

**ATTORNEY GENERAL**  
**STATE OF MONTANA**

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VOLUME NO. 56

OPINION NO. 2

**PUBLIC SAFETY OFFICERS** - The definition of “agent” in Mont. Code Ann. § 44-2-111 does not restrict the persons that the Attorney General may appoint as agents to employees “within the department of justice”;

**STATUTORY CONSTRUCTION** - Where statutory language is ambiguous, I must look outside of the plain language to determine the intent of the Legislature;

**MONTANA CODE ANNOTATED** - Title 44, chapter 1, part 1; sections 1-2-101, 1-2-102, 7-32-303, 44-2-111, 44-2-113, 44-2-115, 44-2-115(1), 44-2-115(2), 44-2-115(3), 44-2-115(5).

**HELD:** The definition of “agent” in Mont. Code Ann. § 44-2-111 does not restrict the persons that the Attorney General may appoint as agents to employees “within the department of justice.”

July 1, 2016

Sheriff Tony Harbaugh, Chair  
Montana POST Council  
2260 Sierra Road East  
Helena, MT 59602

Dear Sheriff Harbaugh:

**[P1]** The Montana Public Safety Officer Standards and Training Council (POST) has requested an Attorney General Opinion as to a question that I have rephrased as:

Does the definition of “agent” in Mont. Code Ann. § 44-2-111 restrict the persons that the Attorney General may appoint as agents to employees “within the department of justice”?<sup>1</sup>

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<sup>1</sup> Because I conclude that 44-2-111 does not restrict “agents” to employees within the Department of Justice (DOJ), I do not reach your second question regarding the authority of the Department to enter into a Memorandum of Authority (MOU) with the Department of Corrections (DOC) regarding DOC investigators.

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**MONTANA DEPARTMENT OF JUSTICE**

Legal Services Division ★ Division of Criminal Investigation ★ Highway Patrol Division ★ Forensic Science Division  
Gambling Control Division ★ Motor Vehicle Division ★ Information Technology Services Division ★ Central Services Division

[P2] Part 1 of Volume 44, Chapter 2, Montana Code Annotated, provides the Attorney General with the authority to appoint “agents.” An agent appointed by the Attorney General “is a peace officer” and is provided the powers and duties (and limitations on those powers) in Mont. Code Ann. § 44-2-115.

[P3] At issue here is Mont. Code Ann. § 44-2-111 which defines “agent.” This statute reads: “[a]s used in this part, ‘agent’ means a person appointed by the attorney general to conduct criminal investigations and perform related duties within the department of justice.” Your letter questions whether the phrase “within the department of justice” qualifies “agent” and thereby limits an “agent” to DOJ employees only.

[P4] While 44-2-111 could be read to limit agents to DOJ employees, it is not the only way to read the sentence, grammatically speaking. “Within the department of justice” could be read to modify “related duties” but not “conduct criminal investigations.” Under this reading an “agent” may be appointed from departments other than DOJ, but, if the agent is to “perform related duties” outside of conducting criminal investigations, these related duties must be within DOJ. An example of such a “related duty” is teaching at the Law Enforcement Academy. The instructors at the Academy are not actively conducting criminal investigations, but they are performing related duties within DOJ.

[P5] Because the statute is subject to more than one reasonable interpretation as to whether it limits an “agent” to employees of DOJ, it is ambiguous. I must therefore look outside the plain language of the definition to determine the meaning intended by the Legislature. *See State v. Johnston*, 2008 MT 318, ¶ 26, 346 Mont. 93, 193 P.3d 925 (“We resolve ambiguous terms, however, by looking to the structure, purpose and/or legislative history of a statute to determine the intent of the Legislature.”). I also must consider statutory schemes “in their entirety and the legislative intent may not be gained from the wording of any particular section or sentence, but only from a consideration of the whole.” *Friends of the Wild Swan v. Department of Natural Res. & Conservation*, 2005 MT 351, ¶ 16, 330 Mont. 186, 127 P.3d 394.

