

INTRODUCTION

Journalists and other citizens frequently run up against closed doors in their search for information and access, often because they're simply not aware of their rights. The Montana Journalism Review and the Montana Freedom of Information Hotline offer this guide to educate journalists and citizens about public access to state, federal and local government.

Questions and responses in this guide were culled from questions journalists have already asked the Montana FOI Hotline, operated by a coalition of news media to monitor, ensure and enforce the public's right to know. The Meloy Law Firm of Helena answers a full range of questions on government access at 406-442-8670. The firm may be accessed through the FOI Hotline Website or by email to mike@meloylawfirm.com.

This guide should in no way substitute for legal guidance from the FOI Hotline. The purpose of the FAQ is to serve as a guide that will answer basic access questions. It should also help journalists narrowly define inquiries they might make to the Hotline. Complex issues should always be referred to either the Hotline or the news organization's legal counsel.

OPEN MEETINGS

What laws govern access to meetings?

Montana's 1972 Constitution has two key right-to-know sections that are the strongest in the nation in guaranteeing citizens' right to inspect public records and attend meetings of government agencies at all levels of state and local government.

Article II, Section 8. Right of Participation. The public has the right to expect government 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.

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 the state government and its subdivisions, except in cases where the demand of individual privacy clearly exceeds the merits of public disclosure.

Title 2, Chapter 3 of Montana Code Annotated (MCA) further defines access to meetings in Montana. §2-3-201 declares the Legislature's intent that "public boards, commissions, councils and other public agencies in this state exist to aid in the conduct of the peoples' business." It further declares that provisions of this part of the law "shall be liberally construed" in favor of openness. §2-3-202 defines a meeting as the convening of a quorum of a public agency to hear, discuss or act upon a matter over which the agency has control or advisory power.

§2-3-203 says all meetings of governmental bodies of the state, political subdivisions or organizations supported in whole or in part by public funds shall be open to the public, including committees and subcommittees. The presiding officer may close a meeting for discussion of a matter involving individual privacy, but only if the officer determines that the demand of individual privacy clearly exceeds the merits of public disclosure. The right to individual privacy may be waived by the individual about whom the discussion pertains.

Meetings may be closed to discuss litigation strategy when an open meeting would have a detrimental effect on the position of the public agency. Meetings may not be closed to discuss litigation in which the only parties are public bodies.

The public must also be provided the opportunity to comment on any item even if the item is not on the public meeting agenda. §2-3-103 MCA (1)(a).

What is a “quorum” of a public body?

A quorum of a public body is the minimal number of members of the body committee or organization, usually a majority, who must be present for valid transaction of business. For a three-member body, two members meeting for the purpose of discussing any public business is subject to the open-meeting/right-to-participate laws.

Do open-meetings/right-to-participate requirements apply to informal gatherings of a quorum of the members?

Yes. Two of three members of a body riding together in a motor vehicle to a meeting, going out for coffee or lunch to discuss any public business are activities that are covered by open-meetings/right-to-participate laws regardless of the formality of the setting.

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

Legally, a meeting holder starts with the notion that ALL meetings are presumed to be open and meetings can only be closed when the body discusses matters involving individual privacy and then only if the presiding officer determines that the demand of individual privacy *clearly* exceeds the merits of public disclosure. The burden is on the person seeking a closed meeting to overcome the presumption of openness.

Public bodies may also close a meeting to discuss litigation strategy, but only when: 1) litigation actually exists (not just threatened); 2) an open discussion will negatively affect the litigating position of the body; and 3) the litigant is a private-nongovernmental party. A body may not close a meeting when the parties in litigation are both governmental entities.

What must the officer do to close a meeting?

Meeting closures are at the discretion of the presiding officer. Before closing a meeting, the presiding officer must explain in open session the reasons for closing the meeting and must also explain generally each item the body intends to discuss in private before closing the meeting.

The presiding officer must also determine that privacy interests clearly outweigh public disclosure before the meeting can be closed. The right of privacy encompasses delicate matters such as medical or family issues or matters in which an employee's performance will be criticized (excluding employees vested with public trust, as discussed *supra*). The Supreme Court has made it clear that there is no blanket exemption from the right to know for discussion of personnel matters or records. *Missoula County Public Schools v. Bitterroot Star*, 378 Mont. 451, 345 P.3d 1035.

