Freedom of Information in Montana: Open meetings

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What is Freedom of Information?

Freedom of Information (FOI) also is called Open Government or "the Right to Know."

It is based in the belief that only an informed citizenry can govern itself.

FOI generally addresses citizen access to government records, government meetings and court proceedings.

News reporters have the same "right to know" as other citizens—no more, no less.

What is the basis for Freedom of Information in Montana?

Montana Constitution Article II, Section 8

Right of Participation.

The public has the right to expect governmental agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision as may be provided by law.

What is the basis for Freedom of Information in Montana?

Montana Constitution Article II, Section 9

Right to Know.

No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

NOTE: Many FOI disputes involve the balance between the Right to Know and the Right of Privacy.

Article II, Section 10 is not implicated

The right of privacy set forth in Article II, Section 10 does not control public access to meetings and documents. Access to meetings and documents is governed by the balancing test set froth in Article II, Section 9.

The Montana statutes define open meeting requirements

Montana Code Annotated

2-3-203: Open Meetings

(1) All meetings of public or governmental bodies, boards, bureaus, commissions, agencies or the state, or any political subdivision of the state or organizations or agencies supported in whole or in part by public funds or expending public funds, including the supreme court, must be open to the public.

What kinds of governmental bodies are covered by open meetings laws?

Montana Code Annotated

2-3-203: Open Meetings

(2) All meetings of associations that are composed of public or governmental bodies referred to in subsection (1) and that regulate the rights, duties, or privileges of any individual must be open to the public.

How about committees and subcommittees

Montana Code Annotated

2-3-203: Open Meetings

(6) Any committee or subcommittee appointed by a public body or association described in subsection (2) for the purpose of conducting business that is within the jurisdiction of that agency is subject to the requirements of this section.

NOTE: This section applies to state, city or county governments, school districts, or other decision-making bodies that regulate Montanans.

OPEN MEETINGS:
What makes a "public agency"?

Montana Code Annotated
2-3-203: Open Meetings

- Public or governmental bodies, boards, bureaus, commissions, agencies of the state or any political subdivision of the state or organizations or agencies supported in whole or in part by public funds or expending public funds.
- Committees or a public body ... for the purpose of conducting business which is within the jurisdiction of that agency is subject to the requirements of the Open Meetings Act.
- "Committees of the whole" as well as "work sessions" sometimes held by school boards. In 2001 a Supreme Court decision found that a committee, or advisory board, made up of several school principals, a school board trustee, two teachers and four member of the public formed to discuss school-closure options was subject to open-meeting laws.
- The meetings of associations composed of public or governmental bodies that regulate the rights, duties or privileges of any individual must be open to the public.

Are individual agency heads subject to open meeting requirements?

MONTANA SUPREME COURT:

Associated Press v. Crofts (2004)

Meetings of an informal committee of public university officials must be open to the public under the Montana Constitution and open meetings laws.

Commissioner of Higher Education Richard Crofts held meetings with high-ranking university employees, including presidents and chancellors, to seek input on such policies as student tuition and fees. In 2002, one of these meetings was canceled by Crofts after an AP reporter came to cover the meeting and wouldn't leave.

The Supreme Court said the policy committee was a public body and its deliberations should have been open, even if it did not produce a result or action, take voters or keep minutes. ``In this case, while the Policy Committee was not formally created by a government entity to accomplish a specific purpose, …it was organized to serve a public purpose.''

The court said that factors to be considered in determining if such a committee is subject to open meeting laws include, but are not limited to whether the meetings are paid for with public funds, whether committee members are public employees acting in their official capacity, frequency of meetings, whether the committee deliberates or just gathers facts, whether the meetings concern policy matters rather than mistrial or administrative functions, whether the committee members have executive authority, and the result of the meetings.

OPEN MEETINGS:
What defines a public meeting?

