

Montana Freedom of Information Guidelines

Open Meetings & Member Activities

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October 3, 2022



Legislative Engagement Montana Department of Commerce

BOARD MEMBERS: Members of Boards that are administratively attached to the Department may testify on legislation in which the Board has requested the member to comment. For such testimony, the Board Member should identify themselves as a member of the Board and they are testifying at the request of the Board. Board members may testify on legislation as private citizens or in their other professional roles, but it must be clear in their testimony they are not testifying as a Board Member.

Department of Commerce employees and board members may participate in the legislative process as representatives of the Department or of Boards attached to the Department under specific conditions and direction by the Department.



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.

Meetings is defined as "*the convening of a quorum of the constituent membership of a public agency or association described in **2-3-203 MCA**, 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.*" **§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 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 board or 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?

Two of three members of a board traveling to a meeting, going out for a meal to discuss any public business are activities that are covered by open-meetings/right-to-participate laws regardless of the formality of the setting.

Closure of Meetings

What are the reasons for a public body close its meeting 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 be done 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 vote be had during closed meetings of a public body?

A board can discuss a private issue in a closed meeting, but the vote should be taken during an open session.



Electronic communications

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.

Meeting Notices

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 1998 Montana Attorney General’s opinion deemed that county commissioners cannot comply with the state’s open-meetings law by saying they may meet anytime during their regular work week. The opinion stressed the requirement meeting date and time must be specified in advance to inform citizens when a quorum meets to discuss or act on a public interest issue; to allow the public the opportunity to participate in the decision making. The agenda notice must be detailed to inform discussion issues.



Is a public notice required prior to a public body meeting?

Yes. 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), the District court ruled that 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.

What types of ‘public agencies’ fall under the Open Meetings Act?

§2-3-203 MCA states that *public agencies* and certain associations of public agencies must hold open public meetings (*public or governmental bodies, boards, bureaus, commissions, state agencies, state political subdivisions, organizations or agencies public funded, public body appointed committees and subcommittees conducting public business*). Under the **Open Meetings Act**, this would apply to sub-committees as well as to “work sessions” held by some entities.

The Montana Supreme Court held in 2002 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 meetings are subject to the Open Meetings Laws?

In **Associated Press v. Crofts**, 321 Mont., 89 P.3d 971(2004), the Montana Supreme Court ruled 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 court further stated that 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.

Importance of public purpose - the Court stated *"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 set factors to consider:

- (i) are meetings paid for with public funds,
- (ii) whether committee members are public employees acting in their official capacity,
- (iii) frequency of meetings,
- (iv) whether the committee deliberates or just gathers facts,
- (v) whether the meetings concern policy matters rather than ministerial or administrative functions,
- (vi) whether the committee members have executive authority, and the result of the meetings.

In **Bryan v. Yellowstone County Elementary School Dist.** No. 2, 312 Mont. 257, 60 P.3d 381 (2002), the Court held 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. 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.



Media, Recordings, and Communications in Meetings

Are pictures and recordings permissible in open meetings?

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.*” According to Montana Attorney General Opinion 38 Op. Att’y Gen. No. 8 (1979), legislative intent of the law would be furthered by allowing the public to mechanically record open meetings.

Are sharing notes, sending emails or texting or whispering among members of a public body permissible?

If deliberations are concealed via the exchange of these means of communications, the public is denied the opportunity to observe the deliberations. The public has a constitutional right is to observe deliberations. Such hidden communications is tantamount to holding a meeting behind closed doors.



Are public bodies required to store and provide public access to meeting minutes?

§2-3-212 MCA, states that 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) MCA**, 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**) MCA.

Finally, under **§2-3-212(4) MCA**, 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.

Are emails sent to a public body quorum constitute a “meeting” and, be subject to notice and public access requirement?

The Montana Supreme Court in **Allen v. Lakeside Neighborhood Planning Committee**, 371 Mont. 310, 308 P.3d 916 (2013) stressed that public officers “conducting official business via email can potentially expose them to claims of violation of open meetings laws.”



Legislative Purposed Meetings

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 Montana Constitution, states “*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 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. The court ruled, however, that the news media had no legal basis for suing to get access to party caucuses during legislative sessions. Thereafter, the Montana Supreme Court, remanded the issues, and subsequently, the court ruled that the caucuses during legislative sessions are to discuss public business, so they too are subject to the open meetings law. Since 1999, caucuses have been open.



Takeaways

Montana's Constitution states:

"No person shall be deprived of the right to examine documents or to observe the deliberation 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."

Notices are needed

Quorum determined by majority number of members present

Public access

Records of meetings

Public purpose of meetings

Public has a right to be informed

