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**STATE OF MONTANA**

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September 30, 2015

Blaine C. Bradshaw  
Granite County Attorney  
P.O. Box 489  
Phillipsburg, Montana 59858

Re: Request for Letter of Advice  
Release of draft Commission Meeting Minutes as "public records"

Dear Mr. Bradshaw:

You have requested a letter of advice regarding the following question:

Must draft minutes of the meetings of county commissioners be released as "public records" upon request by a member of the public?

Your request is being answered generally, without reference to any specific event. It is not a formal Attorney General Opinion and should not be presented as such.

The analysis begins with the recognition that: "Every citizen has a right to inspect and take a copy of any public writings of this state." Mont. Code Ann. § 2-6-102(1). Mont. Code Ann. §2-6-101 (2)(a) defines "public writings" as including "the written acts or records of the acts of the sovereign authority, of official bodies and tribunals, and of public officers . . . except records that are constitutionally protected from disclosure." As you noted in your request, "writings" under these statutes are of two types (public and private) and are divided into four classes, including "other official documents." Mont. Code Ann. § 2-6-101.

As Title 2 Chapter 6 Part 1 unfolds, the term "public writings" is replaced by "public records." Mont. Code Ann. § 2-6-104(1) speaks in terms of "public records" and not "public writings," when making "the public records and other matters . . . in the office of any officer" available to inspection. This distinction is inconsequential, as the focus is on the "official" nature of the document being requested.

Records management is covered in Title 2 Chapter 6 Part 2 Mont. Code Ann. "The purpose of this part is to create an effective records management program for . . . political subdivisions by establishing guidelines and procedures" for the maintenance and utilization of "state and local records." Mont. Code Ann. § 2-6-201. As defined in Part 2, "Public records" includes papers, books correspondence and the like of the "record required by law to be kept as part of the official

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record.” Mont. Code Ann. § 2-6-202(1)(a)(i), with following qualifications. Drafts, however, are not public records:

The term [public record] does not include any paper, correspondence, form, book, photograph, microfilm, magnetic tape, computer storage media, map, drawing, or other type of document that is for reference purposes only, a *preliminary draft*, a telephone messaging slip, a routing slip, part of a stock of publications or of preprinted forms, or a superseded publication.

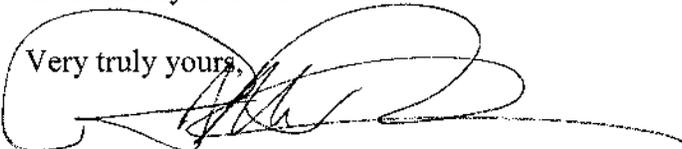
Mont. Code Ann. § 2-6-2-202(1)(c) (emphasis added). The statutes do not require that an entity retain drafts as part of the official record.

Courts have explained that the exemption of draft documents from disclosure encourages the frank exchange of ideas, and opinions might cease to be exchanged and the quality of administrative decisions might suffer if pre-decisional or deliberative communications were the subject of public disclosure. See *National Security Archive v. Central Intelligence Agency*, 752 F.3d 460, 462-464 (D.C. Cir. 2014) for a discussion of the policies concerning pre-decisional disclosure. The idea is that drafts may evolve over time and only the final action of the deliberative or administrative body is relevant, or “official.” While these cases deal primarily with federal Freedom of Information Act claims, it has been noted that the policies supporting the deliberative process privilege apply whether the claim is under the FOIA or the common law. See *Harris v. City of Philadelphia*, 1995 U.S. Dist. LEXIS 7908 pp. \*15-20 (E.D. Pa. 1995). See also *N.L.R.B. v. Sears*, 421 U.S. 132, 150 (1975): “The point . . . is that the frank discussion of legal or policy matters in writing might be inhibited if the discussion were made public; and that the decisions and policies formulated would be the poorer as a result.”

The same policies arguably support Mont. Code Ann. § 2-6-2-202(1)(c) since the documents or papers referenced therein are either the bases of final agency action or are merely the apparatus used in producing the final record. Because a “preliminary draft” is not a public record (Mont. Code Ann. § 2-6-2-202(1)(c)) the public cannot compel disclosure of draft meeting minutes as a “public writing” under Mont. Code Ann. § 2-6-102(1).

Again, this letter is in response to your request for a letter of advice, and not a formal Opinion of the Attorney General.

Very truly yours,



PATRICK M. RISKEN

cc: ALJ