

**OVERVIEW FOR
LEGISLATIVE BRANCH RECORDS MANAGEMENT POLICY
RELATING TO PUBLIC INFORMATION REQUESTS**

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This document is being prepared in response to two different precursors: the update of the Public Records laws in 2015, and the increasingly frequent requests to legislators for public information. This document is an overview of elements that will become part of a Records Management Policy and will include parts specific to legislators. The full policy will be prepared for consideration by the Legislative Council in August. All documents must be reconciled with the Record & Retention Categories for final adoption.

Various parts of this document, specifically Legal Requirements, Analyses for Public Information Requests, and Record & Retention Categories will be included in the Records Management Policy. The sections on E-Mail Guidelines for Legislators and Recommendations, Legislative Branch Procedure for Public Information Requests for Legislator E-Mails, and Legislative Services Division E-Mail Services will be modified into a simplified brochure for easy reference for legislators. The Legislative Council will also be asked to make a policy decision on legislator use of state e-mail accounts and related training for legislators.

This document does not constitute legal advice but provides background and guidance. Any specific questions should be directed to a Legislative Services Division attorney.

PART ONE

LEGAL REQUIREMENTS (proposed to be part of Records Management Policy)

As a background to compliance with public records law, Montana's Constitution has two provisions that must be balanced: the public's right to know (Art. II, Sec. 9, Mont. Const.) and the individual right of privacy (Art. II, Sec. 10, Mont. Const.) In addition, the Legislative Branch, including staff and legislators, is subject to the Montana public records laws in Title 2, chapter 6, part 10, MCA.

- Definitions in 2-6-1002, MCA, include that of a "public officer ," defined as any person who has been elected or appointed as an officer of state or local government.
- "Public information" means information prepared, owned, used, or retained by any public agency relating to the transaction of official business, regardless of form, except for confidential information that must be protected against public disclosure under applicable law.
- "Public agency" means the executive, legislative, and judicial branches of Montana state government, a political subdivision of the state, a local government, and any agency, department, board, commission, office, bureau, division, or other public authority of the

executive, legislative, or judicial branch of the state of Montana. Legislators are the public authorities of the Legislative Branch and the respective divisions and chambers are the agencies.

- "Public record" means public information that is:
 - (a) fixed in any medium and is retrievable in usable form for future reference; and
 - (b) designated for retention by the state records committee, judicial branch, legislative branch, or local government records committee.

Discussion on legal requirements

Whether a document or e-mail constitutes a public record depends on the content, not the format or where it resides. The public's right to know is not about who the request is from or the purpose for which it is sought. The Montana Constitution guarantees that "no person" may be deprived of the right to examine such documents, (Art. II, Sec. 9, Mont. Const.). A person from outside the state can make a request directly of a legislator or the public body without regard to residence.

An elected official of the legislature is defined as a "public officer" under the public record statutes. The Legislative Branch, which includes legislators, is defined as a "public agency". "A public officer may not withhold from public scrutiny any more information than is required to protect individual or public safety or the security of public facilities". (2-6-1003, MCA) If the content of the information involves official legislative business, it is likely to be considered a public record. From the courts' perspective, a right of privacy only exists if, in balancing the competing interests and demands of individual privacy, privacy clearly exceeds the merits of public disclosure. The courts would look to see if the expectation of privacy is reasonable. "Time, place, and status are factors in the reasonableness determination" considering "all relevant circumstances including the nature of the information sought." (*Missoulia vs. Bd of Regents of Higher Educ.*, 207 Mont. 513, 823, 675 P.2d 962, 968 (1984))

If the content is purely personal, having to do with family, private, business-related, nonofficial, or nonlegislative activities, legislators may invoke their right of privacy. This information should be separated from legislative information and treated appropriately. Even if information may be considered legislative, certain information may be protected within a document, such as personnel records, health or financial records, job performance valuations, corporate trade secrets, names (especially of minors), social security numbers, driver's license numbers, library records, burial site records, or information necessary to protect security of public facilities or information technology of the state.

