Montana Code Annotated

TITLE 2 GOVERNMENT STRUCTURE AND ADMINISTRATION

CHAPTER 3
PUBLIC PARTICIPATION IN GOVERNMENTAL OPERATIONS

Part 2
Open Meetings

Part Attorney General Opinions:

Tax Appeal Board Deliberations Regarding Application for Reduction in Valuation -- Open to Public: The deliberations of a county tax appeal board regarding an application for a reduction in property valuation must be open to the public unless the presiding officer determines the discussion relates to a matter of individual privacy and the demands of individual privacy clearly exceed the merits of public disclosure. 42 A.G. Op. 61 (1988).

Law Review Articles:

Comments on Government Censorship and Secrecy, Elison & Elison, 55 Mont. L. Rev. 175 (1994).

Is E-Mail Subject to the Open Meetings Act?, 90 Ill. B.J. 450 (2002).

Facilitating Government Decision Making: Distinguishing Between Meetings and Nonmeetings Under the Federal Sunshine Act, 66 Tex. L. Rev. 1195 (1988).

2-3-201. Legislative intent -- liberal construction. The legislature finds and declares that public boards, commissions, councils, and other public agencies in this state exist to aid in the conduct of the peoples' business. It is the intent of this part that actions and deliberations of all public agencies shall be conducted openly. The people of the state do not wish to abdicate their sovereignty to the agencies which serve them. Toward these ends, the provisions of the part shall be liberally construed.

History: En. Sec. 1, Ch. 159, L. 1963; R.C.M. 1947, 82-3401.

Cross References:

Right of public to examine documents or to observe deliberations of public bodies, Art. II, sec. 9, Mont. Const.

Case Notes:

1. Open Public Meeting Laws Liberally Construed -- University System Policy Committee Meetings Open to Public: Plaintiff media organizations sued the Commissioner of Higher Education, alleging that policy meetings between the Commissioner and other University System senior employees were subject to state open meeting laws. The District Court concluded that the meetings should be open to the public, and on appeal, the Supreme Court concurred. The Legislature created open meeting laws with the intent that deliberations of state agencies be conducted openly, and to that end, the open meeting laws are liberally construed. In the context of 2-3-203,

public or governmental bodies means a group of individuals organized for a governmental or public purpose. Although the university policy committee was not formally created by a government entity to accomplish a specific function, the committee brought together public officials for an undeniably public purpose. The committee was not merely a staff meeting or fact-finding body, nor was it an ad hoc group that came together to consider a specific matter or to gather facts on a particular issue. Rather, the group met to deliberate on matters of substance that were the public's business and thus was considered a public body within the meaning of Art. II, sec. 9, Mont. Const., whose meetings were required to be open to the public. The Commissioner argued that: (1) even if the committee was considered a public body, it did not hold meetings as contemplated in the open meeting laws; (2) because the committee's membership was not fixed, no number of members were required to attend to constitute a quorum; and (3) neither direct action nor votes were taken at committee meetings. The Supreme Court disagreed. A quorum of any body of an indefinite number consists of the members who attend a meeting. All that is required under 2-3-202 is that a quorum of the membership convene to conduct public business, not that the meeting produces some particular result or action or that a vote be taken. The constitution protects the public's right to observe the deliberations of public bodies, and the policy committee meetings were required to be open to the public. Assoc. Press v. Crofts, 2004 MT 120, 321 M 193, 89 P3d 971 (2004).

2. Meeting of City Employees and Private Contractors Not Subject to Open Meeting Law: The plaintiff television station argued that it had the right to have a reporter cover a meeting between the city engineer, the public works director, and representatives of a private construction company. The Supreme Court stated that the statutes require agencies to have open meetings and that the definition of "agencies" does not include individual employees. The Supreme Court, after examining the legislative history of Art. II, sec. 9, Mont. Const., concluded that the statutes, which limit the right to know to agencies, are consistent with the intent of the constitution and therefore the plaintiff was not entitled to have a reporter present at the meeting of individual employees and a private party. SJL of Mont. Associates Ltd. Partnership v. Billings, 263 M 142, 867 P2d 1084, 50 St. Rep. 1726 (1993).

Attorney General Opinions:

Deliberations of Human Rights Commission: The deliberations of the Human Rights Commission following a contested case hearing are subject to the Montana open meeting law. They must be open to the public unless the presiding officer determines that the discussion relates to a matter of individual privacy and that the demands of individual privacy clearly exceed the merits of public disclosure. 38 A.G. Op. 33 (1979).

Mechanical Recordings of Public Meetings: A member of the public may make a mechanical recording of the proceedings and deliberations of an open school board meeting. 38 A.G. Op. 8 (1979).

2-3-202. Meeting defined. As used in this part, "meeting" means the convening of a quorum of the constituent membership of a public agency or association described in 2-3-203, whether corporal or by means of electronic equipment, to hear, discuss, or act upon a matter over which the agency has supervision, control, jurisdiction, or advisory power.

History: En. 82-3404 by Sec. 2, Ch. 567, L. 1977; R.C.M. 1947, 82-3404; amd. Sec. 2, Ch. 183, L. 1987.

Compiler's Comments:

1987 Amendment: Near middle of section, after "public agency", inserted "or association described in 2-3-203".

Severability Clause: Section 6, Ch. 567, L. 1977, was a severability clause.

