

# OFFICE OF THE CITY ATTORNEY

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## Legal Opinion 2023-002

**TO:** Mayor Jordan Hess, City Council, Dale Bickell, Angela Simonson, Department City Clerk, Leigh Griffing

**CC:** Department City Attorney

**FROM:** Jim Nugent, City Attorney

**DATE:** February 2<sup>nd</sup>, 2023

**RE:** Montana state law pertains to gifts of substantial value to public elected officials or public employees.

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### FACTS:

Recently there was a city council member inquiry that indicated that city public elected officials should be informed about Montana general laws providing guidance with respect to gifts or pecuniary benefits offered to elected public officials.

### ISSUE(S):

Does Montana state law provide any general guidance pertaining to gifts or pecuniary benefits offered to public elected officials and public employees?

### CONCLUSION(S):

There are several provisions of Montana state law that provide general guidance about gifts or pecuniary benefits offered to elected public officials or public employee.

### LEGAL DISCUSSION:

Title 2, chapter 2 Mont. Code Ann. is entitled "STANDARDS OF CONDUCT". Part 1 of title 2, chapter 2 is entitled CODE OF ETHICS". This statutory code of ethics applies to elected public officers as well as public employees. Definitions are set forth in Mont. Code Ann. § 2-2-102.

Subsection 2-2-102(3) Mont. Code Ann. defines the term “Gift of Substantial Value” as meaning:

“(3)(a) ‘Gift of substantial value’ means a gift with a value of \$50 or more for an individual. (b) The term does not include: (i) a gift that is not used and that within 30 days after receipt, is returned to the donor or delivered to a charitable organization or the state and that is not claimed as a charitable contribution for federal tax purposes; (i) food and beverages consumed on occasion when participation in a charitable, civic, or community event bears a relationship to the public officer’s or public employee’s office or employment or when the officer or employee is in attendance in an official capacity; (iii) educational material directly related to official governmental duties; (iv) an award publicly presented in recognition of public service; or (v) educational activity that: (A) does not place or appear to place the recipient under obligation; (B) clearly serves the public good; and (C) is not lavish or extravagant.

There also are a couple of Montana state criminal laws that have potential relevance. These two laws are: Title 45, chapter 7, part 1 entitled “BRIBERY AND CORRUPT INFLUENCE INCLUDES” § 45-7-104 Mont. Code Ann. entitled “GIFTS TO PUBLIC SERVANTS BY PERSONS SUBJECT TO THEIR JURISDICTION”. As well as Title 45, chapter 7, section 101 Mont. Code Ann. entitled “OFFICIAL MISCONDUCT”. This section provides:

- (1) A public servant in any department or agency exercising regulatory function, conducting inspections or investigations, carrying on a civil or criminal litigation on behalf of the government, or having custody of prisoners may not solicit, accept, or agree to accept any pecuniary benefit from a person known to be subject to the regulation, inspection, investigation, or custody or against whom litigation is known to be pending or contemplated.
- (2) A public servant having any discretionary function to perform in connection with contracts, purchases, payments, claims, or other pecuniary transactions of the government may not solicit, accept, or agree to accept any pecuniary benefit from any person known to be interested in or likely to become interested in any contract, purchase, payment, claim, or transaction.
- (3) A public servant having judicial or administrative authority and a public servant employed by or in a court or other tribunal having judicial or administrative authority or participating in the enforcement of its decision may not solicit, accept, or agree to accept any pecuniary benefit from a person known to be interested in or likely to become interested in any matter before the public servant or tribunal with which the public servant or tribunal is associated.
- (4) A legislator or public servant employed by the legislature or by any committee or agency of the legislature may not solicit, accept, or agree to accept any pecuniary benefit from a person known to be interested in or likely to become interested in any matter before the legislature or any committee or agency of the legislature.

- (5) This section does not apply to:
- (a) fees prescribed by law to be received by a public servant or any other benefit for which the recipient gives legitimate consideration or to which the public servant is otherwise entitled; or
  - (b) trivial benefits incidental to personal, professional, or business contacts and involving no substantial risk of undermining official impartiality.
- (6) A person may not knowingly confer or offer or agree to confer any benefit prohibited by subsections (1) through (5).
- (7) A person convicted of an offense under this section shall be fined not to exceed \$500 or be imprisoned in the county jail for any term not to exceed 6 months, or both.

Another Montana criminal law that could potentially have relevance is title 45, chapter 7, part 4 entitled "OFFICIAL MISCONDUCT", setting forth § 45-7-401 Mont. Code Ann. which identifies official misconduct as including conduct such as with the purpose to obtain a personal advantage for themselves or another performs an act in excess of the public servant's lawful authority or knowingly accepting a fee or reward for the performance of any act the public servant knows is not authorized by law. § 45-7-401 Mont. Code Ann. states:

- (1) A public servant commits the offense of official misconduct when in an official capacity the public servant commits any of the following acts:
- (a) purposely or negligently fails to perform any mandatory duty as required by law or by a court of competent jurisdiction;
  - (b) knowingly performs an act in an official capacity that the public servant knows is forbidden by law;
  - (c) with the purpose to obtain a personal advantage or an advantage for another, performs an act in excess of the public servant's lawful authority;
  - (d) solicits or knowingly accepts for the performance of any act a fee or reward that the public servant knows is not authorized by law; or
  - (e) knowingly conducts a meeting of a public agency in violation of **2-3-203**.
- (2) A public servant convicted of the offense of official misconduct shall be fined not to exceed \$500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.
- (3) The district court has exclusive jurisdiction in prosecutions under this section. Any action for official misconduct must be commenced by an information filed after leave to file has been granted by the district court or after a grand jury indictment has been found.
- (4) A public servant who has been charged as provided in subsection (3) may be suspended from office without pay pending final judgment. Upon final judgment of conviction, the public servant shall permanently forfeit the public servant's office. Upon acquittal, the public servant must be reinstated in office and must receive all backpay.

(5) This section does not affect any power conferred by law to impeach or remove any public servant or any proceeding authorized by law to carry into effect an impeachment or removal.


The Montana Code Annotated Annotations in part provide some background and explanation for provisions of Mont. Code Ann. The Mont. Code Ann. Annotations in volume 9, at page 95 discusses “pecuniary benefit” with respect to Montana’s criminal laws. Stating:

“PECUNIARY BENEFIT”. This subsection (45-2-101(56) Mont. Code Ann. when in conjunction with the new chapter on Corrupt Influences (Mont. Code Ann. 45-7-101 through 45-7-401) unqualifiedly prohibits the giving or receiving of any pecuniary benefit to influence official discretion. Offers of nonpecuniary benefit such as political support, Honoria; etc. are penalized under 45-7-101. The wording comes directly from the Model Penal Code.”

#### **CONCLUSION(S):**

There are several provisions of Montana law that provide general guidance about pecuniary benefits offered to elected officials or public employees.

OFFICE OF THE CITY ATTORNEY

A handwritten signature in black ink that reads "Jim Nugent". The signature is written in a cursive, flowing style.

Jim Nugent, City Attorney

JN: mcs