application

As Commissioner, I recognize the importance of open and transparent communication between Montana voters and their state officials while also prioritizing adherence to the Montana Code of Ethics. I suggest this can be accomplished by preparing an email response which directs the inquirer to a campaign website, personal email, or the email of a campaign manager.

The following factors must be considered when responding to any email that references the officer's campaign.

- Avoid words that indicate solicitation of support or opposition to any campaign or ballot issue, either explicitly or implicitly.
- Do not direct the inquirer to a website that exclusively serves as a conduit for donations. An informative website that also includes a 'donate' link is acceptable.
- Never include such a response as a matter of course but only as the response to an inquiry. Never initiate a campaign communication from a government email.
- Consider including a reference to MCA 2-2-101 and 103.

An appropriate email response might read:

"I appreciate your inquiry regarding the upcoming election. As a public officer, I am bound by Montana's Code of Ethics defined in MCA §§ 2-2-101 and 103. In order to honor the trust placed in me by the people of Montana, any communication concerning my campaign should be directed to my website at (campaign website) or my personal e-mail at (e-mail address)."

CONCLUSION

In accordance with all applicable law, as Commissioner I will consider the reading and responding to emails that reference a campaign, by a public official, to be de minimis if the official does not solicit support for or opposition to any candidate or ballot issue as detailed in the discussion above.

LIMITATIONS ON ADVISORY OPINIONS

All advisory opinions issued by this office are posted on the COPP website where they may serve as general guidance for similarly situated individuals, but they are not controlling law. While I will act consistently with respect to this issue under similar circumstances, an advisory opinion rendered in accordance with ARM 44.11.102(2) is only "binding between the commissioner and the inquirer" and only as to the specific facts delineated in the written request.³

³ Your question specifically asks me to address the aforementioned activities by state or local officials. In accordance with (MCA) § 2-2-136(1), I am granted authority to enforce Code of Ethics violations by "judicial officers, state officers, legislators, and state employees" and under limited circumstances, county attorneys. Therefore, I have no legal authority over the Code of Ethics as it applies to local officials and this advisory opinion is applicable only to state officers.

This advisory opinion may be superseded, amended, or overruled by subsequent opinions or decisions of the Commissioner of Political Practices or changes in Montana law with which this opinion is in conflict. ARM 44.11.102(f). This advisory opinion does not waive the commissioner's authority to investigate and prosecute violations alleged in a formal complaint, including violations involving all or some of the matters discussed above. ARM 44.11.102(e).

An advisory opinion may not be appealed. Therefore, if you are aggrieved by this opinion, you may seek a formal declaratory ruling in accordance with MCA 2-4-501 and ARM 44.11.102(1).

Regards,



Chris J. Gallus
Commissioner of Political Practices