Case Notes:

3. Open Public Meeting Laws Liberally Construed -- See Case Note #1 under MCA 2-3-201.

4. When Particular Meetings Must Be Open to Public -- Factors to Be Considered: Under Art. II, sec. 9, Mont. Const., and Montana's open meeting laws, which are liberally interpreted in favor of openness, factors to be considered when determining whether a particular committee's meetings must be open to the public include but are not limited to: (1) whether committee members are public employees acting in their official capacities; (2) whether the meetings are paid for with public funds; (3) the frequency of meetings; (4) whether the committee deliberates rather than simply gathers facts and reports; (5) whether the deliberations concern matters of policy rather than merely administrative or ministerial functions; (6) whether committee members have executive authority and experience; and (7) the results of the meetings. This list of factors is not exhaustive, and each factor may not be present in every instance of a meeting that must be open to the public. Assoc. Press v. Crofts, 2004 MT 120, 321 M 193, 89 P3d 971 (2004).

5. "Meeting" Held When Three of Four Members Met to Select Recommended Persons for Position Appointed by Governor: A meeting was held within the meaning of the open meeting law when three members of the four-member committee that recommends a list of persons from whom the Governor may select the Commissioner of Political Practices met to discuss candidates and the transmission of their names to the Governor. Common Cause of Mont. v. Statutory Comm. to Nominate Candidates for Comm'r of Political Practices, 263 M 324, 868 P2d 604, 51 St. Rep. 77 (1994).

6. Official Misconduct Statute -- Definition of Meeting Not Incorporated: In 1975 the official misconduct criminal statute (45-7-401) was expanded to include a violation of the open meeting law (2-3-203). In 1977 this section was enacted. In 1979 1-2-108 was amended, creating the presumption that a reference to a section encompasses subsequent changes. However, because 1-2-109 states that no law is retroactive unless expressly declared to be, 1-2-108 does not act to incorporate the 1977 definition of "meeting" into the 1975 criminal statute. St. v. Conrad, 197 M 406, 643 P2d 239, 39 St. Rep. 680 (1982). (Annotator's Note: Section 1-2-108 was amended in 1983 to make the "living reference" presumption retroactive as well as prospective.)

7. Open Meeting Law -- Criminal Penalty Void for Vagueness: In 1975 the official misconduct criminal statute (45-7-401) was expanded to include a violation of the open meeting law (2-3-203). In 1977 this section was enacted. Because there was no express legislative intent to amend the criminal statute to encompass the expanded definition of "meeting" and because people of common intelligence could differ over this matter, it is not clear what constitutes prohibited conduct. Subsection (1)(e) of the criminal statute is void for vagueness. St. v. Conrad, 197 M 406, 643 P2d 239, 39 St. Rep. 680 (1982).

8. Telephone Conversation as Constituting a "Meeting" -- Notice Required to Be Given: Where two of three County Commissioners discussed by telephone the approval of a preliminary plat of a subdivision, a "meeting" as defined in 2-3-202 took place, and the Commissioners were subject to the requirement that notice of the meeting be given in accordance with statute. Bd. of Trustees v. County Comm'rs, 186 M 148, 606 P2d 1069 (1980).

Attorney General Opinions:

Applicability of Open Meeting and Public Participation Laws to County Commission Meetings -- Notice Required in Matters of Significant Public Interest: The gathering of a quorum of County Commissioners to discuss, either among themselves or with members of the public, issues over which the County Commission has authority is a meeting subject to open meeting laws. Meetings involving the consideration of matters of significant public interest, meaning decisions involving more than a ministerial act requiring no exercise of judgment, are subject to public participation mandates, including notice requirements and the opportunity for public participation in the decisionmaking process. Thus, a County Commission that established the hours of 9:30 a.m. to 5 p.m., Monday through Friday, as its regular meeting time for public notice purposes, did not comply with Montana's constitutional and statutory public participation provisions. 47 A.G. Op. 13 (1998). See also 42 A.G. Op. 51 (1988).

2-3-203. Meetings of public agencies and certain associations of public agencies to be open to public -- exceptions. (1) 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, including the supreme court, must be open to the public.

(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.

(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 if and 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.

(4) (a) Except as provided in subsection (4)(b), a meeting may be closed to discuss a strategy to be followed with respect to litigation when an open meeting would have a detrimental effect on the litigating position of the public agency.

(b) A meeting may not be closed to discuss strategy to be followed in litigation in which the only parties are public bodies or associations described in subsections (1) and (2).

(5) The supreme court may close a meeting that involves judicial deliberations in an adversarial proceeding.

(6) Any committee or subcommittee appointed by a public body or an 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.

History: En. Sec. 2, Ch. 159, L. 1963; amd. Sec. 1, Ch. 474, L. 1975; amd. Sec. 1, Ch. 567, L. 1977; R.C.M. 1947, 82-3402; amd. Sec. 1, Ch. 380, L. 1979; amd. Sec. 1, Ch. 183, L. 1987; amd. Sec. 1, Ch. 123, L. 1993; amd. Sec. 1, Ch. 218, L. 2005.

