



# Open Meetings & Publics Right To Participate

Dan Clark, MSU Local Government Center



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**Let the sun  
shine in...**



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# Why we are here...

- To understand the people's right to know, the right to public records and the right of public participation in their government.
- To identify the laws that help protect these rights.
- To provide an overview of key court decisions related to the public's right to know, individual privacy and citizen participation.





The business of  
government is  
the people...

## **The Golden Rule of Open Government**



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Government is not  
designed to be  
efficient, it's  
designed to be fair



Fairness is assured by  
giving the opportunity  
for people to know  
what their government  
is doing for them... and  
to them



# How did the current laws on Freedom of Information develop?

- 1972 Constitutional Convention
- Legislative Sessions
- Agency Policies
- Administrative Rules
- Attorney General Opinions
- Supreme Court Decisions



# Montana's Constitutional Basis

## Article II

### The Big Four

- Sec. 7: Freedom of speech, expression and press
- Sec. 8: Right of Participation
- Sec. 9: Right to Know
- Sec.10 Right of Privacy





# Freedom of Speech, Expression and Press

No law shall be passed impairing the freedom of speech or expression. Every person shall be free to speak or publish whatever he will on any subject, being responsible for all abuse of that liberty. In all suits and prosecutions for libel or slander the truth thereof may be given in evidence; and the jury, under the direction of the court, shall determine the law and the facts.

-MT Constitution Article II, Sec 7



# 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.

-MT Constitution Article II, Sec 8



# 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.

-MT Constitution Article II, Sec 9



# Right of privacy

The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.

-MT Constitution Article II, Sec 10



“The delegates to the Constitutional Convention made a clear and unequivocal decision that government operates most effectively, most reliably, and is most accountable when it is subject to public scrutiny...

While on any given occasion there may be legitimate arguments for handling government operations privately, the delegates to our constitutional Convention concluded that in the long term those fleeting considerations are outweighed by the dangers of a government beyond public scrutiny.”

Justice Terry Trieweiler for the court in *Great Falls Tribune v. Day* - 1998



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# The Role of the Press

- The public's eyes and ears on what government is doing for them, and to them
- When the press is at a meeting, the walls of the meeting room grow!

**8 out of 10 adults read at least one newspaper every week!**

Univ. of Missouri-2007

**Local TV, Internet and local radio news expands the citizen information base.**



# How do people get their news about their local communities?

**Newspapers - 50%**

**TV - 23%**

**Radio - 2%**

**Other - 16%**

University of Missouri - 2007



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# What do readers read?

95% read local news

75% read public notices

78% believe local news coverage is good to excellent

67% believe accuracy of their local newspaper is good to excellent

58% believe fairness of reporting is good to excellent

University of Missouri 2007





The Constitution recognizes the importance of the press in informing the public, but the press uses the same laws and rights as the general public.

# The Press has few special privileges

- Montana Shield Law
- Retraction Law for Libel
- Right to record and photograph public meetings

# The basic concept

**The government agency is the board of directors...**

The staff reports to the board...

And the board is responsible to the stockholders (the public)...

# Right of Participation

- The ability of the public to exert this right depends upon its ability to know the actions of the government (Right to Know) and (Open Records).
- Each agency is required to develop procedures for permitting and encouraging the public to participate in agency decision that are significant interest to the public. MCA 2-3-103

- Must ensure adequate notice and assist public participation before a final agency action is taken that is of significant interest to the public MCA 2-3-103
- Agenda of the meeting (as defined by MCA 2-3-202) must allow public comment on any public matter not on the agenda of the meeting and within jurisdiction of the agency.
- Can't take action on any matter discussed unless specific notice included and public comment has been allowed.
- Public comment needs to be included into the official minutes of the meeting(as provided in MCA 2-3-212.