Documents that contain political central committee activities that are purely campaign related likely would not be considered official legislative business. Other campaign related work or communications, such as solicitations for campaign money, campaign management or planning, or voting activities such as get-out-the-vote, also likely would not be a public record as long as no legislative duty or function is involved.

Correspondence made or received in transacting official legislative business likely would be considered public records and subject to public inspection. Legislators should consider whether the information bears on their ability as persons who hold a position of public trust to perform their public duties.

Anything that is related to the deliberations of the Legislature or written acts of the body would be legislative business, such as bill drafts and junque files of bill drafts, session committee and interim committee minutes, and voting records. Documents made or received in transacting official legislative business related to a vote, decision, recommendation, approval, disapproval, or other action that involves the use of discretionary authority are public records.

ANALYSES FOR PUBLIC INFORMATION REQUESTS (proposed to be part of Records Management Policy and Legislator Brochure)

There are basically two questions for legislators to keep in mind when making decisions about how to treat requests for public information:

1. **Has the information requested been retained as a public record according to branch retention schedules?**

Legislators (and all public employees) will be able to answer yes to this question by practicing good records management. This means determining whether information related to legislative business is a public record requiring retention or not. This determination is best made as information is generated or received. The branch retention schedules provide guidance and examples to assist in answering this question. When information is determined to be a nonrecord, legislators should dispose of it when it is no longer useful. When information is determined to be record, it needs to managed according to the retention schedules, until those schedules indicate that the record may be destroyed.

2. **Is there a right to individual privacy for any of the information requested that may outweigh the public's right to know?**

If legislators have practiced good records management, they should only be in possession of information that is required to be maintained as a public record under branch retention schedules. Being classified as a public record does not mean that the public always has a right to examine or obtain a copy; it may be that an individual privacy right outweighs the public's right to know. Invoking this privacy right could be subject to challenge in the courts, and legislators should seek legal counsel in this circumstance and remember that statutory and case law indicate that Montana public records laws are to be "liberally construed."

PART TWO

E-MAIL GUIDELINES FOR LEGISLATORS AND RECOMMENDATIONS (proposed to be part of Legislator Brochure)

This document contains guidelines to help legislators organize a specific form of public information, e-mails. Many legislator e-mails are considered public records, and these guidelines are designed to assist legislators in anticipation of fulfilling public right-to-know requests and also to protect legislators' individual privacy. The Legislative Services Division can provide attorneys to help legislators decide whether an e-mail is public or if a privacy right may exist, and the IT staff can also provide a state e-mail account and archive services. The various forms of assistance that Legislative Services Division can provide are outlined below.

E-mails may also include any attachment and transmission data (To, Sent, From) that provides context for the record. For citizen legislators, there is no prohibition on the use of public facilities for private business purposes as there is for other public officers and state employees. However, state e-mail use guidelines state that state-provided e-mail services are not to be used for "for-profit" or "non-profit" activities; as a legislator, a state e-mail account should be used primarily for state legislative business.

This information gives legislators a step-by-step procedure on how to fulfill a public information request for legislator e-mails. These e-mail guidelines also follow records management protocols to help legislators organize their public record e-mails for retention, archive, and destruction. These guidelines are general in nature; for more specific information, references are included at the end of this document.

Recommendations

1. Create an e-mail account for legislative business, whether a private one (Gmail, Yahoo, etc.), or ask for a state "mt.gov" account through Legislative Services (see Legislative Services Division E-mail Services later in this document). With a mt.gov e-mail account, limit that account use to official business as much as possible.
2. Inform correspondents that e-mails related to official business are public records and may be subject to release if requested. Sample disclaimer: *Legislators are publicly elected officials. Legislator e-mails sent or received involving legislative business may be subject to the Right to Know provisions of the Montana Constitution and may be considered a "public record" pursuant to Montana law. As such, e-mail sent or received, its sender and receiver, and the e-mail contents may be subject to public disclosure, except as otherwise provided by Montana law.*



3. Practice good records management by deleting nonrecords and archiving records regularly. To make that easier, set up folders in your inbox and in the archive for different categories that correspond with retention schedules. One example of an e-mail setup to manage records is captured at the left. Nonrecord e-mails are moved to a folder that auto-deletes after 3 months. E-mails that qualify as records are moved from the inbox to "Received Archives" on a regular basis and retained (this keeps the "Inbox" below the 250KB limit). Sent items may be managed similarly.

