



HB 142 - REVIEW OF ADVISORY COUNCILS & REPORTS

*Prepared by Sheri Scurr,
Legislative Research Analyst
for the Law and Justice Interim Committee
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Part 1 - Montana Department of Justice

Purpose & Organization of Brief

This paper is the first installment of the additional information on advisory councils and agency reports requested by the Law and Justice Interim Committee at its December 15-16, 2011, meeting. A December 2011 Decision Brief presented a complete at-a-glance chart and copies of the statutes for the statutory advisory councils and agency reports that the LJIC is required to review under HB 142.

Section A of this brief provides additional information and recommendations on the Department of Justice's statutory advisory councils, which are the:

- Fire Prevention and Investigation Advisory Council;
- Domestic Violence Fatality Review Commission;
- Gaming Advisory Council; and
- Criminal Intelligence Information Advisory Council.

Section B of this brief provides additional information and recommendations on the statutorily required reports by the Department of Justice, which are the:

- Cigarette Standards Report;
- Racial Profiling Report; and
- Domestic Violence Fatality Review Commission Report.

The **Executive Summary** lists only the staff recommendations.

EXECUTIVE SUMMARY OF STAFF RECOMMENDATIONS

Section A - Advisory Councils

Recommendation #1 - Fire Prevention & Investigation Advisory Council

The Fire Prevention and Investigation Advisory Council created in subsection (3) of section 2-15-2005, MCA, should be stricken from statute.

Recommendation #2 - Domestic Violence Fatality Review Commission

Section 2-15-2017, MCA, establishing the domestic violence fatality review commission should be amended. Subsection (5) should state that the commission shall review "closed domestic homicide cases selected by the attorney general to provide the commission with the best opportunity to fulfill its duties under this section."

Recommendation #3 - Gaming Advisory Council

Unless primary stakeholders bring up additional issues or considerations not discussed in this brief, section 2-15-2021, MCA, need not be amended. However, the committee may wish to amend the statute to provide that the maximum compensation per day of council business be the same as provided under section 2-15-122, MCA, for other advisory councils.

Recommendation #4 - Criminal Intelligence Information Advisory Council

The statutes concerning the criminal justice intelligence information advisory council should be revised or stricken. If the advisory council is stricken, the attorney general may appoint an advisory council pursuant section 2-15-122, MCA. However, if the advisory council would need to have duties regarding multiple agencies or duties or membership defined by the legislature rather than the attorney general, then the advisory council statutes should be revised accordingly.

Section B - Statutory Reports

Recommendation #5: Racial Profiling Report

The statute requiring periodic reports to the Law and Justice Interim Committee about compliance with the law prohibiting racial profiling serves a useful purpose and should not be eliminated. The committee could coordinate with the State-Tribal Relations Interim Committee to recommend bill amending the reporting requiring to provide that the report also be made to the State-Tribal Relations Committee. Also, there is no standardized format for this report. It may be helpful if the Department of Justice could work toward a standardized format that ensures each aspect of the racial profiling law is analyzed in each report, for example: (1) policies; (2) training; (3) complaint procedures; (4) corrective actions and investigations of complaints; and (5) traffic stop data collection and reporting.

Recommendation # 6 - Cigarette Standards Report

The reporting requirement in section 50-65-102(7), MCA, for a report on how a particular section of law on cigarette standards is working should be stricken. However, it would probably be useful for the State Fire Marshal's Report to include annual data on the causes of the fires investigated, which would include a category for cigarette-caused fires. The Fire Marshal's Report is not required by statute. Thus, the committee could also consider making such a report mandatory, or part of a comprehensive annual report by the Attorney General that would cover all programs under the Department of Justice.

Recommendation #7: Domestic Violence Fatality Review Commission Report

Subsection (11) of section 2-15-2017, MCA, which requires the report by the Domestic Violence Fatality Review Commission to the legislature should be amended to specify that the report must be made to the Law and Justice Interim Committee each interim and made available to the full legislature prior to each regular session. The language specifying that the report must be made "no later than the third Tuesday in January of each year in which the legislature meets in regular session" is unnecessarily specific and should be stricken.