An entity may not close a meeting to discuss personnel matters, then move on to other business while in closed session.

Individuals may waive their rights to privacy and allow meetings to remain open, even when personnel matters are being discussed. A public entity may assert the right of

privacy on behalf of an individual, but it is always prudent to consult the individual in advance of the meeting to see whether they wish to waive the right.

Can a public body 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. §2-3-202 MCA defines a meeting as “the convening of a quorum of the constituent membership of a public agency or association ... whether corporal or by means of electronic equipment ... ”

The state Supreme Court has ruled that a telephone conference with a quorum is subject to the Open Meeting Act. *Board of Trustees, Huntley Project School District No. 24 v. Board of County Commissioners*, 186 Mont. 148, 606 P.2d 1069 (1980).

Therefore, all laws governing public access to such meetings would apply, and meetings could be closed only for the exceptions noted. The body may also communicate during a meeting by email or text message, but the email or message must be displayed to the audience while it is occurring. Otherwise, private emailing 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 expressly require public agencies to post their agendas. However, recent rulings combined with other Montana statutes clearly indicate that agencies should post agendas.

A sweeping 1998 Montana Attorney General’s opinion held that county commissioners cannot comply with the state’s open-meetings law by saying they may meet anytime during their regular work week. The ruling said commissions must specify particular meeting dates and times in advance to let citizens know when a quorum will meet to discuss or act on any issue of significant public interest. That’s so the public has an opportunity to participate in the decision making. And the agenda should be sufficiently detailed to alert the public as to the topic of discussion.

Can the public body discuss matters that are not on the agenda?

No. The right to observe decision-making activities of a public body is conditioned on the public having advanced notice of the topic of the discussion. That’s the purpose of the agenda. When a body discusses matters which were not on the agenda, both the right to observe and the right to participate are violated.

Can a public body meet without giving public notice?

No. In *Board of Trustees Huntley Project, supra*, the Montana Supreme Court ruled that “(w)ithout 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 legitimately can be closed to the public. In *Seliski v. Rosebud County et. al.*, Rosebud County Case No. DV 94-13 (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, §2-3-101, et seq., MCA.

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. *Great Falls Tribune v. Great Falls Public Schools, supra*. In 1993, the Legislature amended §2-3-203 MCA to remove the exception.

What types of "public agencies" fall under the Open Meeting Act?

§2-3-203 MCA requires that the meetings of public agencies and certain associations of public agencies must be open to the public. These include 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.

Further, any committee or subcommittee appointed by 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. This would apply to sub-committees of the whole, as well as to "work sessions" sometimes held by some entities not necessarily made up of members of the constituent body.

In 2002 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. *Bryan v. Yellowstone County Elementary School Dist. No. 2*, 312 Mont. 257, 60 P.3d 381 (2002). However, in *Boulder Monitor v. Jefferson High School District*, 373 Mont. 212, 316 P.3d 848 (2014) the Court held that attendance as an observer by one of the members of the public body did not convert the sub-committee into a quorum of the body for purposes of providing notice that would otherwise have been required of the body.

What kind of meetings are subject to the open meetings laws?

The Montana Supreme Court ruled in a suit brought by The Associated Press and 13 other news organizations in 2004, that the 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

votes 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 whether 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 ministerial or administrative functions, whether the committee members have executive authority, and the result of the meetings. *Associated Press v. Crofts*, 321 Mont., 89 P.3d 971(2004).

A 2002 decision found that a committee, or advisory board, made up of several school principals, a school board trustee, two teachers and four members of the public formed to discuss school-closure options was subject to open-meeting laws. *Bryan v. Yellowstone County Elementary School Dist. No. 2*, 312 Mont. 257, 60 P.3d 381 (2002). 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.

What type of personal information can be properly discussed in a closed meeting?

This private, personal information is generally limited to family problems, health problems, drug and alcohol problems (see 42 Mont. AG. Op. 119 (1988), and information relating to marriage to procreation, contraception, family relationships, and child rearing. *Flesh v. Mineral and Missoula Counties*, 241 Mont. 158, 786 P.2d.2d 4 (1990).

