



CITY OF BILLINGS

CITY ATTORNEY'S OFFICE
P.O. BOX 1178
BILLINGS, MONTANA 59103

(406) 657-8205
FAX (406) 657-3067

June 24, 2020

To: Chris Kukulski, City Administrator
Kevin Iffland, Assistant City Administrator
Rich St. John, Police Chief
Bill Rash, Fire Chief
Andy Zoeller, Financial Services Director
Wyeth Friday, Planning and Community Development Director

From: Brent Brooks, City Attorney *BB*
Gina Dahl, Assistant City Attorney

Re: Public Safety Mill Levy Election: Education v. Advocacy Rules and Restrictions for City Staff and Elected Officials

BACKGROUND

On June 22, 2020, The Mayor and Council approved an ordinance and ballot language resolution submitting the Public Safety Mill Levy (PSML) to voters for approval in a special mail ballot election currently scheduled for September 15, 2020. If approved by voters, this mill levy will amend the City Charter by allowing 60 mills to be levied each year indefinitely into future years. The next step in this process concerns the rules and restrictions for City elected officials and City staff members as information is provided to City voters concerning the levy.

PURPOSE of MEMORANDUM

This memorandum addresses the requirements to keep records and report-expenses and time incurred regarding the mill levy election as required of Incidental Political Committees as defined by Montana election statutes.

DUTY OF FILING REPORTS OF CONTRIBUTIONS AND EXPENDITURES:

Montana Code Annotated (MCA) §13-1-101(31) defines a political committee broadly:

(31)

(a) "Political committee" means a combination of two or more individuals or a person other than an individual who receives a contribution or makes an expenditure:

(i) to support or oppose a candidate or a committee organized to support or oppose a candidate or a petition for nomination;

(ii) to support or oppose a ballot issue or a committee organized to support or oppose a ballot issue; or

(iii) to prepare or disseminate an election communication, an electioneering communication, or an independent expenditure.

(b) Political committees include ballot issue committees, incidental committees, independent committees, and political party committees.

(c) A candidate and the candidate's treasurer do not constitute a political committee.

(d) A political committee is not formed when a combination of two or more individuals or a person other than an individual makes an election communication, an electioneering communication, or an independent expenditure of \$250 or less.

(emphasis added). An electioneering communication includes publicly distributed printed materials that do not support or oppose a ballot issue, that can be received by more than 100 recipients in the district that refers to a ballot issue or other question submitted to the voters. MCA § 13-1-101(16)

Section 13-1-101(23), MCA, defines an "incidental committee" as one that is not specifically organized or operating for the primary purpose of supporting or opposing candidates or ballot issues but that may incidentally become a political committee by receiving a contribution or making an expenditure.

The Montana Commission on Political Practices (COPP) is a state agency which regulates political campaign practices and enforces Montana election laws. COPP has indicated that the election rules do apply to cities as they relate to ballot issues such as the PSML.

Because public monies may be expended in educating the public on the PSML ballot issue, the City must register with the COPP as an Incidental Political Committee and appropriately report expenditures.

INCIDENTAL POLITICAL COMMITTEE REGISTRATION PROCESS

Our office will prepare and file the C-2 Form and then thereafter the C-4 will need to be prepared and filed under the schedule set by the COPP's rules. We suggest that Wynnette Maddox and a staff member primarily shepherd the process and coordinate the reporting, in conjunction with the Finance Department. Someone will need to assist in calendaring and reporting the information which is provided by those City officials or employees who work on the process, similar to that which is involved in lobbying the State Legislature. Attached in this regard is a template to use to track time and expenses that I we have modified for this purpose

In preparing the C-2 Form, I would suggest that Andy Zoeller be designated as the Incidental Committee Treasurer and perhaps Kevin Iffland as Deputy Treasurer, Please let me know your thoughts in this regard.

OTHER APPLICABLE STATUTORY PROVISIONS

1. City Staff Member Restrictions: Education But Not Advocacy

After registering as an Incidental Political Committee, City staff members will be authorized to expend time and public monies that are allowed under the following criteria provided in MCA §2-2-121(2):

(a) Except as provided in subsection (3)(b), a public officer or public employee may not use public time, facilities, equipment, supplies, personnel, or funds to solicit support for or opposition to . . . the passage of a ballot issue unless the use is:

(i) authorized by law; or

(ii) properly incidental to another activity required or authorized by law, such as the function of an elected public officer, the officer's staff, or the legislative staff in the normal course of duties.

(b) As used in this subsection (3), ... [w]ith respect to ballot issues, properly incidental activities are restricted to:

(i) the activities of a public officer, the public officer's staff, or legislative staff **related to determining the impact of passage or failure of a ballot issue on state or local government operations;**

(Emphasis added)

2. Elected Officials

The above restriction in bold font is different with an elected official, such as the Mayor or Councilmembers. A 2005 Montana Attorney General's (AG) opinion provides some guidance on such use of public resources:

Although "public time" is not defined, a reasonable construction would be those hours for which an employee receives payment from a public employer. **Elected officials, of course, do not have specific hours of employment nor do they receive vacation leave or other time off duty. They receive annual salaries rather than hourly wages. Thus, they could be considered to be on "public time" at all times. However, as long as public facilities, equipment, supplies, or funds are not involved, elected officials are not restricted in the exercise of political speech by the provisions of Montana law.**

...

The presumption is that free speech rights are protected and only the very specific restrictions in Mont. Code Ann. § 2-2-121 can be invoked to limit a public officer's or public employee's right to political speech.

THEREFORE, IT IS MY OPINION:

A public officer or public employee may engage in political speech so long as his or her speech does not involve the use of public time, facilities, equipment, supplies, personnel, or funds.

51 Mont. Op. Atty. Gen. 1 (2005), P. 1 (emphasis added).

This AG opinion is attached here along with a 2002 memo from former Montana Attorney General Joseph Mazurek to a citizen group supporting a state-wide Initiative, for your review. As an example of a restriction, the Mayor and Council would not be authorized to advocate during Council meetings or City advisory board meetings since this is using public resources and staff time.

CONCLUSION:

The City Attorney's Office has been advised of the stated desire to educate and inform the public as to the effects of passage or failure of the Public Safety Mill Levy ballot issue. Therefore, the City should complete the C-2 Form register as an Incidental Political Committee and report the activities, including staff time and costs expended.

As provided in § 2-2-121, City staff **should not** promote or oppose the Public Safety Mill Levy in the education efforts, but instead restrict their incidental activities to those related to determining and communicating to the public the impact of passage or failure of a ballot issue on City operations.

Undoubtedly there will be unpredictable issues and questions not addressed in this brief memorandum that arise as the education process proceeds and we will assist in answering them.

Attachments