Compiler's Comments:

2005 Amendment: Chapter 218 in (1) near end inserted "including the supreme court"; inserted (5) allowing the supreme court to close a meeting involving judicial deliberations in an adversarial proceeding; and made minor changes in style. Amendment effective April 14, 2005.

1993 Amendment: Chapter 123 at beginning of (4)(a) inserted exception clause, near middle, before "litigation", deleted "collective bargaining or", and near end, before "litigating", deleted "bargaining or"; inserted (4)(b) requiring open litigation strategy meetings when the parties involved are public bodies or associations; and made minor changes in style.

1987 Amendment: Inserted (2) relating to associations; near beginning of (5), after "public body", inserted "or an association described in subsection (2)"; and made minor change in phraseology.

Cross References:

Right of public to observe deliberations of all public bodies, Art. II, sec. 9, Mont. Const.

Right of individual privacy, Art. II, sec. 10, Mont. Const.

Legislature -- organization and procedure, Art. V, sec. 10, Mont. Const.

Notice of agency action required, 2-3-103.

Deliberations of Medical Legal Panel to be secret, 27-6-603.

Criminal penalty for closed meeting -- official misconduct, 45-7-401.

Case Notes:

9. Open Public Meeting Laws Liberally Construed -- See Case Note #1 under MCA 2-3-201.

10. When Particular Meetings Must Be Open to Public -- See Case Note #4 under MCA 2-3-202.

11. School District Advisory Group as Public or Governmental Body: A school district assembled a group of people to research and advise the district on the closure of schools. The Legislature has given a school district the power to close schools. Therefore, the advisory group assumed the identity of the district with respect to the closure question and performed a legislatively designated governmental function that served a clear public and governmental purpose, and the advisory group was a public or governmental body subject to Art. II, sec. 9, Mont. Const. Bryan v. Yellowstone County Elementary School District No. 2, 2002 MT 264, 312 M 257, 60 P3d 381 (2002).

12. Standing of Parent Who Did Not Request Information on Proposed School Closure but Belonged to Group Another Member of Which Did: School district parents, including Bryan, worked in concert to rebut a school closure recommendation, delegating duties among themselves. Schroeder, but not Bryan, requested information from the school authorities, which was not received. Bryan sued as a result of the school closure. That Bryan did not personally request the information did not prevent her from having

standing to claim a violation of Art. II, sec. 9, Mont. Const. Bryan v. Yellowstone County Elementary School District No. 2, 2002 MT 264, 312 M 257, 60 P3d 381 (2002).

13. Closed Meeting in Violation of Law, but No Action Taken -- No Reversible Error Found: Goyen, the Chief of Police of Troy, was not notified of a meeting of the Troy City Council on May 10 at which an incident involving Goyen and a city gravel pile ("gravel-gate") was discussed. That meeting was closed at the request of the Mayor of Troy and at the request of a witness in order for the witness to testify regarding indiscretions with Goyen in a city police car. Later, Goyen was allowed to present a defense at an August 16 open hearing before the City Council. Subsequent to his discharge, Goyen filed a petition to void the City Council's decision to terminate his employment, and the District Court held that there was no violation of the open meeting law. The Supreme Court held that Goyen was improperly not given notice of the May 10 meeting, but because the action taken by the City Council was based upon the results of the August 16 hearing and not the May 10 hearing, the District Court did not commit reversible error in holding that there was no violation of the open meeting law in regard to the May 10 meeting. Goyen v. Troy, 276 M 213, 915 P2d 824, 53 St. Rep. 353 (1996).

14. Privacy Interest of Witness Held Sufficient for Closure of City Council Meeting -- "Generally Known" Incident: Goyen, the Chief of Police of Troy, was not notified of a meeting of the Troy City Council on May 10 at which an incident involving Goyen and a city gravel pile ("gravel-gate") was discussed. That meeting was closed at the request of the Mayor of Troy and at the request of a witness, Denton, who testified regarding indiscretions with Goyen in a patrol car. Later, after Goyen was discharged, he brought an action arguing that Denton's privacy interest was not at issue and that, in any event, the facts of her indiscretions with him were well known in the community, so much so that the demands of Denton's privacy could not outweigh the merits of public disclosure. The Supreme Court held that the plain meaning of this section clearly allows a witness to assert the witness's privacy interest. Citing Missoulian v. Bd. of Regents of Higher Educ., 207 M 513, 675 P2d 962 (1984), the Supreme Court held that even harmless or generally known information is subject to constitutional protection and that Denton's relationship with Goyen, while known by others, was private in nature and Denton therefore had a reasonable expectation of privacy that society would recognize. Goyen v. Troy, 276 M 213, 915 P2d 824, 53 St. Rep. 353 (1996).

15. Advisory Body Meeting Without Notice -- Mootness of Issues When Ultimate Action Becomes Final: The committee that recommends a list of persons from whom the Governor may select the Commissioner of Political Practices met, without public notice, to discuss who would be recommended. The Governor appointed a recommended person. A suit was filed to void the appointment on the grounds that the submission of the list was void because there was no notice of the meeting. The committee was granted summary judgment in the District Court, and plaintiffs appealed. Before the appeal was heard, the Senate confirmed the appointment. That the confirmation vested the title to the office in the appointee did not make the appeal and issue moot because alleged violations of the state constitutional right to know and open meeting statutes could occur again, both in the context of this committee and similar advisory entities. To allow an alleged violation to escape judicial scrutiny simply because legal proceedings are not always swift would take away the people's constitutional right to know. Common Cause of Mont.

v. Statutory Comm. to Nominate Candidates for Comm'r of Political Practices, 263 M 324, 868 P2d 604, 51 St. Rep. 77 (1994).