Montana Code Annotated

2-3-202 MCA:

…"meeting" means the convening of a quorum of the constituent membership of a public agency or association …whether corporal or by means of electronic equipment, to hear, discuss, or act upon a matter over which the agency has supervision, control, or advisory power.

For what reasons can a meeting of a governmental body be closed to the public?

Montana Code Annotated

2-3-203: Open Meetings

(3) The presiding officer of any meeting may close the meeting during the time the discussion relates to a matter of individual privacy and then only if the presiding officer determines that the demands of individual privacy clearly exceed the merits of public disclosure.

The right of individual privacy may be waived by the individual about whom the discussion pertains and, in that event, the meeting must be open.

For what reasons can a meeting of a governmental body be closed to the public?

Montana Code Annotated

2-3-203: Open Meetings

(4)(a) A meeting may be closed for a discussion of strategy in litigation.

(4)(b) A meeting may not be closed to discuss strategy when both parties in the litigation are public entities.

What must the officer do to close a meeting?

- Explain in open session the reasons for closing the meeting.
- Explain each item the body intends to discuss in private.

A PRESIDING OFFICER MAY NOT:

- Close a meeting to discuss personnel matters, then move on to other business while in closed session.
- Close a meeting when individuals waive their rights to privacy, even when personnel matters are being discussed.

Can the Board vote on issues during closed meetings?

No. A board can discuss a private issue in a closed meeting, but the vote should be taken during an open session.

Can governmental bodies meet by telephone or other electronic means?

Yes, but they must allow the public some method of observing the meeting.

The body may also communicate during a meeting by e-mail or text message, but the e-mail or message must be displayed to the audience while it is occurring.

Otherwise, private e-mailing and texting about an issue being discussed during a meeting violates the open meetings laws.

Must public agencies post their agendas?

Montana's Open Meetings law does not strictly require public agencies to post their agendas.

However, recent rulings combined with other Montana statutes clearly indicate that agencies should post agendas.

Must public agencies meet at specific times on specific days?

No. But public agencies or decision-making bodies must announce their meeting dates/times in advance in order to allow public participation.

Attorney General Opinion (1998)

A county commission which establishes the hours of 9:30 a.m. to 5 p.m., Monday through Friday, as its regular meeting date for public notice purposes is not in compliance with Montana's public participation constitutional provisions and statutes.

Can a public body meet without giving public notice?

No. Montana court rulings re-inforce this.

"Board of Trustees vs. Board of County Commissioners

(1980--Montana Supreme Court)

"(without) public notice, an open meeting is open in theory only, not in practice."

Further, the Public Participation Act requires agencies to develop procedures to "ensure adequate notice" before a final decision and to assist public participation in its decision-making before the decision is made (§2-3-103 MCA).

Public notice must be given even for meetings that can be legitimately closed to the public.

Can a public body meet without giving public notice?

No. Montana court rulings re-inforce this.

Seliski v. Rosebud County et. al., (1995)

District Judge Joe Hegel found that a county commission's practice of conducting meetings on regular business days from 8 a.m. to 5 p.m. without notice of when particular matters would be discussed, was "really no notice at all" and violated the Public Participation in Government Act.

The public should be given an adequate agenda of subjects to be discussed by the governmental agency, sufficiently in advance to allow members of the public to decide to attend and/or give input on significant decisions.

Can public agencies close meetings to discuss collective bargaining strategy?

No. The Supreme Court threw out that exception to the Open Meetings Act in 1992 in ***Great Falls Tribune vs. Great Falls Public Schools, supra***.

In 1993, the Legislature amended 2-3-203 MCA to remove the exception.

What type of personal information is "private"?

- Private, personal information is generally limited to family problems, health problems, drug and alcohol problems.

  (Attorney General Opinion 119--1988)

- Information relating to marriage to procreation, contraception, family relationships, and child rearing.

  ***(Flesh v. Mineral and Missoula Counties*—1990)**

- Hiring interviews may also involve private information which justifies closing a meeting.