LEGISLATIVE BRANCH PROCEDURE FOR PUBLIC INFORMATION REQUESTS FOR LEGISLATOR E-MAILS

(proposed to be part of Legislator Brochure)

1. Policy, procedure, and request forms will be easily accessible via the legislative website.
2. A member of the public may direct a request for public information to the executive director or legal services director in the Legislative Services Division (LSD). If a legislator receives a request directly, the legislator may refer the request to the executive director or legal director for assistance and provide the necessary information from the legislator to fulfill a request.
3. The LSD will inform the legislator if a request is received directly and inquire whether the requested e-mails are on a state mt.gov account or a private account.
4. The LSD will review requests, and if necessary, contact the requestor for clarification or greater specificity.
5. If the requested e-mails are on a private account, LSD will forward the request to the legislator and the legislator will be responsible for fulfilling the request pursuant to 2-6-1006, MCA. The legislator may seek legal advice or other assistance from the LSD legal office.
6. If the requested e-mails are on an mt.gov e-mail account, the director will work with the legislator and LSD staff to fulfill the request pursuant to 2-6-1006, MCA. This may include consulting with an attorney on questions regarding whether information is public or private and, by request of the legislator, performing an electronic search of the mt.gov account (see more below).

7. The legal services office will review e-mails with the legislator as necessary prior to delivering the e-mail to the requestor. Upon request, a copy of all materials supplied to the requestor will be sent to the legislator.

LEGISLATIVE SERVICES DIVISION E-MAIL SERVICES (proposed to be part of Legislator Brochure)

The Legislative Branch offers legislators the ability to conduct legislative business with the use of a state-administered e-mail account. This account will be set up at the request of the legislator.

The mt.gov e-mail account enables the Legislative Services Division IT staff, when requested, to perform a "public right to know" search of a legislator's state-owned e-mail account for requested information. Since this account is a publicly assigned e-mail address, the legislator should conduct only legislative business with this account and treat it as public information (see Legal Requirements).

The state administers the mt.gov e-mail accounts, and as a condition of use, the accounts are governed by the Executive Branch's policy. Legislators who would like to have one of these accounts for legislative use should be aware of some distinct differences between a personal e-mail account (such as Gmail, Yahoo, or Outlook.com) and this enterprise-based e-mail service.

The following outlines some policy issues that need to be understood when using a state-administered e-mail account:

1. Access to e-mail through the mt.gov accounts is intended to be through a web-based browser. These accounts can also be set up to sync with a smartphone or tablet by signing the Mobile Device Management (MDM) policy.
2. The mt.gov e-mail accounts come with a size restriction of 250MB of stored e-mail and will need to be proactively monitored. If your mailbox reaches this limit, it will no longer send or receive e-mails until the mailbox has been reduced to under the 250MB limitation. There will be an archive directory set up each user, and this directory will allow up to 25GB of e-mail to be stored.
3. Passwords will expire every 60 days and must be changed in order to access the account. Password requirements include a minimum of 8 characters, at least one uppercase letter, at least one lowercase letter, and at least one number. A password that does not meet these minimum requirements will not be accepted.
4. Legislator e-mail addresses will be either Rep.Firstname.Lastname@mt.gov or Sen.FirstName.LastName@mt.gov.
5. Contact the Legislative Services Division at (406) 444-0912 to set up an e-mail account.

PART THREE

RECORD & RETENTION CATEGORIES (proposed to be part of Records Management Policy)

Records management principles will assist a legislator to analyze and categorize each document and store it in an appropriate folder for easier retrieval and retention of records. Some basic rules of thumb are to delete or destroy nonrecords quickly, keep important documents as long as appropriate, and print or retain anything of enduring value. Retention categories of permanent, official, and transitory records and nonrecords may be useful. Other categories of essential records and historic records may apply, but generally these will be the responsibility of the respective legislative divisions or chambers.