FIRE PREVENTION & INVESTIGATION ADVISORY COUNCIL

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| Statutory authority: | Section 2-15-2005, MCA, establishes the state fire prevention and investigation section and specifies that the Attorney General <i>shall</i> create the advisory council pursuant to section 2-15-122, MCA. |
| Initial enactment: | Sec. 1, Ch 148, L. 1911 |
| Membership: | Not defined in statute, determined pursuant to section 2-15-122, MCA. |
| Duties: | Not specified in statute, determined pursuant to section 2-15-122, MCA. |
| Meetings: | Not specified in statute, determined pursuant to section 2-15-122, MCA, which states that unless otherwise specified by the creating authority, the council must meet at least annually. |
| Biennial cost: | Under section 2-15-122, MCA, a member would be entitled to \$50 a day (unless they are a salaried public employee) and travel, meals, and lodging expenses for council business. |
| Latest activities: | According to the department, the council has not met in some time and all council member terms have expired. The department reports that historically, the council provided recommendations to the attorney general about the adoption of fire codes and to provide guidance on the disbursement of federal fire-related grant money. However, the department has not received federal grant money in many years and the fire service organizations already provide input to fire codes through their professional organizations. |
| Analysis: | The current statute <i>requires</i> that the advisory council exist, thus does not leave it's creation to the discretion of the attorney general. There are no other statutes and there are no administrative rules that relate to the advisory council. The purpose of HB 142 was to clean up statutes that were no longer serving a purpose. Staff is not aware of any |

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significant legislative interest in mandating this advisory council. Striking subsection (3) of 2-15-2005, MCA, will allow the attorney general to decide whether or not to continue the advisory council under the discretionary language of section 2-15-122, MCA.

Recommendation #1:

The Fire Prevention and Investigation Advisory Council created in subsection (3) of section 2-15-2005, MCA, should be stricken from statute.

DOMESTIC VIOLENCE FATALITY REVIEW COMMISSION

- Statutory authority:** Section 2-15-2017, MCA, establishes the commission, specifies its duties, membership, and compensation. The statute also specifies the confidentiality of meetings and records, but requires disclosure of conclusions and recommendations, including a biennial report to the legislature, which is due no later than the third Tuesday in January during a regular session.
- Initial enactment:** Sec. 1, Ch. 81, L. 2003
- Membership:** The statute specifies there shall be no more than 18 members appointed by the attorney general and representing relevant state agencies, private organizations, medical and mental health care providers, law enforcement, the judiciary, state bar, the tribes, concerned citizens, and a member of the legislature who serves on either the house or senate judiciary committee.
- Duties:** The commission's statutory duties are to examine trends and patterns, educate the public, service providers and policymakers, recommend policies, practices and services to encourage collaboration and reduce domestic violence fatalities. The department's website states the commission's reviews are to identify gaps in Montana's system for protecting battered women and to better coordinate multi-agency efforts to protect those most at risk of domestic homicide.
- Meetings:** The statute implies that the commission will meet as necessary to review fatalities not under investigation and fatalities in cases which involved adjudication and a final judgement. Meetings and proceedings are exempt from open meeting laws. The department's website states the commission meets twice a year and reviews closed domestic homicide cases.

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- Biennial cost: Members serve without compensation, but are entitled to travel expenses. If the member is a full-time public employee, the member is entitled to receive regular compensation.
- Latest activities: See January 2011 Report to the Legislature.
- Analysis: The details of the statute enacting the commission indicate a significant interest by the legislature in the membership, duties, and findings of the commission. The latest report by the commission also seems to provide good information. For example, the report highlighted 8 trends and offered 11 detailed recommendations. Based on a simple review of the statute, the department's website information, and the biennial report, the commission seems to be very active and productive. Nevertheless, although the statute mandates that the commission "shall review fatalities that are not under investigation and fatalities in cases that have been adjudicated and have received a final judgement", in practice, the commission is reviewing only a select group of intimate partner homicides due to the commission's limited time and resources.

Recommendation #2:

Section 2-15-2017, MCA, establishing the domestic violence fatality review commission should be amended. Subsection (5) should state that the commission shall review "closed domestic homicide cases selected by the attorney general to provide the commission with the best opportunity to fulfill its duties under this section."

GAMING ADVISORY COUNCIL

- Statutory authority:** Section 2-15-2021, MCA, establishes the council and allocates it to the Department of Justice for administrative purposes only. The statute further establishes membership, duties, compensation of members, and reporting requirements. The statute also establishes duties for the department with respect to the council.
- Initial enactment:** Sec. 64, Ch. 642, L. 1989
- Membership:** The statute sets membership at nine and specifies one member from the senate, one from the house, and the seven remaining members to be appointed by the department as follows: one representing the public at large, two representing local governments, one being a Native American, and three representing the gaming industry. Members are appointed to a 3-year term.
- Duties:** The council is directed to "study all aspects of gambling in the state", "submit a biennial report to the department" with "recommendations for amendments to the gambling statutes, the need for additional or modified department rules, the clarification of existing rules, and other recommendations on the operation of the department or any other gambling-related matter". The council may submit interim reports it considers necessary and is required to meet with the department upon request. The department is directed to meet with the council upon the council's request and to provide each council member notice and a copy of each proposed change in administrative rules relating to gambling. The council must review the rules and may comment on the proposed rule and may attend any hearing on the proposed rule. The department is required to consider the comments of individual members or of the council as a whole before adopting the proposed change.

