

# **ELECTRONIC COMMUNICATIONS & PUBLIC RECORDS FOR LEGISLATORS**

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# THE LEGAL OBLIGATIONS

# The Public Trust

*Government is a trust, and the officers of the government are trustees; and both the trust and the trustees are created for the benefit of the people.*

*— Henry Clay*

*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. A public officer, legislator, or public employee shall carry out the individual's duties for the benefit of the people of the state.*

*— from § 2-2-103, Montana Code Annotated*

# Montana Constitution

## **Art. II, sec. 8**

### **Right of participation.**

The public has the right to expect governmental agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision as may be provided by law.

## **Art. II, sec. 9**

### **Right to know.**

No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

# MT Constitution, Cont.

## Art. II, sec. 10

### Right of privacy.

The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.

## Art. V, sec. 10

### Organization and procedure.

...

(3) The sessions of the legislature and of the committee of the whole, all committee meetings, and all hearings shall be open to the public.

**“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 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 ... legislative branch[.]

**What  
is a  
public  
record?**

**It's  
about  
the  
content!**

# Why is this Important?

## The Presumption of Openness:

- Under the state constitution and § 2-6-1003, Montana citizens have a right to examine and take copies of public records - that includes the public records you create and store on your own email accounts with your own devices
- Exception: Records do not have to be made public when there is an individual privacy right that is implicated AND that right to privacy clearly exceeds the merits of public disclosure

**1. Does the constitutional right to know apply to the particular political subdivision against whom enforcement is sought?**

**The Legislative Branch is a public body subject to the provisions of Article II, section 9.**

**2. Are the documents in question “documents of public bodies” subject to inspection?**

**The Montana Supreme Court has broadly defined “documents of public bodies” to mean those documents “generated or maintained by a public body which are somehow related to the function and duties of that body.”**

**3. Is there a privacy interest present?**

**3a. If there is, does the demand of individual privacy clearly exceed the merits of public disclosure?**

**(A) Does the person have a subjective or actual expectation of privacy?**

**(B) Is society willing to recognize that expectation as reasonable?**

# Montana Supreme Court

3-Part  
Balancing  
Test



# What is Legislative Business?

**Legislative business is related to your function and duties as a legislator and your role as an enactor of legislation.**

## **During the Session:**

- Legislative bills, amendments and resolutions
- Committee work
- Records related to the transaction of your legislative duties
  - Voting for bills or amendments
  - Communications with your constituents

## **During the Interim:**

- Interim committee work
- Communications with your constituents

# What is Not Legislative Business?

Any written communication that does not contain content related to legislative business does not need to be managed or retained for a specific length of time

**Examples may include communications related to:**

- Personal business
- Political activity
- Your non-legislative employment

**HOW THE BRANCH  
RESPONDS TO  
REQUESTS FOR  
RECORDS**

# **Branch procedure for requests for public records**

- 1. General branch information, such as policies, procedures, and request forms, is easily accessible on the branch website**
- 2. Requests for information are directed to the Executive Director or the Legal Services Director → if you get a request directly, you may refer the request to Susan or Todd for assistance**
- 3. If the branch receives the request directly, you will be informed of the request**
- 4. The branch will review the request and may contact you for clarification or greater specificity**

# Procedure, Cont.

- 5. If the request applies to your private email account, you will be responsible for fulfilling the request; you may seek legal advice or other assistance from the Legal Services Office**
- 6. If the request applies to an mt.gov email account, the Executive Director will work with you and with branch staff to fulfill the request**
- 7. The Legal Services Office will review any emails with you as necessary prior to delivering them to the requestor; you may also request a copy of all materials sent to the requestor**

# MANAGING YOUR PUBLIC RECORDS

# Legislative Public Records

## Records Managed by the Branch:

- Bills and resolutions
- Committee minutes
- Session journals
- Interim reports
- Legal opinions
- Correspondence related to legislative business that is routed through the Branch

## Records to be Managed by You as a Legislator:

- Correspondence relating to legislative business that comes to or from you directly

# How Do You Manage Your Public Records?

## Best Practices Suggestions:

- Have a separate email account dedicated solely to your legislative business
- Save emails in that account for the retention period that is specified in the branch's record management policy
- If you have someone make a request for your records, contact the branch's Chief Legal Counsel or Executive Director for assistance in fulfilling that request
- Include an automatic disclaimer that notifies correspondents that emails may be subject to public records requests



FILE

MESSAGE

INSERT

OPTIONS

FORMAT TEXT

REVIEW

ADOBE PDF



Paste

Calibri (Box)

11

Address  
BookCheck  
NamesAttach  
FileAttach  
Item

Signature

Assign  
Policy

Follow Up



High Importance



Low Importance



Zoom

Clipboard

Basic Text

Names

Include

Tags

Zoom



Send

To...

Cc...

Subject

Senator John Doe, SD 100

[Sen.John.Doe@mt.gov](mailto:Sen.John.Doe@mt.gov)

(406) 444-3064

Capitol Building

PO Box 201706

Helena, MT 59620

DISCLAIMER: Legislators are publicly elected officials. Legislator emails 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, email, sent or received, its sender and receiver, and the email contents, may be subject to public disclosure, except as otherwise provided by Montana law.

## USE THE FOLLOWING TO HELP YOU MANAGE, ARCHIVE, AND DELETE EMAILS APPROPRIATELY.

### IS THE EMAIL CONSIDERED PUBLIC INFORMATION?

*2-6-1002(11): Public information is "information relating to the transaction of official business, regardless of form, except for confidential information that must be protected against public disclosure under applicable law"*

No

### THE CONTENT OF THE EMAIL RELATES TO NONLEGISLATIVE BUSINESS

Examples may include communications related to:

- Personal business
- Political activity
- Your non-legislative employment

Since these are **nonrecords**, you can **delete** these emails as soon as you are done with them

DELETE

As a member of the Montana State Legislature, some of your emails may be subject to disclosure under the provisions of the **Montana Public Records Act**, beginning at § 2-6-1001, MCA.