16. Appointment by Governor Not Voided by Failure of Recommending Committee to Give Notice of Meeting at Which Recommended Persons Chosen: The committee that recommends persons to the Governor, who appoints the Commissioner of Political Practices, violated the open meeting law when it met, without public notice, to discuss who would be recommended. The Governor appointed a recommended person, and the Senate confirmed the appointment. Since the Governor is free to disregard the recommended persons, the Governor did not violate the law in appointing one of the recommended persons, and the appointment was not voided. Common Cause of Mont. v. Statutory Comm. to Nominate Candidates for Comm'r of Political Practices, 263 M 324, 868 P2d 604, 51 St. Rep. 77 (1994).

17. Decision of Issues on Other Than Constitutional Grounds When Possible: If the open meeting statutes require a meeting of an advisory committee to be open to the public, the court did not have to determine whether the state constitutional right to know provision requires the meeting to be open. It is elementary that courts should avoid constitutional questions if an issue can be otherwise resolved. Common Cause of Mont. v. Statutory Comm. to Nominate Candidates for Comm'r of Political Practices, 263 M 324, 868 P2d 604, 51 St. Rep. 77 (1994).

18. Failure to Give Notice of Meeting of Committee That Recommends Persons Governor May Appoint as Commissioner of Political Practices: When three members of the four-member committee that recommends a list of persons from whom the Governor may select the Commissioner of Political Practices met to discuss candidates and the transmission of their names to the Governor and gave no public notice of the meeting, the committee violated the open meeting law. Common Cause of Mont. v. Statutory Comm. to Nominate Candidates for Comm'r of Political Practices, 263 M 324, 868 P2d 604, 51 St. Rep. 77 (1994).

19. Meeting Open Only in Theory When No Public Notice Given: The open meeting law requires public notice of a meeting subject to that law. Without public notice, a meeting is open to the public in theory only, not in practice. Common Cause of Mont. v. Statutory Comm. to Nominate Candidates for Comm'r of Political Practices, 263 M 324, 868 P2d 604, 51 St. Rep. 77 (1994).

20. Public or Governmental Bodies -- Committee to Recommend Commissioner of Political Practices Appointees to Governor: The committee that recommends a list of persons from whom the Governor may select the Commissioner of Political Practices is not a board, bureau, commission, or agency within the meaning of those terms as used in the open meeting law. However, the committee is a "public or governmental body" under the plain meaning of those terms as used in that law because it has a clear public and governmental purpose and was created for a specific governmental task and is thus subject to the open meeting law. Common Cause of Mont. v. Statutory Comm. to Nominate Candidates for Comm'r of Political Practices, 263 M 324, 868 P2d 604, 51 St. Rep. 77 (1994).

21. Meeting of City Employees and Private Contractors Not Subject to Open Meeting Law -- See Case Note #2 under MCA 2-3-201.

22. Collective Bargaining Strategy Exception Unconstitutional: The collective bargaining strategy exception to the open meeting law, as set out in subsection (4) of this

section, is an unconstitutional violation of the right to know provision of Art. II, sec. 9, Mont. Const., and an impermissible legislative attempt to extend grounds upon which meetings may be closed. (See 1993 amendment.) Great Falls Tribune Co., Inc. v. Great Falls Public Schools, 255 M 125, 841 P2d 502, 49 St. Rep. 944 (1992).

23. Litigation Exception Unconstitutional Between Public Entities -- Board's Closure of Meeting Violation of Public's Right to Know: The Board of Public Education closed its meeting to the public to discuss litigation strategy concerning a possible challenge of an executive order requiring it to submit rules to the Governor for prior review and approval. The Associated Press and its member news organizations filed a complaint, arguing that the statutory litigation exception unconstitutionally conflicted with the public's right to know. Affirming the District Court order, the Supreme Court ruled that the litigation exception allowing public agencies to close meetings when discussing litigation strategy violated the public's constitutional right to attend and observe the deliberations of a public body. The dispute between the Board and the Governor was essentially a turf battle that should be given public scrutiny. The holding was limited to litigation between public entities. (See 1993 amendment.) Assoc. Press v. Bd. of Pub. Educ., 246 M 386, 804 P2d 376, 48 St. Rep. 1 (1991).

24 University Presidents' Job Performance Evaluations -- Right to Know Versus Right of Privacy: The Missoulian challenged the closure by the Board of Regents of a job performance evaluation of the university system's presidents. The challenge was based on the constitutional right to know. The right to know is not absolute but must be balanced against competing constitutional interests in the context of each case. In this case the demands of individual privacy of the university presidents and other university personnel in confidential job performance evaluations sessions of the Board of Regents clearly exceed the merits of public disclosure. Missoulian v. Bd. of Regents, 207 M 513, 675 P2d 962, 41 St. Rep. 110 (1984), followed in Flesh v. Bd. of Trustees, 241 M 158, 786 P2d 4, 47 St. Rep. 161 (1990), and Goyen v. Troy, 276 M 213, 915 P2d 824, 53 St. Rep. 353 (1996).

