

# OPEN GOVERNMENT GUIDE

Access to Public Records  
and Meetings in

MONTANA

**REPORTERS  
COMMITTEE**  
FOR FREEDOM OF THE PRESS

Sixth Edition  
2011



# OPEN GOVERNMENT GUIDE

## OPEN RECORDS AND MEETINGS LAWS IN

# MONTANA

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2011

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## **MONTANA**

**SIXTH EDITION**  
**2011**

Previously Titled  
Tapping Officials' Secrets

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## Introductory Note

The OPEN GOVERNMENT GUIDE is a comprehensive guide to open government law and practice in each of the 50 states and the District of Columbia. Fifty-one outlines detail the rights of reporters and other citizens to see information and attend meetings of state and local governments.

The OPEN GOVERNMENT GUIDE — previously published as *Tapping Officials' Secrets* — is the sole reference on open government laws in many states.

Written to follow a standard outline to allow easy comparisons between state laws, the compendium has enabled open government advocates in one state to use arguments successful in other states to enhance access rights at home. Press associations and lobbyists have been able to invoke other sunshine laws as they seek reforms in their own.

Volunteer attorneys, expert in open government laws in each state and in Washington, D.C., generously donated their time to prepare the initial outlines for the first incarnation of this project in 1989. In most states these same attorneys or their close associates updated and rewrote the outlines for the 1993, 1997, 2001 and 2006 editions as well this current 2011 edition.

Attorneys who are new to the compendium in this edition are also experts in open government and access issues, and we are grateful to them for their willingness to share in this ongoing project to create the first and only detailed treatise on state open government law. The rich knowledge and experience all the participating attorneys bring to this project make it a success.

While most of the initial users of this compendium were journalists, we know that lawyers and citizens have discovered it and find it to be indispensable as well.

At its core, participatory democracy decries locked files and closed doors. Good citizens study their governors, challenge the decisions they make and petition or vote for change when change is needed. But no citizen can carry out these responsibilities when government is secret.

Assurances of open government exist in the common law, in the first state laws after colonization, in territorial laws in the west and even in state constitutions. All states

have passed laws requiring openness, often in direct response to the scandals spawned by government secrecy. The U.S. Congress strengthened the federal Freedom of Information Act after Watergate, and many states followed suit.

States with traditionally strong access laws include Vermont, which provides virtually unfettered access on many levels; Florida, which was one of the first states to enact a sunshine law; and Ohio, whose courts have issued several access-friendly rulings. Other jurisdictions, such as Pennsylvania and the District of Columbia, have made significant changes to their respective open government laws since the fifth edition was published designed to foster greater public access to information. Historically, Pennsylvania had a reputation as being relatively non-transparent while the District of Columbia was known to have a very restrictive open meetings law.

Some public officials in state and local governments work hard to achieve and enforce open government laws. The movement toward state freedom of information compliance officers reflects a growing activism for access to information in the states.

But such official disposition toward openness is exceptional. Hardly a day goes by when we don't hear that a state or local government is trying to restrict access to records that have traditionally been public — usually because it is feared release of the records will violate someone's "privacy" or threaten our nation's security.

It is in this climate of tension between broad democratic mandates for openness and official preference for secrecy that reporters and good citizens need to garner their resources to ensure the passage and success of open government laws.

The Reporters Committee genuinely hopes that the OPEN GOVERNMENT GUIDE will help a vigorous press and citizenry to shape and achieve demands for openness, and that it will serve as a primer for those who battle in government offices and in the courts for access to records and meetings. When challenges to secrecy are successful, the news is better and so is the government.

## User's Guide

Whether you are using a guide from one state to find a specific answer to an access issue, or the complete compendium encompassing all states to survey approaches to a particular aspect of open government law around the country, knowing a few basics on how the OPEN GOVERNMENT GUIDE is set up will help you to get the most out of it.

*Following the outline.* Every state section is based on the same standard outline. The outline is divided into two parts: access to records and access to meetings.

Start by reviewing the table of contents for each state. It includes the first two tiers of that state's outline. Once you are familiar with the structure of the outline, finding specific information is simple. Typically, the outline begins by describing the general structure of the state law, then provides detailed topical listings explaining access policies for specific kinds of records or meetings.

Every state outline follows the standard outline, but there will be some variations. Some contributors added items within the outline, or omitted subpoints found in the complete outline which were not relevant to that state's law. Each change was made to fit the needs of a particular state's laws and practices.

In general, outline points that appear in boldface type are part of the standard outline, while additional topics will appear in italicized type.

Whether you are using one state outline or any number of outlines, we think you will find the outline form helpful in finding specific information quickly without having to read an entire statute or search through many court cases. But when you do need to consult statutes, you will find the complete text of the relevant portions at the end of each outline.

Additional copies of individual state booklets, or of the compendium covering the 50 states and the District of Columbia, can be ordered from The Reporters Committee for Freedom of the Press, 1101 Wilson Blvd., Suite 1100, Arlington, Virginia 22209, or by calling (703) 807-2100. The compendium is available in electronic format on CD.

The state outlines also are available on our World-Wide Web site, [www.rcfp.org/ogg](http://www.rcfp.org/ogg). The Internet version of the outlines allows you to search the database and compare the law in different states.