Yes

### THE CONTENT OF THE EMAIL RELATES TO **YOUR DUTIES** OR YOUR POSITION AS A LEGISLATOR

#### PROPOSED RETENTION POLICY\*

Emails distributing **official committee documents** such as agendas, reports, or committee bill drafts are retained and maintained by legislative branch staff so can be **deleted** by a legislator

Emails that are **tangentially related** to your duties or position as a legislator, such as a newsletter from NCSL, are transitory records and can be **deleted**

Emails containing legislative administrative documents or discussions about legislative business **must be kept** for a maximum of **4 years** (see page 8 for further explanation).

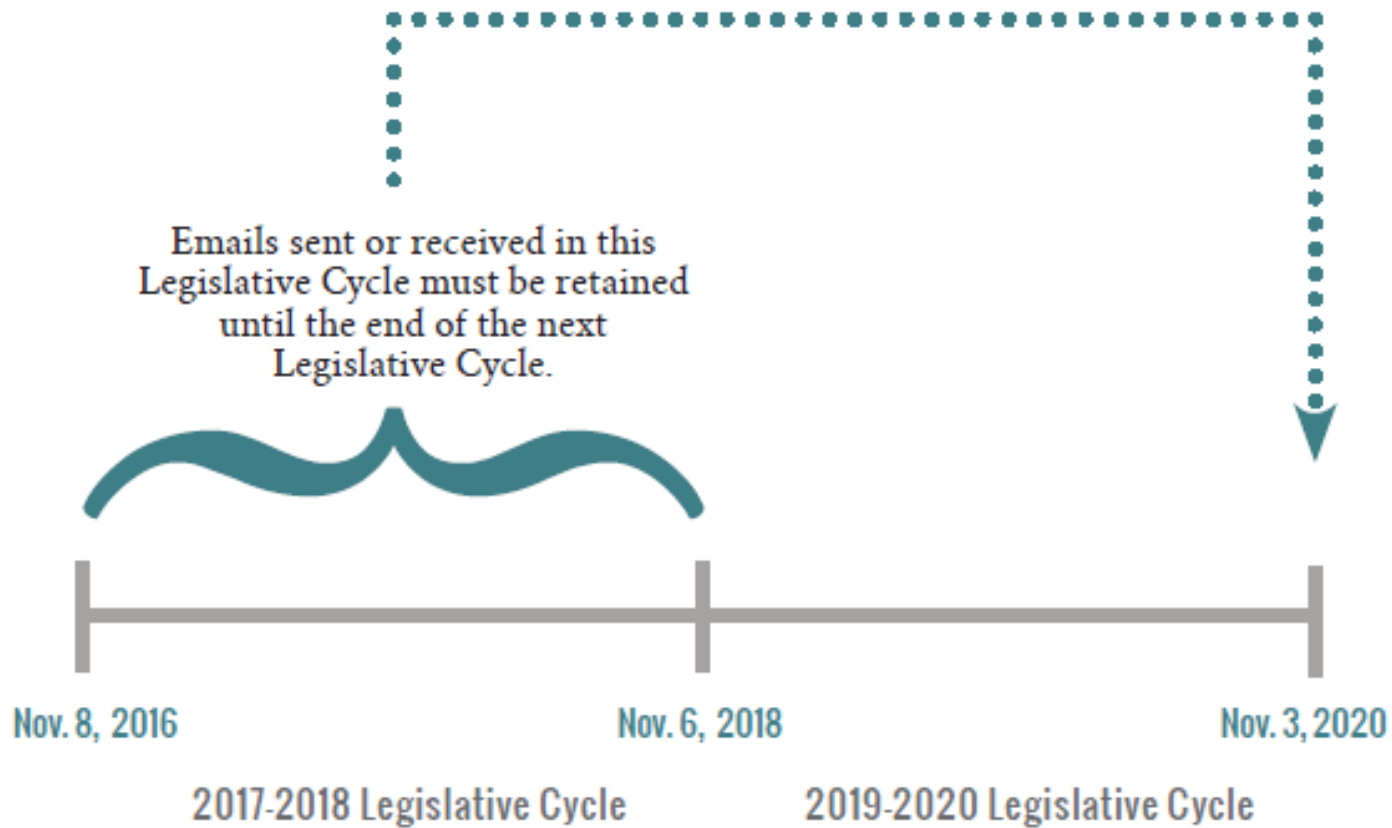
\*This guidance reflects legislator email retention policy proposed, but not yet adopted (as of Nov. 1, 2016) by Legislative Council.

DELETE

DELETE

UP TO 4 YEARS

# Proposed Retention Policy



# If You Decide to Use a State-Administered Email Account

## Unique Features of an MT.gov Email Account

- Accounts should be used primarily for state legislative business → usage for “for-profit” or “non-profit” activities is not allowed
- Email addresses are standard: Rep.FirstName.LastName@mt.gov or Sen.FirstName.LastName@mt.gov
- Inbox size is limited to 250 MB
- Archive size is 20 GB and is readily accessible from a web-based browser
- Passwords must be changed every 60 days
- Email is accessible from your smartphone or tablet once you sign the Mobile Device Management policy
- Legislative Services Division’s IT staff can assist with “right to know” searches at your request

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**CONTACT  
INFO**