[P6] First, I note that 44-2-111 speaks to the “definition” of agent, not the “qualifications” of an agent. The Legislature listed the specific qualifications of agents in Mont. Code Ann. § 44-2-113: “a person qualified by experience, training, and high professional competence in criminal investigation. Each agent shall meet all the requirements of 7-32-303 (listing POST certification standards).” The Legislature could have expressly included “employed by the department of justice” or similar language as a qualification, but did not do so. This weighs against reading such a limitation into the definition. *See* Mont. Code Ann. § 1-2-101 (an interpretation of a statute should not “insert what has been omitted or . . . omit what has been inserted.”). Additionally, as

44-2-113 is the more particular provision regarding qualifications, it should control. Mont. Code Ann. § 1-2-102.

[P7] Importantly, for ten years or more, beginning under former Attorney General McGrath, DOJ has maintained an MOU with DOC designating DOC employees as investigators so that these employees may conduct criminal investigations within DOC prison and treatment facilities. As such, three Attorneys General, myself included, have implicitly acknowledged that agents may be appointed by the Attorney General in departments other than DOJ. The DOC agents subject to the MOU are essential to conducting investigations within DOC facilities, because local law enforcement often does not have the time or resources to investigate all alleged crimes within these facilities. This long-standing, consistent interpretation is entitled to “respectful consideration.” *Friends of the Wild Swan*, ¶ 11 (granting DNRC, “as a state agency . . . respectful consideration of its long and continued course of consistent interpretation of a statute”) (citation and internal quotations omitted).

[P8] Additionally, I understand from DOC that a prior Legislature was informed of the MOU between DOJ and DOC, and then opted not to pass legislation designating DOC investigators as “peace officers,” preferring instead the additional oversight provided by the MOU. Thus the Legislature, despite having knowledge of the use of this statute to appoint non-DOJ agents, has not taken steps to change the law but instead relied on the MOU. The Legislature’s inaction in light of knowledge of the MOU weighs in favor of an interpretation that does not limit agents to DOJ employees. *See Swanson v. Hartford Ins.*, 2002 MT 81, ¶ 22, 309 Mont. 269, 46 P.2d 584 (“We presume that if the legislature disagreed with our interpretation . . . it would have amended the statute accordingly.”) (internal citation and quotation marks omitted).

[P9] On the other hand the lists of powers and duties under Mont. Code Ann. § 44-2-115 seem tailored toward DOJ criminal investigators. For example, the agent “shall provide investigative assistance” to federal, state and local agencies “at their request in accordance with rules adopted by” DOJ. 44-2-115(1). The only “concurrent jurisdiction” expressly granted is the investigation of “offenses involving dangerous drugs [and] organized criminal activity,” -115(2), and the section also speaks to investigating gambling and workers’ compensation fraud. -115(3), (5).

[P10] The majority of agents appointed by the Attorney General will, of course, work within DOJ. It thus makes sense that the powers and duties section refers primarily to the type of work performed by DOJ agents. The listed duties do not apply to all agents within DOJ, however. Not all agents, for example, “investigate gambling activities” or workers’ compensation fraud. -115(3), (5). Thus the listed duties cannot be read as

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mandatory for all agents. Though primarily directed at DOJ agents, this list of powers and duties could be intended to place limits on the authority of non-DOJ agents as well. A non-DOJ agent, for example, would be able to provide “investigative assistance” to local law enforcement agencies, but only at the request of a local agency and “in accordance with rules adopted by” DOJ.

**[P11]** Looking at the statute and Part 1 as a whole, and considering the history of agency interpretation and inaction by the Legislature, my opinion is that the phrase “within the department of justice” in Mont. Code Ann. § 44-2-111 is not intended to limit the definition of “agent” to DOJ employees only. A person “qualified by experience, training, and high professional competence in criminal investigation,” Mont. Code Ann. § 44-2-113, may be appointed as an “agent” by the Attorney General, even if he works for a state agency other than DOJ.<sup>2</sup>

THEREFORE, IT IS MY OPINION:

The definition of “agent” in Mont. Code Ann. § 44-2-111 does not restrict the persons that the Attorney General may appoint as agents to employees “within the department of justice.”

Sincerely,



TIMOTHY C. FOX  
Attorney General

tcf/jss/jym

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<sup>2</sup> It is unnecessary in this opinion to address whether “agent” is limited to state employees. However, I note that Mont. Code Ann. § 44-2-114 requires all agents to “be covered by the public employees’ retirement system.”