Certain types of records correspond to specific retention schedules. A legislator could create e-mail or other folders that correspond to the type of record and the retention schedule. Retention categories are in a hierarchy from low (nonrecords) to high, rising in order of importance (transitory, official, and permanent).

At the lowest level, legislators would not be responsible for retaining certain records, considered nonrecords, if generated by an external source, such as notices for something that does not require any official business after receipt, promotional materials, reference files copied or downloaded, or other unsolicited items, such as spam, external publications, or vendor solicitations. These documents may be destroyed or deleted at will.

Other categories that legislators may want to use for their e-mail or hard copy folders could include personal/private, administrative, session committees (perhaps by committee), floor votes, category by bill or subject area, interim committees, constituent correspondence, historic/permanent, and so forth. For each folder, legislators will want to determine the appropriate amount of time that the records may be necessary to keep or their retention category. The Legislative Branch Records Management Policy that will be adopted by the Legislative Council will provide the official schedules.

Examples: transitory, official, permanent records

For example, interim committee materials that are sent to the entire committee for a meeting will be retained as permanent public records by the Legislative Services Division and would not need to be retained permanently by a legislator. E-mail examples include e-mail notices that may contain links to the website or information about or for the meeting. Materials on the website are easily accessible by the public, which makes permanently saving the general committee e-mail unnecessary. These notices or e-mails could be considered transitory and be retained until their usefulness is exhausted (i.e., until after the meeting or the end of the interim).

If legislators receive a letter or an e-mail from a constituent commenting on something that will come before a legislative committee and may result in some form of transacting official business -- a vote, decision, recommendation, or action involving the use of discretionary authority -- that information would be considered official legislative business. The documents,

including e-mails, should be retained by legislators for the time that the interim committee is active, and retained or archived for a period before destruction (2 to 5 years, end of term, and so forth, as directed in the Records Management Policy).

Legislators could use a folder labeled "legislative correspondence" for constituent letters and e-mails. Legislative correspondence would likely be a category most relevant to legislative duties and functions. Maintaining a separate folder for correspondence would assist legislators in archiving and retrieving letters or e-mails upon request. These are likely official records that should be maintained for several years after their origination (refer to the Records Management Policy).

Legislative Branch examples

- Official records of the branch (i.e., journals, official bills, committee minutes, financial records) are retained as permanent by the branch so there is no need for legislators to retain those documents.
- Materials for interstate organizations (NCSL, CSG) are maintained (other than payment of dues, invoices, etc.) only as long as needed for the event at hand. They are considered transitory and may be purged 3 months after the event.
- Legislative administrative documents have a 4-year retention period before destruction.
- The retention cycle for "junk" files, or the files that have all of the bill draft request and drafting information prior to bill introduction, are kept for the session and the following interim (2 years), then stored on-site for 2 years, and then destroyed. This can be contrasted to the bill itself, minutes, journal, and so forth, which are all permanent records and are stored with the secretary of state for a specific time before being archived with the Historical Society.
- Interim committee files are maintained in the offices for the current interim, retained onsite for 4 years, and then sent to the Historical Society for permanent archiving.
- Staff is directed to follow these same guidelines and retain and archive documents appropriately.

REFERENCES

- Ethics Law (Code of Ethics). Title 2, chapter 2, part 1, MCA.
- Everts, Todd M. Legal memo to Legislative Council Members. "Legislator Electronic Communications and Public Record/Right-to-Know Requirements." December 23, 2013.
- Greenberg, Pam. "The Private Life of E-Mail." *State Legislatures* magazine, NCSL, January 2010.
- Montana Legislative Services Division. "Legislative Services Filing System Policy and Branchwide Procedures." 2002.
- Montana Legislative Services Division, Legal Division. "Checklist -- Public Right to Know -- Legal Review Constitutional Consideration." May 15, 2014.
- Montana Records Committee. "State of Montana E-Mail Guidelines." September 2006.
- Public Records Law. Title 2, chapter 6, parts 10 and 11, MCA (complete revision Ch. 348, L. 2015).

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