# Compliance with notice provisions 2-3-104

Agency has complied with the notice provisions of MCA 2-3103 if:

Environmental impact statement is prepared

Proceeding held under Montana Administrative Procedure Act

Public hearing, after notice, is held according to state law, local ordinance or resolution; **or**

**A newspaper of general circulation within the area to be affected by a decision has carried a news story or advertisement prior to a final decision to permit public comment.**



- Supplemental notice by radio or television MCA 2-3-105
- Other means of public notice are also permitted... including direct mail, internet, postings, that might be considered if questioned if public notice was sufficient... **only the publication in the paper, however, is specifically given as sufficient.**
- Public hearings must include a method of affording interested persons reasonable opportunity to submit data, views or arguments, orally or in written form, prior to making a final decision. MCA 2-3-111
- District courts can set aside an agency decision upon petition of any person whose rights have been prejudiced. Petition must be filed within 30 days of the date the petitioner learns, or reasonably should have learned, of the agency's decision.

# Exceptions

MCA 2-3-103 and 2-3-111 don't apply in these cases:

1. An emergency situation affecting public health, welfare or safety
2. An agency decision that must be made to maintain or protect the interests of the agency, including but not limited to the filing of a lawsuit in a court of law or becoming a party to an administrative proceeding
3. A decision involving no more than a ministerial act.





# Open Meetings

# Provisions of Open Meeting Laws

- Law must be liberally construed. It is the intent that actions and deliberations of all public agencies shall be conducted openly.

MCA 2-3-201

- A meeting is quorum of the agency. Can be an actual meeting, or by electronic means, to hear, discuss or act upon a matter over which the agency has supervision, control, jurisdiction or advisory power. MCA 2-3-202

- **All meetings of all agencies** (includes boards committees and subcommittees) **must be open** to the public. MCA 2-3-202

- Includes associations of public or governmental bodies. MCA 2-3-202

- Includes organizations supported in whole or part by public funds. MCA 2-3-202

- The press can record, photograph or televise any meeting. 2-3-211
- Individuals can also record. 38 Mont AG Op. 8 (1979)
- Presiding officer can 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 exceeds** the merits of public disclosure. MCA 2-3-203
- The individual about whom the discussion pertains may waive his right to privacy and the **meeting must be open**. MCA 2-3-203
- A meeting can be closed to discuss litigation 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. Does not apply if both litigants are public bodies or associations. MCA 2-3-203

# Minutes

- Minutes of all meetings required to be open shall be kept and be available for inspection. Includes open portion of closed meetings. MCA 2-3-212
- Minutes must include:
  - Date, time and place of 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
  - At the request of any member, a record of individual votes taken by member.
- Minutes are available on request (even draft copies) MCA 2-6-101



# Consequences

- Any decision made in violation of 2-3-203 may be declared void by a district court having jurisdiction. Suit must be started within 30 days of the decision date or which the plaintiff or petitioner learns, or reasonably should have learned, of the agency's decision. 2-3-213
- The court may award costs and reasonable attorneys' fees.
- May be charged with official misconduct if knowingly conducts a meetings of public agency in violation of 2-3-203. District Court has jurisdiction. Maximum penalty is \$500 fine or 6 months in county jail or both. 45-7-401
- May be required to forfeit office. 45-7-401





# More about privacy....



- The ability to control access to information about oneself  
MT. Divn. Of Human Rights v. City of Billings (1982)
- Individual must have a subjective or actual expectation of privacy and society is willing to recognize as reasonable MT. Divn. Of Human Rights v. City of Billings (1982)
- Private information includes: **matters related to family problems, health problems, employee evaluations, military records, IQ test results, prison records, drug and alcohol problems, and information "most individuals would not willingly disclose publicly.** MT. Divn. Of Human Rights v. City of Billings (1982); Missoulain v. Board of Regents 1984); 42 MT AG Op. 119 (1988)
- **Relates to marriage, procreation, contraception, family relationships, child-rearing and education.** Flesh v. Missoula and Mineral Counties (1973)



- Corporations do not have a right to individual privacy *Great Falls Tribune v. MT Pub. Svc. Comm.* (2003)
- Public agencies do not have a right of privacy *Goyen v. Troy* (1996)
- Trade secrets are private (30-14-402)
- Economic advantage is not a reason to close a meeting  
*Great Falls Tribune v. Day*
- Collective bargaining is public *Great Falls Tribune v. Great Falls Public Schools* (1992)
- All meetings are open, even if no decisions are made. *Goyen v. Troy* (1996), *State v. Conrad* (1982)
- If meeting closed for privacy reasons, chairman must apply balancing test and reason for closure on the record. *Great Falls Tribune v. District Court* (1989)