25. Violation of Right to Know -- Exhaustion of Remedies Not Applicable Under Separation of Powers: Plaintiff was negotiating his salary with the school board. The board closed their meeting to discuss plaintiff's salary request. Plaintiff contacted counsel and began proceedings against the board for violating the open meeting law. The board met at another closed meeting and withdrew its offer of employment. The board contended plaintiff was required to exhaust his administrative remedies before filing suit in District Court. The Supreme Court held that the exhaustion doctrine does not apply to constitutional issues. Plaintiff claimed violation of his constitutional right to observe deliberations of a public body under the constitution's right to know provisions. Constitutional questions are properly decided by a judicial body, not an administrative official, under the separation of powers doctrine. Jarussi v. Bd. of Trustees, 204 M 131, 664 P2d 316, 40 St. Rep. 720 (1983).

26. Collective Bargaining Exception Construed: Plaintiff was negotiating his salary with the school board. The board closed their meeting to discuss plaintiff's salary request. Plaintiff contacted counsel and began proceedings against the board for violating the open meeting law. The board met at another closed meeting and withdrew its offer of employment. The board contended it closed the meetings to discuss collective bargaining strategy under 2-3-203(3). In construing the term "collective bargaining", the court relied

on the identical technical and legal definitions of the phrase. Collective bargaining is an activity involving the settling of disputes by negotiation between the employer and the representative of the employees. The board improperly closed the meetings since plaintiff was not acting on behalf of anyone else and the board's decision would not affect anyone else. Plaintiff had the right to be present at deliberations regarding his future. (See 1993 amendment.) Jarussi v. Bd. of Trustees, 204 M 131, 664 P2d 316, 40 St. Rep. 720 (1983).

27. Official Misconduct Statute -- See Case Note #6 under MCA 2-3-202

28. Criminal Penalty Void for Vagueness: In 1975 the official misconduct criminal statute (45-7-401) was expanded to include a violation of this section. In 1977 a broad definition of "meeting" was enacted (2-3-202). Because there was no express legislative intent to amend the criminal statute to encompass the expanded definition of "meeting" and because people of common intelligence could differ over this matter, it is not clear what constitutes prohibited conduct. Subsection (1)(e) of the criminal statute is void for vagueness. St. v. Conrad, 197 M 406, 643 P2d 239, 39 St. Rep. 680 (1982).

29. Termination of Employment: A decision to terminate a schoolteacher made in violation of this section does not involve rights guaranteed by federal law or the United States Constitution, and the remedy is found in state courts. Branch v. School District, 432 F. Supp. 608 (D.C. Mont. 1977).

Attorney General Opinions:

City Council Agenda -- Addition of and Immediate Action on Certain Items Limited: Only an item that is not of significant public interest or that is otherwise exempt from public participation requirements may be added to a City Council agenda and acted upon at the same City Council meeting. 51 A.G. Op. 12 (2005).

Right of Public to Comment on Nonagenda City Council Items Extended to Matters Involving Individual Privacy -- Right of Presiding Officer to Close City Council Meeting to Protect Individual Privacy: The right of the public to comment at a City Council meeting on nonagenda items extends to matters that may involve an interest in individual privacy. However, the presiding office of the City Council retains the power to close a City Council meeting to the public if the presiding officer determines that the interest of individual privacy clearly outweighs the public's right to know. 51 A.G. Op. 12 (2005).

Applicability of Open Meeting and Public Participation Laws to County Commission Meetings -- Notice Required in Matters of Significant Public Interest: The gathering of a quorum of County Commissioners to discuss, either among themselves or with members of the public, issues over which the County Commission has authority is a meeting subject to open meeting laws. Meetings involving the consideration of matters of significant public interest, meaning decisions involving more than a ministerial act requiring no exercise of judgment, are subject to public participation mandates, including notice requirements and the opportunity for public participation in the decisionmaking process. Thus, a County Commission that established the hours of 9:30 a.m. to 5 p.m., Monday through Friday, as its regular meeting time for public notice purposes, did not comply with Montana's constitutional and statutory public participation provisions. 47 A.G. Op. 13 (1998). See also 42 A.G. Op. 51 (1988).

Applicability of Open Meeting Law to Montana Life and Health Insurance Guaranty Association Board of Directors: Noting that the constitutional right to know

and open meeting laws are to be liberally construed, the Attorney General found the Montana Life and Health Insurance Guaranty Association to be a public body statutorily organized to protect insured members of the public from the extraordinary event of insurance company insolvency and found that, as such, the meetings of the Association's board of directors are subject to the open meeting law. The Association may close a meeting only when and to the extent that the demands of individual privacy clearly exceed the merits of public disclosure. 46 A.G. Op. 24 (1996).

Proceedings of Workers' Compensation Board of Directors Subject to Open Meeting Law: Because the Board of Directors of the Montana self-insurers guaranty fund fits the definition of "agency" in state law and is considered a public agency because of its legal authority to compel membership, assess its members, and exercise other regulatory powers in the conduct of the people's business, a broad construction of laws guaranteeing the public's right to know requires the Board to comply with the state open meeting law. 46 A.G. Op. 1 (1995).

