

# Open Meetings & the Public's 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.



## Suit claims school violated open meetings law

Missoulian, May 8, 2004

MISSOULA (AP) — Two people are suing the county school district, claiming it violated the state's **open meetings law** by meeting secretly to discuss its budget and the closing of three schools this summer. ... The lawsuit contends board meetings at which members discussed budget balancing options were illegally held in private **without required public notice and with no minutes kept.**



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## **Nugent gives opinion on council e-mails**

Missoulian, Oct. 24, 2007

Missoula City Council members must abide by the law and conduct the public's business in the open because people have the right to watch - and hear - council deliberations, City Attorney Jim Nugent said Tuesday.

...Deliberations by **electronic communication** are no exception to public meetings laws, Nugent said in the opinion. In fact, he said, if six of 11 council members are e-mailing each other during a meeting about an agenda item, they may create a de facto meeting - which the public must be able to monitor. The Missoulian's review of council members' electronic conversations during several meetings in August and September revealed cases where deals were made prior to votes, or amendments were floated by e-mail before being proposed to the larger group. In addition, council members used e-mails to make fun of or to discount comments by members of the public and one another.



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**CREDIBILITY**  
**VS.**  
**COMPETENCY**

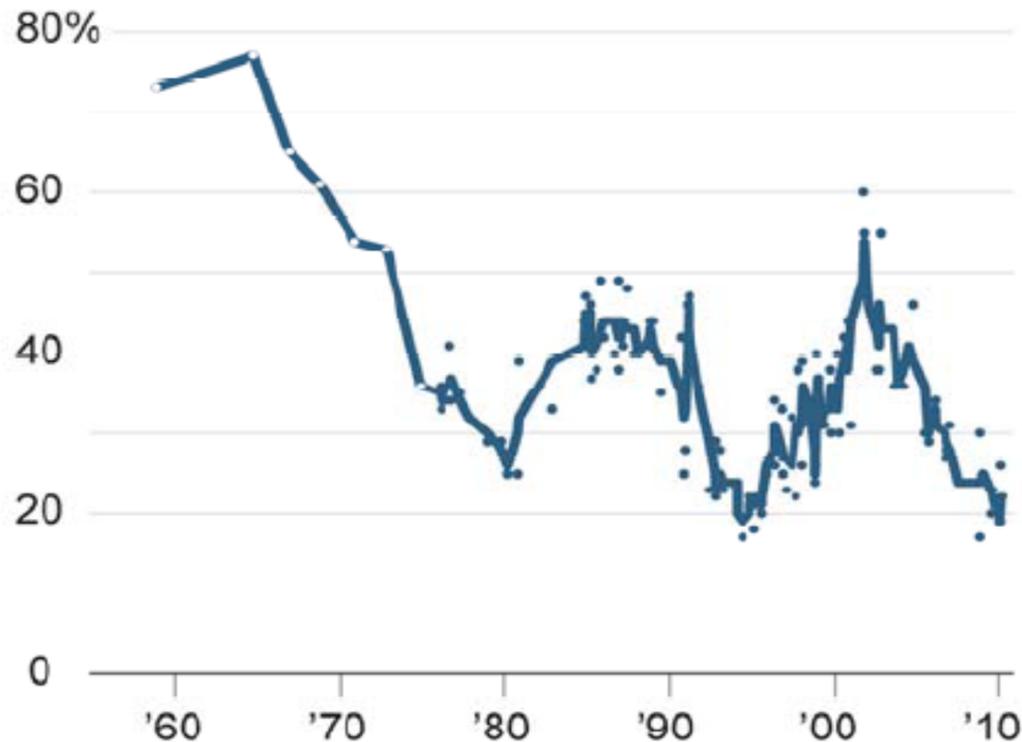


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## Public Trust in Government: 1958-2010

*Trust government just about always or most of the time*



Pew Research Center March 11-21 Q21.

Trend sources: Pew Research Center, National Election Studies, Gallup, ABC/Washington Post, CBS/New York Times, and CNN Polls. From 1976-2010 the trend line represents a three-survey moving average with individual data points shown.