- Public employees don't have same right to privacy as individuals 44 MT AG Op. 40 (1992)
- Investigative reports and materials used or created as part of a publicly funded investigative report on employee or elected official misconduct is open  
Citizens to Recall Whitlock v Whitlock (1992)
- Allegations of misconduct of public employees both while investigation is ongoing and at the conclusion.  
Great Falls Tribune v. Cascade County Sheriff (1989); Citizens to Recall Whitlock v Whitlock (1992); Bozeman Daily Chronicle v. Bozeman Police Dept. (1993)



# Public records

- Public writings include laws, judicial records, other official documents, public records of private writings, including electronic mail. MCA 2-6-101
- Citizens entitled to inspect and copy public writings 2-6-102
- Does not apply to constitutionally protected information, and matters related to individual or public safety MCA 2-6-102
- May withhold information (redact) relating to individual privacy or public safety or security of public facilities MCA 2-6-102
- Public records available for inspection by any person during office hours. MCA 2-6-104
- Public records cannot be removed, except on court order 2-6-105



- Public officers cannot compile mailing lists for private use, without permission of those on the list, although individuals can compile lists by inspection. Does not apply to corporate lists  
MCA 2-6-109

- The public has access to public information in electronic or other non-print media. A fee, not to exceed actual cost of purchasing the electronic media, and other direct costs, plus hourly fee (for electronic media only of the state) may be charged. MCA 2-6-110

- Concealment of public hazards prohibited. MCA 2-6-112

- Draft copies are public records, although draft records are not required to become permanent records MCA 2-6-401, 2-6-102

- Election records are public, including voting lists MCA 13-15-101, 13-1-109, 20-20-102 (Schools)
- Competitive bids may be inspected after they are opened, but not before awarded. MCA 18-4-304
- Public can examine settlements of lawsuits if they involve government agencies, unless individual privacy clearly exceeds the merits of disclosure MCA 2-9-303
- Government employees salaries are public information 43 AG Op 119 (1988)
- Draft documents (minutes, etc.) are open to public inspection MEIC v. City of Great Falls 2008 District Court

# Courts & Criminal Justice Information

- Court proceedings are open unless specifically closed
- Court documents are public when filed
- Most youth court records are open until specifically sealed  
MCA 41-5-216
- Pre-sentence investigations are not public (can be released by a judge) MCA 46-11-701
- Most pretrial hearings are open to the public MCA 46-11-701
- Coroners inquests are open MCA 46-4-201





# Public Criminal Justice Information

- Information made public by law
- Court records and proceedings
- Information of convictions, deferred sentences and deferred prosecutions
- Postconviction proceedings and status.
- Information from a criminal justice agency including
  - Initial offense reports and arrest records
  - Bail records
  - Daily occupancy rosters

- Information considered necessary by a criminal justice agency to secure public assistance,
- Statistical information.

All the above MCA 44-5-103

- 911 tapes are public





# MONTANA FOI HOTLINE

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- A 501-C-3 corporation
- A coalition of news media to monitor, ensure and enforce the public's right to know
- Supported by grants and donations by media and individuals
- Provides, without charge, a lawyer to give basic advice to media, the public and government officials on right to know issues.



**(406) 442-8670**



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# Scenarios

- A member of the public comes into the Clerk's office and asks to "inspect" the City Council minutes for the last 3 years. It's 4:45 PM on a Friday afternoon. The clerk is on vacation. What do you do?
- Another individual says he's from North Dakota and asks for photocopies of the same documents. What do you tell him/her?



- An individual who does not speak English comes into the Clerk's office and provides a note with the same request. What do you do?
- The young boy asks for a CD of the town charter and ordinances on skateboarding. What do you tell him?



- At the start of a City Council meeting, a member of the public shows up with a video camera, another has a cell phone pointed at the council, and another says he has a wireless connection with a web camera plugged into his laptop pointed at the council. Is this legal?
- A citizen comes into your office complaining that you never advertize upcoming city council meetings. Do you know where you post your notice of upcoming city council meetings?



- A quorum of City Council members are sitting in the high school grandstands watching the football game together. They are not discussing government business. Suddenly, a teacher comes up and says, “I’ve been meaning to ask you all what you intend to do about the potholes on Main Street.” What should they do?