Applicability of Open Meeting Law to Local Chamber of Commerce Receiving Bed Tax Funds: A local chamber of commerce, when acting as a nonprofit convention and visitor bureau, is an organization supported at least in part by public funds in the form of bed tax money. By accepting public funds and deciding how those funds are to be spent, the convention and visitor bureau takes on the responsibility of accounting to the public for those funds. Therefore, meetings of a local chamber of commerce or other organization recognized and acting as a nonprofit convention and visitor bureau must be open to the public in accordance with the open meeting law unless the demands of individual privacy of the chamber clearly exceed the merits of public disclosure. 44 A.G. Op. 40 (1992).

Tax Appeal Board Deliberations Regarding Application for Reduction in Valuation -- Open to Public: The deliberations of a county tax appeal board regarding an application for a reduction in property valuation must be open to the public unless the presiding officer determines the discussion relates to a matter of individual privacy and the demands of individual privacy clearly exceed the merits of public disclosure. 42 A.G. Op. 61 (1988).

Open Meeting Law Inapplicable to Departmental-Tribal Cooperative Agreement Negotiations: Negotiations between a Department Director and tribal representatives relating to establishment of a cooperative agreement authorized under 18-11-103 are not subject to Montana's open meeting law. Such discussions do not constitute a "meeting" under this section because the Director, when acting alone on behalf of the Department, does not fall within the scope of the term "quorum of the constituent membership" as used in this section. 42 A.G. Op. 51 (1988).

Meetings of Private Corporation Under State Contract to Be Open: A private, nonprofit corporation that contracted with the state to restore and preserve state-owned property was considered a public body within the meaning of the open meeting law because the corporation was performing a public function and was receiving funds generated by public property. As such, meetings of the corporation were subject to the public's right to know and the standards established in this section. 42 A.G. Op. 42 (1987).

Deliberations of Human Rights Commission: The deliberations of the Human Rights Commission following a contested case hearing are subject to the Montana open

meeting law. They must be open to the public unless the presiding officer determines that the discussion relates to a matter of individual privacy and that the demands of individual privacy clearly exceed the merits of public disclosure. 38 A.G. Op. 33 (1979).

Public Disclosure -- Right to Know Versus Individual Privacy: A public body may close a meeting under 2-3-203 when the matter discussed relates to individual privacy and the demand for individual privacy clearly exceeds the merits of public disclosure. 37 A.G. Op. 170 (1978).

Public Disclosure of Records: The Board of Real Estate (now Board of Realty Regulation), when requested, must disclose the status of any real estate licensee, whether any disciplinary action has been taken against that individual, and if so, the reason. Public access to information relating to complaints or to allegations and to other files on individual licensees is left to the discretion of the Board, within the guidelines of this opinion. All minutes, except those minutes of a meeting closed by the presiding officer pursuant to 2-3-203, must be open to public inspection. 37 A.G. Op. 107 (1978).

Collateral References:

Pending or prospective litigation exception under state law making proceedings by public bodies open to the public. 35 ALR 5th 113.

Attorney-client exception under state law making proceedings by public bodies open to the public. 34 ALR 5th 591.

Emergency exception under state law making proceedings by public bodies open to the public. 33 ALR 5th 731.

Validity, construction, and application of statutes making public proceedings open to the public. 38 ALR 3d 1070, superseded by 34 ALR 5th 591.

2-3-204 through 2-3-210 reserved.

2-3-211. Recording. Accredited press representatives may not be excluded from any open meeting under this part 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.

History: En. 82-3405 by Sec. 4, Ch. 567, L. 1977; R.C.M. 1947, 82-3405.

Attorney General Opinions:

Mechanical Recordings of Public Meetings: A member of the public may make a mechanical recording of the proceedings and deliberations of an open school board meeting. 38 A.G. Op. 8 (1979).

2-3-212. Minutes of meetings -- public inspection. (1) Appropriate minutes of all meetings required by 2-3-203 to be open must be kept and must be available for inspection by the public. If an audio recording of a meeting is made and designated as official, the recording constitutes the official record of the meeting. If an official recording is made, a written record of the meeting must also be made and must include the information specified in subsection (2).

(2) Minutes must include without limitation:

(a) the date, time, and place of the meeting;

(b) a list of the individual members of the public body, agency, or organization who

were in attendance;

(c) the substance of all matters proposed, discussed, or decided; and

(d) at the request of any member, a record of votes by individual members for any votes taken.

(3) If the minutes are recorded and designated as the official record, a log or time stamp for each main agenda item is required for the purpose of providing assistance to the public in accessing that portion of the meeting.

Cross References:

Citizens entitled to inspect and copy records, 2-6-102.

Records open to public inspection, 2-6-104.

Attorney General Opinions:

Public Disclosure of Records: The Board of Real Estate (now Board of Realty Regulation), when requested, must disclose the status of any real estate licensee, whether any disciplinary action has been taken against that individual, and if so, the reason. Public access to information relating to complaints or to allegations and to other files on individual licensees is left to the discretion of the Board, within the guidelines of this opinion. All minutes, except those minutes of a meeting closed by the presiding officer pursuant to 2-3-203, must be open to public inspection. 37 A.G. Op. 107 (1978).

Public's Right to Know: The salaries of teachers and administrators of a public school district are subject to inspection by the public. 36 A.G. Op. 28 (1975).