Can meetings of public bodies be closed to discuss job reviews?

Usually. The Montana Supreme Court has ruled that the public's right to know is not absolute; an individual's right to privacy must be weighed against it.

Montana Supreme Court
(Missoulian v. Board of Regents—1984)

The court ruled that closure of university presidents' job-performance evaluation meetings was necessary to protect individual privacy of university presidents and other university personnel.

Some government officials, including a city manager, have chosen to allow the public to view their job reviews.

However, if the employee is a supervisory level employee and the review concerns illegal or improper acts, the employee does not have an expectation of privacy in that discussion and the meeting may not be closed.

Can a governmental body close proceedings during a hiring process?

Usually. Governmental bodies, such as school boards hiring superintendents, can close proceedings to the public in order to protect the privacy of the candidates if those candidates have a reasonable expectation of privacy. ***(Missoulian v. Board of Regents)***

Governmental bodies have chosen to keep candidate searches open by asking candidates whether they mind public interviews, thereby eliminating the expectation of privacy. If the candidates were not told beforehand that the proceedings were to be open, a governmental body could justifiably close a meeting.

Nevertheless, an argument can be made that the hiring process should be open if the body is looking to fill a position that is important to the community.

Can a meeting to discuss the discipline/termination of an employee be closed for privacy if the employee wants it open?

No. According to 2-3-203(3) MCA:

"The right of individual privacy may be waived by the individual about whom the discussion pertains, and, in that event, the meeting must be open."

Can a meeting be closed to discuss an employee grievance?

Sometimes. If the grievance concerns a disciplinary action taken by a supervisor, the meeting may only be closed if:

1) the employee asserts the right of privacy and the presiding officer determines the balance in favor of closure; and

2) the employee is not "vested with the public trust." If the employee is a supervisory level employee, handles public money or is otherwise in a position of public trust, and the allegations concern a violation of that trust, the meeting must be open.

If the grievance involves some matter unrelated to performance issues, such as a dispute over pay or benefits, there is no basis for closing the meeting.

What are the remedies if a meeting was illegally closed?

Montana Code Annotated

2-3-213: Voiding Decisions

A decision made in an improperly closed meeting may be voided by an action brought in district court within 30 days of the decision.

2-3-221: Attorneys' Fees

A successful plaintiff can be awarded " costs and reasonable attorneys' fees."

Can pictures or recordings be taken in open meetings?

Montana Code Annotated
2-3-211: Recording Public Meetings

Accredited press representatives may not be excluded from any open meeting ... and may not be prohibited from taking photographs, televising, or recording such meetings.

The presiding officer may assure that such activities do not interfere with the conduct of the meeting.

The attorney general has also ruled that the legislative intent of the law would be furthered by allowing the public to mechanically record open meetings. **(Opinion No. 8—1979)**

Are agencies required to keep and provide access to minutes of their proceedings?

Montana Code Annotated

2-3-212: Meeting Minutes

Minutes of all open meetings shall be kept and shall be available for inspection by the public.

- Minutes must include the date, time and place of the meeting; a list of the individual members of the public body, agency or organization in attendance; the substance of all matters proposed, discussed or decided; and, at the request of any member, a record by individual members of any votes taken.
- Minutes must now be kept of closed (executive) sessions.
- Minutes should be available upon request, even if they are in draft form and have not been approved by the governmental body.
- The Public Records Act and Article II, Section 9 of the Montana Constitution do not make a distinction between draft minutes and final minutes. Both must be provided to the public.

Does passing notes, emailing, texting or whispering among members of governmental bodies violate the Open Meetings Act?

Yes. Although there are no court cases or sections of statute that support these attempts at secrecy the constitutional right is to observe deliberations.

If the deliberations consist in part of the passing of notes or the exchanging of emails, text messages or whispered comments, the public is being deprived of its constitutional right to observe the deliberations of the public body and to have access to public documents.

This is little different than if the board met behind closed doors.

Other Questions?