Source: Pew Research Center for the People & the Press, *The People and Their Government: Distrust, Discontent, Anger, and Partisan Rancor*. April, 2010, <http://people-press.org/report/606/trust-in-government>



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**Handout on Good Governance Principles; Adapted from Graham, Amos and Plumptre (2003)**

<b>Good Governance Principle</b>	<b>Application and Description</b>
<b>Legitimacy and Voice</b>	<p><b>Participation:</b> individuals should have a voice in decision-making, either directly or through legitimate intermediate institutions that represent their intention. Such broad participation is built on freedom of association and speech, as well as capacities to participate constructively.</p> <p><b>Consensus Orientation:</b> good governance mediates differing interests to reach a broad consensus on what is in the best interest of the group and, where possible, on policies and procedures.</p>
<b>Direction</b>	<p><b>Strategic Vision:</b> leaders and the public have a broad and long-term perspective on good governance and human development, along with a sense of what is needed for such development. There is also an understanding of the historical, cultural and social complexities in which that perspective is grounded.</p>
<b>Performance</b>	<p><b>Responsiveness:</b> institutions and processes try to serve all stakeholders.</p> <p><b>Effectiveness and Efficiency:</b> processes and institutions produce results that meet needs while making the best use of resources.</p>
<b>Accountability</b>	<p><b>Accountability:</b> decision-makers in government, the private sector and civil society organizations are answerable and responsible to the public, as well as to institutional stakeholders. Accountability differs depending on the organizations and whether the decision is internal or external.</p> <p><b>Transparency:</b> built on the free flow of information with processes, institutions and information directly accessible, and sufficient and applicable information provided.</p>
<b>Fairness</b>	<p><b>Equity:</b> all have opportunities to improve or maintain their well-being.</p> <p><b>Rule of Law:</b> legal frameworks are fair and enforced impartially.</p>



# The Golden Rule of Open Government

The business of  
government is  
the people...



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



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



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

- 1972 Constitutional Convention
- Legislative Sessions
- Local Policies
- 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



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# 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



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# 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



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# 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



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



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# Accountability

- 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 presiding officer may assure that such activities do not interfere with the conduct of the meeting. [2-3-211]



# Notice and Opportunity to be Heard

Each agency shall develop procedures for permitting and encouraging the public to participate in agency decisions that are of significant interest to the public (2-3-103).

## Adequate notice

“Forty-eight hours is generally considered sufficient to notify the public of contemplated action. ... The amount of notice given should increase with the relative significance of the decision to be made.” (47 Op. Att’y Gen. No. 13) Joseph P. Mazurek, Attorney General 1998.



- 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).



# Notice and Opportunity to be Heard

## Non-agenda items

The agenda for a meeting, ...must include an item allowing public comment on any public matter that is not on the agenda of the meeting and that is within the jurisdiction of the agency conducting the meeting. However, the agency may not take action on any matter discussed unless specific notice of that matter is included on an agenda and public comment has been allowed on that matter. Public comment received at a meeting must be incorporated into the official minutes of the meeting (2-3-103).



# Compliance with notice provisions 2-3-104

Agency has complied with the notice provisions of MCA 2-3-103 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.

MCA 2-3-114



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# 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



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# 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 a quorum of the agency to **hear, discuss or act** upon a matter over which the agency has supervision, control, jurisdiction or **advisory power**. Can be an physical meeting, or by electronic means. 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



# What constitutes a public meeting?

- Quorum present
- Hear, discuss or act
- Minutes taken
- 48 hour notice
- Public comment
- Agenda



# Municipal Entities Subject to Right of Public Participation -- Limit on Public Comment

**Any municipal entity**, including an advisory board, commission, and committee of a City Council, **is subject to the right of the public to participate in any action that is of significant interest to the public.** However, those municipal entities need not permit public comment on matters that are not of significant interest to the public. **51 A.G. Op. 12 (2005).**



- 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...



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- 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)



# Open Records



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# 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



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# 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.

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