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- Meetings:** The statute provides that the council shall hold meetings as it considers necessary. In practice, the council met twice in 2010 and twice in 2011. Detailed summary minutes of each meeting are posted to the department's website.
- Biennial cost:** Members are entitled to meals, travel, and lodging expenses, and if they are not salaried public employees, to \$25 a day. Expenses are to be paid from the licensing fees paid by the department. The statute authorizes the council to incur expenses for meetings as it considers necessary to study all aspects of gaming in the state. In practice, the council met twice in 2010 and twice in 2011.
- Latest activities:** The council's last meeting was September 16, 2011 and its next meeting is scheduled for March 2, 2012.
- Analysis:** Based on the nature of the duties specified in the statute, the regular meetings and detailed minutes of each meeting, and the significant impact of gaming regulations in the state, it seems that the council performs an important role in developing gaming laws and regulations. Furthermore, the advisory council's review of administrative rules is unique in that the statute requires the department to consider the council's comments. In order to fulfill this role, the advisory council should remain an independent body created by statute. The maximum daily compensation for members of advisory councils created under section 2-15-122, MCA, who are not a full-time salaried public employee is \$50 a day, adjusted for inflation. The Gaming Advisory Council members are receiving less compensation (\$25 a day) than would a non-statutory advisory council, so the legislature should consider increasing that amount to the standard level.

Recommendation #3:

Unless primary stakeholders bring up additional issues or considerations not discussed in this brief, section 2-15-2021, MCA, need not be amended. However, the committee may wish to amend the statute to provide that the maximum compensation per day of council business be the same as provided under section 2-15-122, MCA, for other advisory councils.

CRIMINAL INTELLIGENCE INFORMATION ADVISORY COUNCIL

- Statutory authority: Sections 44-5-501, 44-5-506, and 44-5-511, MCA.
- Initial enactment: Chapter 145, Laws of 1985.
- Membership: Subsection (2) of 44-5-501, MCA states that membership must be as follows: "... one representative from the Montana chiefs of police association, one representative from the Montana sheriffs and peace officers association, one representative from the Montana county attorneys association, one member of the department of justice, a member of the judiciary committee of either the house of representatives or the senate, and a citizen at large."
- Duties: Section 44-5-504, MCA, states: "The advisory council shall: (1) recommend general policies for the operation of the section; (2) recommend the approval or denial of an application from an eligible agency for participation in the section; (3) recommend the suspension of a participant agency for due cause; and (4) recommend, if appropriate, the reinstatement of a suspended participant agency."
- Section 44-5-506, MCA, states: "(1) Agencies eligible for participation in the section are: (a) municipal police departments; (b) sheriff's offices; and (c) sections of the department of justice engaged in criminal investigation. (2) A participant in the section must be an eligible agency that has been authorized by the attorney general to receive criminal intelligence information from the section under this part."
- Section 44-5-515, MCA, states: The advisory council shall review and evaluate the implementation of the section's safeguards of individual privacy rights adopted pursuant to 44-5-504 and periodically inspect all records relating to dissemination of information to determine whether they are in compliance with this part and with the standards and

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procedures adopted by the section. The advisory council shall make an annual report to the attorney general.

- Meetings: The number of meetings is not specified in statute, but the Department of Justice reports that the council meets quarterly.
- Biennial cost: Under section 2-15-122, MCA, which is the general statute authorizing the governor and department heads to create advisory councils, members are entitled to meals, travel, and lodging expenses, and if they are not salaried public employees, to \$50 a day.
- Latest activities: The department reports that the advisory council reviews the policies of the Montana All Threat Intelligence Center (MATIC) as they are proposed. The Attorney General has already established and adopted, with the advisory council's input, a privacy policy for the MATIC.
- Analysis: According to the department, the council was formed with the primary mission of safeguarding privacy rights. Legislative history shows that the advisory council statute was enacted in conjunction with statutes authorizing the attorney general to establish a Criminal Intelligence Information Section within the Department of Justice. The enacting legislation stated that **if** the attorney general established such as section, then the attorney general **must** establish the advisory council. The membership criteria set out in statutes suggests concern by outside associations and the legislature that there be some sort of outside oversight during the establishment of the section. The duties specified for the advisory council under section 44-5-506, MCA, relate only to the denial, acceptance, suspension, or reinstatement of a "participant agency". However, a participant agency is already defined in statute, under section 44-5-511, MCA.
- This statutory language has not been updated since 1985 and it seems out-of-step with actual practice. For example, the DOJ website states that the "MATIC is a multi-agency entity that involves the Division of Criminal Investigation,

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Department of Corrections, Department of Military Affairs, and the Rocky Mountain Information Network." It also states that the "MATIC has been designated by the governor's office as the state's fusion center." The department website further states that there is an "advisory board" created by the attorney general in 2003 that oversees the MATIC and "adopts, implements, and complies with policy regarding safeguarding an individual's right to privacy."

