

Open Meetings

Montana's open meeting and public participation laws are based on two fundamental rights contained in the Montana Constitution. Article II, Section 9 contains a strong right to know provision:

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.

Article II, Section 8 guarantees the right of public participation:

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.

In the case of meetings of public agencies and other entities, these constitutional rights are primarily implemented through Montana's open meeting laws, codified at Montana Code Annotated §§ 2-3-201 through 2-3-221. See SJL of Montana v. City of Billings, 263 Mont. 142, 147, 867 P.2d 1084 (1993). The general provision for open public meetings is contained in Montana Code Annotated § 2-3-203(1), which provides:

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.

...

(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.

What is a Meeting?

Under the open meeting laws, a “meeting” is very broadly defined as “. . . the convening of a quorum of the constituent membership of a public agency or association . . . , 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.” Montana Code Annotated § 2-3-202.

A “quorum” is defined as “a majority of the entire body” when members are acting as a group, “not merely the action of a particular number of members as individuals.” 42 Op. Att’y Gen. No. 51 at 200-01. The same opinion found that the terms “discuss,” “deliberations,” and “discussions” contemplate “collective discussion and collective acquisition of information among the ‘constituent membership’ of the agency.” Id. At 201.

An agency may not appoint any committee or subcommittee for the purpose of conducting business that is within the jurisdiction of the agency in order to avoid the requirements of the open meeting laws. Montana Code Annotated § 2-3-203(6).

There is no statutory distinction between a “regular” or “special” meeting for purposes of determining whether it is a “meeting” subject to the open meeting laws. See Montana Code Annotated § 2-3-202.

A “meeting” subject to the open meeting laws occurs regardless of whether it is conducted in person, by telephone conference call, by videoconferencing, or by email. See Montana Code Annotated § 2-3-202 (“whether corporeal or by means of electronic equipment . . .”).

Notice of the Meeting

The open meeting laws themselves contain no explicit notice requirements. The notice requirement as it pertains to open meetings is derived from Montana’s public participation laws, and it attaches only when an issue is of significant public interest. See Montana Code Annotated § 2-3-103; Common Cause of Mont. v. Statutory Comm. To Nominate Candidates for Comm’r of Political Practices, 263 Mont. 324, 326, 329, 868 P.2d 604, 605, 607 (1994); Board of Trustees, Huntley Project Sch. Dist. No. 24 v. Board of County Comm’rs, 186 Mont. 148, 154, 606 P.2d 1069, 1072 (1980).

The term “significant public interest” is not defined for purposes of the open meeting laws. In the context of meetings of a county commission, the Attorney General has determined that the term refers to “any non-ministerial decision or action . . . which has meaning to or affects a portion of the community” 47 Op. Att’y Gen. No. 13 (1998).

A “ministerial” decision or action is one that is generally performed pursuant to legal authority, and requires no exercise of judgment. Id.

Notice of a meeting must be given sufficiently in advance of the meeting to permit the public to attend. Id.; Montana Code Annotated § 2-3-103. The amount of notice required “should increase with the relative significance of the decision to be made,” with the ultimate goal of encouraging and assisting citizen participation. See 47 Op. Att’y Gen. No. 13 at 6 (1998). In the case of county commission meetings, the Attorney General has suggested that 48 hours advance notice should generally be considered “sufficient to notify the public of contemplated action.” 47 Op. Att’y Gen. No. 13 at 6 (1998). However, each case will be considered based on its own unique facts, and depending on the circumstances less than 48 hours notice may be adequate. See Jones v. Missoula County, 330 Mont. 205, 127 P.3d 406 (2006).

Failure to comply with the notice requirements may subject any decision made in violation of the requirement to be voided under Montana Code Annotated § 2-3-213.

Closing a Meeting

Montana Code Annotated § 2-3-203 lists the circumstances under which a public meeting may be closed. The most litigated exception to the open meeting requirement is the one expressed in subsection (3) of the statute:

(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.

The presiding officer of the agency or public body that holds the meeting makes the determination whether to close the meeting. In making the determination, the officer must balance the demands of individual privacy against the constitutional right to know, which can be a difficult process depending on the circumstances. If the presiding officer determines that a meeting should be closed pursuant to this subsection, he or she should state on the record that a determination has been made that the demands of individual privacy clearly exceed the merits of public disclosure.

The right to privacy is guaranteed by Article II, Section 10 of the Montana Constitution:

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.

The courts have developed a general balancing test to “resolve the competing and conflicting right-to-know and right-to-privacy provisions” of the Constitution. The two-part test requires the person making the decision to determine: 1) whether the person involved had a subjective or actual expectation of privacy; and 2) whether society is willing to recognize that expectation as reasonable. See, e.g., Flesh v. Board of Trustees of Joint School Dist. #2, 241 Mont. 158, 786 P.2d 4 (1990); Missoulian v. Board of Regents, 207 Mont. 513, 675 P.2d 962 (1984). Examples of privacy interests that courts have recognized as sufficient justification for closing meetings include candid discussion of performance evaluations and qualifications of university presidents (Missoulian v. Board of Regents); personnel issues where disciplinary action is possible (Flesh v. Board of Trustees); and allegations of employee misconduct that implicated privacy interests of a witness (Goyen v. City of Troy, 276 Mont. 213, 915 P.2d 824 (1996)). There are likely other privacy interests that would justify closing a meeting. The presiding officer must carefully consider each case based on its unique facts when making the determination whether to close a meeting.

Once the presiding officer determines that the demands of individual privacy clearly exceed the merits of public disclosure, the public body subject to the open meeting laws must defer discussion of the issue until the individual whose privacy interest is involved is notified and is given the opportunity to attend the meeting and/or waive his or her right to privacy. If the person waives his or her right to privacy, the meeting must remain open. See Goyen, 276 Mont. at 219, 915 P.2d at 828.

Violation of the Open Meeting Laws

A violation of the open meeting laws may subject the agency or public body to injunctive or prospective relief, resulting in voiding the decision made in the illegal meeting. Any lawsuit seeking to void a decision must be commenced within 30 days of the decision. Montana Code Annotated § 2-3-213. A plaintiff who prevails in an action to enforce constitutional access rights under the open meeting laws may be awarded costs and reasonable attorney fees. Montana Code Annotated § 2-3-221.