2-3-213. Voidability. Any decision made in violation of 2-3-203 may be declared void by a district court having jurisdiction. A suit to void a decision must be commenced within 30 days of the date on which the plaintiff or petitioner learns, or reasonably should have learned, of the agency's decision.

History: En. 82-3406 by Sec. 5, Ch. 567, L. 1977; R.C.M. 1947, 82-3406; amd. Sec. 2, Ch. 211, L. 2007.

Compiler's Comments:

2007 Amendment: Chapter 211 at end of second sentence after "days of the" inserted "date on which the plaintiff or petitioner learns, or reasonably should have learned, of the agency's"; and made minor changes in style. Amendment effective October 1, 2007.

Case Notes:

30. Discretion of District Court Whether to Void School Board Decision: Motta filed a pro se lawsuit against a school district board, contending that the district did not have an appropriate procedure in place for public participation in the decisionmaking process and that because the school board did not adequately publicize a series of negotiation sessions and a special meeting to approve a negotiated agreement between the board and the teachers' union, results of the meeting should be void. The District Court found that the board violated state open meeting laws, granted partial summary judgment for Motta, and ordered that the district submit copies of its public participation procedures and maintain minutes consistent with applicable statutes, but the court did not void the agreement. On appeal, Motta argues that the District Court erred and moved the Supreme Court to void the agreement. The Supreme Court declined. Under this section,

the decision whether to void any decisions reached at a meeting held in violation of state open meeting laws is clearly within the discretion of the District Court, and because that discretion was not abused, the partial summary judgment was affirmed. Motta v. Philipsburg School Bd. Trustees, District No. 1, 2004 MT 256, 323 M 72, 98 P3d 673 (2004).

31. Advisory Body Meeting Without Notice -- See Case Note #15 under MCA 2-3-203

32. Appointment by Governor Not Voided by Failure of Recommending Committee to Give Notice of Meeting at Which Recommended Persons Chosen -- See Case Note #16 under MCA 2-3-203

33. Claim by Third-Party Plaintiffs Not Barred by Open Meeting Law Statute of Limitations: A citizens' group organized to recall Mayor Whitlock sought public disclosure of a report that was ruled to be confidential by a closed meeting of the City Council. In a counterclaim, the City Council sought a declaratory judgment directing disclosure of the report because it believed the public's right to know clearly exceeded Whitlock's privacy right. Whitlock asserted that because the citizens' group failed to file suit within 30 days of the City Council decision, the suit was statutorily barred under this section. However, the declaratory judgment requested by the City Council, as third-party plaintiffs, was not barred by statutory time limitations and because the court's ruling addressed the constitutional questions raised by the city rather than the statutory violation alleged by the citizens' group, the statute of limitations under this section did not control. Citizens to Recall Mayor James Whitlock v. Whitlock, 255 M 517, 844 P2d 74, 49 St. Rep. 1113 (1992).

34. Damages Not Available: Monetary damages are not available for holding an illegally closed meeting. Irving v. School District No. 1-1A, 248 M 460, 813 P2d 417, 48 St. Rep. 512 (1991). However, see Dorwart v. Caraway, 2002 MT 240, 312 M 1, 58 P3d 128 (2002).

35. Voiding of Meetings Not Sought -- Lack of Standing or Justiciable Controversy: When plaintiff brought an action alleging improper closure of school board meetings, the District Court incorrectly relied on this section in granting summary judgment in favor of the school district for meetings that occurred more than 30 days prior to filing of the complaint. Because plaintiff did not seek to void the meetings, this section did not apply; however, summary judgment was affirmed on the grounds of lack of standing and lack of a justiciable controversy. Flesh v. Bd. of Trustees, 241 M 158, 786 P2d 4, 47 St. Rep. 161 (1990).

36. Violation of Right to Know -- See Case Note #25 under MCA 2-3-203

37. Lack of Notice of Public Meeting as Voiding Decision -- Abuse of Discretion: Where County Commissioners failed to follow the statutory requirements for notice for a meeting of the Board of County Commissioners, the District Court had discretionary authority to void the results of the meeting, and where the Commissioners failed to fulfill their burden of proving the meeting legal, it was a clear abuse of discretion for the court not to void the results of the meeting. Bd. of Trustees v. County Comm'rs, 186 M 148, 606 P2d 1069 (1980).

38. Use of Mandamus to Void Unlawfully Held Public Meeting: Where respondent County Commissioners failed to give public notice of a meeting so that the result was voidable by the court under 2-3-114 and 2-3-213, a Writ of Mandamus would be

appropriate in this case to void the illegal meeting. In future cases, the remedy should take the form of a simple petition to void an action or a petition for declaratory judgment. Bd. of Trustees v. County Comm'rs, 186 M 148, 606 P2d 1069 (1980), followed in Goyen v. Troy, 276 M 213, 915 P2d 824, 53 St. Rep. 353 (1996).
Law Review Articles:
Montana Supreme Court Survey: Administrative Law, Reep, 42 Mont. L. Rev. 329 (1981).

2-3-214 through 2-3-220 reserved.