Thus, there are three basic flaws in the current statutory language compared to practice. First, the participating agencies in MATIC appear to include more than the "participant agencies" listed in section 44-5-506, MCA. Second, the provisions of section 44-5-511, MCA, which relate to the duties of the advisory council to determine who is a participant agency is not consistent with the language in section 44-5-504, MCA, which suggests the council is also supposed to advise the attorney general on section standards and procedures. Third, an advisory council is, by definition, advisory and so should not be acting as a governing board or adopting or implementing policies.

Recommendation #4:

The statutes concerning the criminal justice intelligence information advisory council language should be revised or stricken. If the advisory council is stricken, the attorney general may appoint an advisory council pursuant section 2-15-122, MCA. However, if the advisory council would need to have duties regarding multiple agencies and duties or membership defined by the legislature rather than the attorney general, then the advisory council statutes should be revised accordingly.

RACIAL PROFILING REPORT

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| Statutory authority: | Section 44-2-117(9), MCA. |
| Initial enactment: | Ch. 302, L. 2003. (HB 293, Rep. Frank Smith) |
| Amendments: | Ch. 243, L. 2005 added reporting. (SB 282, Sen. Frank Smith) Ch. 287, L. 2007 added data collection. (HB 781, Rep. Jonathan Windy Boy) |
| Background: | Section 44-2-117, MCA, prohibits racial profiling and specifies that race or ethnicity may not be the sole factor in determining probable cause to arrest someone or in constituting a particularized suspicion to justify the detention or an investigatory stop of a motor vehicle. The subsection on reporting was not added until 2005. The language requiring written policies and data collection by law enforcement agencies was added in 2007. |
| Statutory language: | Subsection (9), requiring the report to the legislature states: "The department of justice shall make periodic reports to the law and justice interim committee regarding the degree of compliance by municipal, county, consolidated local government, and state law enforcement agencies with the requirements of this section." |
| Last report: | Provided by the Department of Justice Highway Patrol for this meeting of the LJIC, February 2012. A report covering challenges local law enforcement agencies have in collecting data was provided to the LJIC last interim, September 2010. (See attached.) |
| Cost: | Because the report is a printed handout provided to the LJIC, and not a formal publication produced through state printing services, the cost of producing the report is assumed to be negligible. |
| Analysis: | The last two reports have highlighted continuing efforts by law enforcement agencies, particularly the Highway Patrol, to comply with all the requirements of section 44-2-114, |

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MCA. The reports note positive efforts in recruitment and training. The reports have also highlighted on-going challenges, particularly with data collection at the local level due to a lack of a uniform methodology for capturing and reporting data. Each year, there are numerous legislative and public requests for copies of the racial profiling report, indicating there is significant legislative concern and public interest in tracking this issue.

Recommendation #5:

The statute requiring periodic reports to the Law and Justice Interim Committee about compliance with the law prohibiting racial profiling serves a useful purpose and should not be eliminated. The committee could coordinate with the State-Tribal Relations Interim Committee to recommend bill amending the reporting requiring to provide that the report also be made to the State-Tribal Relations Committee. Also, there is no standardized format for this report. It may be helpful if the Department of Justice could work toward a standardized format that ensures each aspect of the racial profiling law is analyzed in each report, for example: (1) policies; (2) training; (3) complaint procedures; (4) corrective actions and investigations of complaints; and (5) traffic stop data collection and reporting.