Hiring interviews may also involve private information which justifies closing a meeting. Disciplinary matters may be closed depending upon the class of employee and the nature of the charges.

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

The Court has ruled that the public's right to know is not absolute; an individual's right to privacy must be weighed against it. In *Missoulian v. Board of Regents*, 207 Mont. 513, 675 P.2d. 962 (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?

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, supra*. 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. For example, if a local governmental body is considering an appointment to fill a vacant elective seat, the entire process should be open.

Should a meeting to discuss the discipline/termination of a city 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 or disciplinary matter?

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?

A decision made in an improperly closed meeting may be voided by an action brought in district court within 30 days of the decision (§2-3-213 MCA) and a successful plaintiff can be awarded attorney fees (§2-3-221). Any person who asserts a claim that a governmental action has deprived them of statutory and constitutional rights to observe a meeting has standing to pursue a legal claim. *Schoof v. Nesbit*, 373 Mont. 226, 316 P.3d 831 (2014).

The Court in *Schoof* reversed a prior decision restricting right-to-know suits only to plaintiffs who could show an actual injury caused by the closed meeting. A claimant need not be a resident of the particular jurisdiction to bring a lawsuit. Claimants only need to show their rights to observe a meeting or examine a document were violated by the agency. *Shockley v. Cascade County*, 376 Mont. 493, 336 P.3d 375 (2014).

Can pictures or recordings be taken in open meetings?

Yes. Under §2-3-211 MCA, “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 Montana Attorney General has also ruled that the legislative intent of the law would be furthered by allowing the public to mechanically record open meetings. 38 Op. Att’y Gen. No. 8 (1979).

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.

Can a person bringing suit for violation of the right to participate under Article II, Section 8 of the Constitution recover attorney fees?

Yes. *Citizens for Balanced Use v. Department of Fish Wildlife and Parks*, 376 Mont. 202, 331 P.3d 844 (2014).

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

Yes. According to §2-3-212 MCA, appropriate 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.

County commission minutes should be published within 21 days after adjournment of the session, or within 30 days for certain financial information (§7-5-2123(2)). Nevertheless, minutes should be available upon request, even if they are in draft form and have not been approved by the governmental body. The statutory provisions governing access to documents include “public information” which is “prepared, owned, used or retained by any public agency relating to the transaction of official business, regardless of form.” §2-6-1002(11), and Article II, Section 9 of the Montana Constitution do not make a distinction between draft documents and approved or “official” documents. Both must be provided to the public. County commissions are required to keep a “minute book” (§7-5-2129).

Finally, under §2-3-212(4), a public body is required to keep minutes of closed meetings. These minutes are to be kept confidential, but may be disclosed upon court order.

Do emails communicated to a quorum of a public body constitute a “meeting” and, therefore, subject to notice and observation by the public?

Yes. In *Allen v. Lakeside Neighborhood Planning Committee*, 371 Mont. 310, 308 P.3d 916 (2013) the Supreme Court warned: “(w)e therefore caution public officers that conducting official business via email can potentially expose them to claims of violation of open meetings laws.”

Are committee meetings of the Montana Legislature open to the public and the news media?

Yes. According to Article V, Section 10, subsection 3 of the state Constitution, “The sessions of the Legislature and of the committee of the whole, all committee meetings, and all hearings shall be open to the public.” This includes when committees are taking votes.

Are political caucuses of the Montana Legislature open to the news media and public?

Yes. In 1995, The Associated Press and 21 other news organizations in Montana sued to end the practice of closed-door caucuses, arguing that they are part of the legislative process where important public-policy issues are discussed by legislators. State

District Judge Thomas Honzel ruled later that year that organizational party caucuses, held before the start of the legislative session, should be subject to the state open meetings law.

Honzel also ruled, however, that the news media had no legal basis for suing to get access to party caucuses during legislative sessions. The news media appealed this decision to the Montana Supreme Court, which ordered Honzel to reconsider the issue. Honzel ruled in 1998 that the caucuses during legislative sessions are to discuss public business, so they too are subject to the open meetings law. The Legislature did not appeal and the caucuses have been open since the 1999 session.