2-3-221. Costs to plaintiff in certain actions to enforce constitutional right to know. A plaintiff who prevails in an action brought in district court to enforce the plaintiff's rights under Article II, section 9, of the Montana constitution may be awarded costs and reasonable attorney fees.
History: En. 93-8632 by Sec. 1, Ch. 493, L. 1975; R.C.M. 1947, 93-8632; amd. Sec. 39, Ch. 61, L. 2007.

Compiler's Comments:
2007 Amendment: Chapter 61 made minor changes in style. Amendment effective October 1, 2007.

Case Notes:
39. No Award of Attorney Fees on Partial Summary Judgment in Pro Se Case Proper -- Remand for Determination of Costs: The District Court awarded Motta partial summary judgment in an action to determine whether a school board violated state open meeting laws. Even though he was the prevailing party, Motta was not entitled to attorney fees because Motta acted pro se throughout the proceeding. However, the District Court failed to address whether Motta was entitled to costs. Although it is within the District Court's discretion whether costs are awarded, an outright denial of costs without a sufficient rationale is an abuse of that discretion. The Supreme Court remanded so that the District Court could consider costs and set forth a rationale if costs were denied. Motta v. Philipsburg School Bd. Trustees, District No. 1, 2004 MT 256, 323 M 72, 98 P3d 673 (2004). See also Gaustad v. Columbus, 265 M 379, 877 P2d 470 (1994).
40. Performance of Public Service in Enforcement of Constitutional Provisions Through Litigation -- Costs and Attorney Fees Payable: Plaintiffs successfully contested the constitutional validity of a Department of Revenue administrative rule regarding the confidentiality of corporate tax information. In doing so, plaintiffs performed a public service by enforcing a portion of the Montana Constitution that would otherwise have been violated. Because of the public benefits gained through plaintiffs' efforts, the Supreme Court spread the cost of the litigation among its beneficiaries and awarded plaintiffs their costs and reasonable attorney fees, including those incurred on appeal. Assoc. Press, Inc. v. Dept. of Revenue, 2000 MT 160, 300 M 233, 4 P3d 5, 57 St. Rep. 657 (2000).
41. Water Rights Decree "Updated" Without Notice or Hearing -- No Violation of Right to Know Found -- Possible Due Process Violation -- Attorney Fees Denied: Jones discovered that her water right set forth in a 1902 court decree had been "updated" by the

judges of the Fourth Judicial District and the terms of the 1902 decree had been changed in the process, all without notice and hearing for Jones. The Supreme Court, distinguishing Assoc. Press v. St., 250 M 299, 820 P2d 421 (1991), and noting that the methods used by the Fourth Judicial District Court may be a violation of due process rights, held that since there was no court order, statute, or other action preventing access to documents or observance of deliberations, there was no violation of the right to know and therefore no attorney fees were awardable pursuant to this section. State ex rel. Jones v. District Court, 283 M 1, 938 P2d 1312, 54 St. Rep. 460 (1997).

42. Award of Attorney Fees Discretionary: It is within the discretion of the District Court to award attorney fees to a prevailing plaintiff, but the award is not mandatory. In this case, the court conscientiously balanced the competing rights and interests of the parties and carefully analyzed controlling case law before denying the award of attorney fees and thus did not exceed the bounds of reason or abuse its discretion in its decision. Gaustad v. Columbus, 272 M 486, 901 P2d 565, 52 St. Rep. 826 (1995), followed in Pengra v. St., 2000 MT 291, 302 M 276, 14 P3d 499, 57 St. Rep. 1231 (2000).

43. Award of Attorney Fees Discretionary -- "May" Construed as Discretionary: Gaustad prevailed in a suit for the release of investigatory records brought under Art. II, sec. 9, Mont. Const., but the District Court denied awarding attorney fees. Citing Assoc. Press v. Bd. of Pub. Educ., 246 M 386, 804 P2d 376 (1991), and Bozeman Daily Chronicle v. Bozeman Police Dept., 260 M 218, 859 P2d 435 (1993), the Supreme Court held that the award of fees was discretionary with the District Court under this section. In response to Gaustad's argument that "may" should be construed as "shall", the Supreme Court reviewed the legislative history of this section and noted that the legislative history favored the construction of "may" as permissive. Because the District Court gave no rationale for its denial of the motion for fees, the Supreme Court remanded the case for inclusion of that rationale. In re Gaustad v. Columbus, 265 M 379, 877 P2d 470, 51 St. Rep. 544 (1994).

44. Newspaper Successfully Seeking Release of Criminal Justice Information Entitled to Attorney Fees: The Bozeman Daily Chronicle successfully sued the city of Bozeman's police department to obtain the name of an officer who had resigned after being investigated for sexual misconduct. The Supreme Court held that the newspaper had prevailed by relying on its rights under Art. II, sec. 9, Mont. Const., and that therefore the lower court had the discretion to award attorney fees to the newspaper. Bozeman Daily Chronicle v. Bozeman Police Dept., 260 M 218, 859 P2d 435, 50 St. Rep. 1014 (1993). See also Pengra v. St., 2000 MT 291, 302 M 276, 14 P3d 499, 57 St. Rep. 1231 (2000).

45. Attorney Fees: Attorney fees are available to plaintiffs under 27-26-402. Kadillak v. The Anaconda Co., 184 M 127, 602 P2d 147 (1979).

Part 3. Use of Electronic Mail Systems