

VOLUME NO. 44

OPINION NO. 40

COMMERCE, DEPARTMENT OF - Tourism advisory council and oversight of bed tax monies;
CORPORATIONS - Application of open meeting law to private nonprofit corporation that receives and spends tax monies;
OPEN MEETINGS - Application of open meeting law to private nonprofit corporation that receives and spends bed tax monies;
PUBLIC FUNDS - Bed tax monies as public funds for purposes of open meeting law;
RIGHT TO KNOW - Deliberations of private nonprofit organizations;
MONTANA CODE ANNOTATED - Sections 2-3-201, 2-3-203, 2-3-210, 2-15-1816, 15-65-101, 15-65-111, 15-65-122;
OPINIONS OF THE ATTORNEY GENERAL - 38 Op. Att'y Gen. No. 109 (1980).

HELD: The meetings of a local chamber of commerce or other organization recognized and acting as a nonprofit convention and visitors bureau which receives and spends bed tax funds must, as they pertain to the receipt and expenditure of bed tax monies, be open to the public in accordance with section 2-3-203, MCA.

September 21, 1992

Alan Elliott, Director
Department of Commerce
1424 Ninth Avenue
Helena MT 59620-0501

Dear Mr. Elliott:

Your predecessor requested my opinion regarding the following question which I have rephrased as follows:

To what extent, if any, is a local chamber of commerce that receives and spends bed tax dollars subject to Montana's open meeting law, § 2-3-203, MCA?

In 1987, the Montana Legislature created the lodging facility use tax, commonly known as the "bed tax," for the purpose of generating funds to be expended for the promotion of Montana tourism and the promotion of Montana as a location for production of motion pictures and television commercials. §§ 15-65-101 to 131, MCA. The bed tax is imposed on those who use overnight public lodging facilities such as hotels, motels, and resorts at a rate of 4 percent of the amount charged by the lodging facility. §§ 15-65-101(3), 15-65-111, MCA.

Approximately 75 percent of the bed tax monies is distributed to the Montana Department of Commerce and approximately 25 percent is distributed to regional nonprofit tourism corporations and nonprofit convention and visitors bureaus in accordance with formulas established by section 15-65-121(1), MCA. A nonprofit convention and visitors bureau (hereinafter referred to as a CVB) is a "nonprofit corporation organized under Montana law and recognized by a majority of the governing body in the city or consolidated city-county in which the bureau is located." § 15-65-101(4), MCA. The State Tourism Advisory Council oversees distribution of bed tax monies to each CVB, prescribing the allowable administrative expenses for which the monies may be used. § 2-15-1816(4)(a), (d), MCA. In order to receive bed tax monies, a CVB must submit an annual marketing plan for approval by the Tourism Advisory Council. § 15-65-122(2), MCA. The CVB also enters into a contract with the Department of Commerce which outlines the duties and responsibilities of the CVB in order to receive bed tax monies. Your question refers to local chambers of commerce which, typically, have been recognized by the governing bodies of Montana cities as the CVBs for their communities.

Section 2-3-203(1), MCA, provides:

All meetings of 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 must be open to the public.

The question here is whether a local chamber of commerce ("chamber") which has been recognized as a CVB and receives bed tax funds is subject to this provision of the open meeting law. A chamber, as a CVB, is an organization supported, at least in part, by bed tax monies which are public funds. Further, a chamber, as a CVB, decides how those public funds are spent. Under the plain language of the statute, it is my opinion that a local chamber of commerce, when acting as a CVB, is subject to the open meeting law.

This opinion is further supported by the intent and purpose of the open meeting law. The open meeting law is to be liberally construed and applies generally to agencies that "exist to aid in the conduct of the peoples' business." § 2-3-201, MCA. The expenditure of public funds for the purpose of developing tourism in Montana is "the conduct of the peoples' business," whether conducted by a public or a private nonprofit organization. As has been stated in a previous Attorney General's Opinion, "The precise expenditure of public funds is simply not a private fact." 38 Op. Att'y Gen. No. 109 at 375, 377 (1980), quoting Penokie v. Michigan Technological University, 93 Mich. App. 650, 287 N.W.2d 304 (1980). Here, it is the CVB that determines, in the first instance, the manner and method of expenditure of bed tax monies. The CVB is not simply providing a service to the state as a private contractor might, but rather is acting as an agent under contract with the state to make decisions about how public funds are spent.

Further, by accepting public funds and deciding how those funds are to be spent, the CVB takes on the responsibility of accounting to the public for those funds. In Redding v. Brady, 606 P.2d 1193, 1196-97 (Utah 1980), the court reasoned that when an individual accepts state employment, that individual is no longer merely a private citizen, but a public servant in whose conduct and in whose salary the public has a legitimate interest. Similarly, a local chamber of commerce that is recognized as a CVB and accepts public funds is no longer merely a private nonprofit corporation, but an entity whose deliberations concerning the expenditure of public funds must be open to the public. See also Seghers v. Community Advancement, 357 So. 2d 626 (La. Ct. App. 1978) (private nonprofit corporation that was supported by and expended public funds and administered local antipoverty program was subject to state sunshine law); Arkansas Gazette Co. v. Southern State College, 620 S.W.2d 258 (Ark. 1981) (Intercollegiate Athletic Conference was supported by public funds and therefore subject to state freedom of information act).

You have also asked to what extent a local chamber, when acting as a CVB, would be subject to the open meeting law. In such circumstances, the chamber would be bound by the same expectations as any other public or governmental body. Thus, a meeting held by the chamber when acting as a CVB may be closed only if the demands of individual privacy of the chamber clearly exceed the merits of public disclosure. See Belth v. Bennett, 227 Mont. 341, 345, 740 P.2d 638, 641-43 (1987). It must be emphasized, however, that the presumption lies with openness and disclosure, and a meeting is presumed open unless an exception exists as defined in section 2-3-203, MCA.

THEREFORE, IT IS MY OPINION:

The meetings of a local chamber of commerce or other organization recognized and acting as a nonprofit convention and visitors bureau which receives and spends bed tax funds must, as they pertain to the

receipt and expenditure of bed tax monies, be open to the public in accordance with section 2-3-203, MCA.

Sincerely,

MARC RACICOT
Attorney General