CIGARETTE STANDARDS REPORT

- Statutory authority: Section 50-65-102(7), MCA.
- Initial enactment: Chapter 318, Laws of 2007. (HB 461, Rep. Bob Ebinger)
- Background: Section 50-65-102, MCA, concerns cigarette test methods, performance standards, conditions of sale, and alternative test methods and performance standards. This section was enacted as part of a 13-section bill establishing requirements about how cigarette paper burns on cigarettes sold in the state. The bill was offered as a fire safety bill modeled on law enacted in New York concerning reduced ignition standards for cigarettes. Six other states were identified during the session hearings as having similar laws with 16 additional states considering similar legislation. Opponents argued that manufactures could not meet 50 different state criteria and that a federal law with technically achievable standards was preferable.
- Statutory language: Subsection (7), requiring the report to the legislature states: "The department of justice shall review the effectiveness of this section and report every 4 years to the legislature the state fire marshal's findings and, if appropriate, submit recommendations for legislation to improve the effectiveness of this section. The report and legislative recommendations may be submitted no later than January 1 of each 4-year period."
- Last report: August 2010 covering data from 2007, 2008, and 2009. Attached.
- Cost: Because the report is a one-page PDF document linked on a web page and not a part of a publication produced through state printing services, the cost of producing the report is not necessary for the department to report and it may be assumed the cost is negligible.

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Analysis: The initial hearing on HB 461 did not involve testimony or questions on the required report to the legislature. Because the bill was drafted based on New York law, it may be assumed that the language requiring a report to the legislature every four years is also based on New York law. The Department of Justice website does have a link to the one-page PDF document constituting the report. However, there is no indication that this report is something that the legislature as a whole has a significant interest in receiving directly. It should be noted that the State Fire Marshal does produce a report entitled "State Fire Marshal's Report". This report provides annual data on fires investigated by region, the number of fire deaths statewide, the number of fire inspections by type of inspection statewide, and an overview of the National Fire Incident Reporting System. However, the report's data does not break out cigarette-caused fires or related deaths.

Recommendation #5:

In accordance with the intent of HB 142 to clean up unnecessary, miscellaneous, or redundant reporting requirements and given the lack of a clearly articulated interest by the legislature in receiving this very specialized report, the reporting requirement in section 50-65-102(7), MCA, should be stricken. However, it would probably be useful for the State Fire Marshal's Report to include annual data on the causes of the fires investigated. The Fire Marshal's Report is not required by statute. Thus, the committee could also consider making such a report mandatory, or part of a comprehensive annual report by the Attorney General that would cover all programs under the Department of Justice.

DOMESTIC VIOLENCE FATALITY REVIEW COMMISSION

- Statutory authority: Section 2-15-2017(11), MCA.
- Initial enactment: Ch. 81, L. 2003. (HB 116, Rep. Christine Kaufman, by Request of the Department of Justice)
No amendments since enactment.
- Background: Section 2-15-2017, MCA, was enacted through a bill requested by the Department of Justice. The hearing on the bill emphasized that the purpose of bill was to ensure that the Commission would have access to the information it needed in order to review closed cases concerning domestic violence fatalities, look for trends, and issue recommendations that would help law enforcement agencies. The reporting requirement was not discussed in detail, except to provide that the report also be provided to DPHHS.
- Statutory language: Subsection (11) requiring the report to the legislature states: "The commission shall report its findings and recommendations in writing to the legislature, the attorney general, the governor, and the chief justice of the Montana supreme court no later than the third Tuesday in January of each year in which the legislature meets in regular session. The report must be made available to the public through the office of the attorney general. The commission may issue data or other information periodically, in addition to the biennial report."
- Last report: January 2011. Attached.
- Cost: The cost of the report is not specified on the report. However, there is a notation that it was paid for through a federal grant awarded through the Montana Board of Crime Control from the Office of Justice Programs, U.S. Department of Justice.

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Analysis: The report produced by the Commission is comprehensive. It covers the legislative history of the Commission and the purpose of the report, a discussion of Commission findings, data on homicides, fatality statistics, fatality maps, a detailed time line of the Commission's activities, and guides and forms that help combat domestic violence. The report also provides a detailed summary of data, trends, and recommendations.

Recommendation #7:

Subsection (11) of section 2-15-2017, MCA, which requires the report by the Domestic Violence Fatality Review Commission to the legislature should be amended to specify that the report must be made to the Law and Justice Interim Committee each interim and made available to the full legislature prior to each regular session. The language specifying that the report must be made "no later than the third Tuesday in January of each year in which the legislature meets in regular session" is unnecessarily specific and should be stricken.

BIENNIAL REPORT?

The Department of Justice does not produce a biennial report covering the operations or activities of its various divisions, sections, and programs. It may be helpful to the legislature and the public to require the Department of Justice to produce a biennial report similar to what is produced by the Department of Corrections. The Department of Corrections' biennial report consolidates information about its various programs and divisions into an accessible reference book that includes information about each program's purpose, staff, expenditures, and relevant data. Much of this information is already provided on the Department of Justices' website. Still, a consolidated report, that included an organizational chart and a staff directory would be very helpful. However, the production of such a report would require additional staff time and incur an administrative cost.