*Updates:* The Reporters Committee published new editions of THE OPEN GOVERNMENT GUIDE in 1989, 1993, 1997, 2001, 2006, and now in 2011. We expect future updates to follow on approximately the same schedule. If we become aware of mistakes or material omissions in this work, we will post notices on this project's page on our World-Wide Web site, at [www.rcfp.org/ogg](http://www.rcfp.org/ogg). This does not mean that the outlines will constantly be updated on the site — it simply means known errors will be corrected there.

For our many readers who are not lawyers: This book is designed to help journalists, lawyers, and citizens understand and use state open records and meetings law. Although the guides were written by lawyers, they are designed to be useful to and readable by nonlawyers as well. However, some of the elements of legal writing may be unfamiliar to lay readers. A quick overview of some of these customs should suffice to help you over any hurdles.

Lawyers are trained to give a "legal citation" for most statements of law. The name of a court case or number of a statute may therefore be tacked on to the end of a sentence. This may look like a sentence fragment, or may leave you wondering if some information about that case was omitted. Nothing was left out; inclusion of a legal citation provides a reference to the case or statute supporting the statement and provides a shorthand method of identifying that authority, should you need to locate it.

Legal citation form also indicates where the law can be found in official reporters or other legal digests. Typically, a cite to a court case will be followed by the volume and page numbers of a legal reporter. Most state cases will be found in the state reporter, a larger regional reporter, or both. A case cite reading 123 A.2d 456 means the case could be found in the Atlantic (regional) reporter, second series, volume 123, starting at page 456.

Note that the complete citation for a case is often given only once. We have tried to eliminate as many cryptic second-reference cites as possible, but you may encounter cites like "Jackson at 321." This means that the author is referring you to page 321 of a case cited earlier that includes the name Jackson. Authors may also use the words *supra* or *infra* to refer to a discussion of a case appearing earlier or later in the outline, respectively.

Except for these legal citation forms, most "legalese" has been avoided. We hope this will make this guide more accessible to everyone.



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**FOREWORD**

Montana's populist roots promoted early adoption of statutory "open records" mandates. Montana's first open records law was passed six years after statehood in 1895 and guaranteed:

Every citizen has a right to inspect and to take a copy of any public writings of this state ... (and) every public officer having the custody of a public writing ... is bound to give (citizens) *on demand* a certified copy of it.

Mont. Code Ann. § 2-6-102. (emphasis added).

It was not until 1963, however, that the legislature statutorily required open governmental meetings. The legislative purpose of the 1963 law tracks the populist philosophy which serves as its underpinning:

It is the intent of this part that actions and deliberations of all public agencies (in Montana) shall be conducted openly. The people of the state do not wish to abdicate their sovereignty to the agencies which serve them. Towards these ends, the provisions of the part shall be liberally construed.

Mont. Code Ann. § 2-3-201.

The "part" referred to above requires that all meetings of governmental bodies "supported in whole or part by public funds or expending public funds" must be open to the public. This statutory provision is among the broadest in the nation with respect to the deliberative bodies it touches.

Finally, when the 19th century Montana Constitution was re-written in 1972, this statutory philosophy was raised to constitutional levels. The 1972 Constitution, Article II, § 9 reads:

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.

In response to this provision, the Montana Legislature commissioned a study to determine which, if any, statutes needed to be amended in order to comply with this new constitutional mandate. In 1975 and again in 1977 the legislature passed several amendments to the open meetings and open records laws to mold a statutory framework that implemented the new constitutional provision. These statutory and constitutional constraints today provide Montana citizens strong statutory and constitutional tools with which to compel open government.

As might be expected, however, these constitutional and legislative efforts have not lessened the tendency of governmental bodies toward secrecy. Montana officials, not unlike officials in other states, believe the public's business can most efficiently be carried on in secret. Thanks to a vigilant press and active public interest groups willing to litigate, Montana government has not been covert with impunity.

**Open Records****I. STATUTE -- BASIC APPLICATION****A. Who can request records?****1. Status of requestor.**

Although Mont. Code Ann. § 2-6-102 guarantees "every citizen" the right to inspect and take copies of public writings, the Montana Constitution guarantees that "no person" may be deprived of the right to examine such documents. Mont. Const., Art. II, § 9. The broader constitutional provision takes precedence, and any "person" is entitled to the protections afforded under the statute. Any citizen from another state, or anyone else, can make a request directly of the public body without regard to residence.

**2. Purpose of request.**

Subject to the "privacy" concerns expressed by the Montana Supreme Court and discussed below, the purpose for which the records are requested has no bearing or relevance on the right of the requester to receive the records. However, see *Engrav v. Cragum*, 236 Mont. 260, 769 P.2d 1224 (1989), where the Montana Supreme Court decided that under the Montana Criminal Justice Information Act, a college student did not demonstrate sufficient interest in confidential criminal justice information to outweigh rights of privacy.

**3. Use of records.**

Finally, there is no restriction placed on subsequent use of information provided.

**B. Whose records are and are not subject to the act?**

The public records provision does not enumerate what agencies it covers. The statute does state what records it covers in a very broad fashion. It covers records "of the sovereign authority, of official bodies and tribunals, and of public officers, legislative, judicial, and executive, whether of this state, of the United States, of a sister state, or of a foreign country." Mont. Code Ann. § 2-6-101(2)(a).

No agency is specifically exempt from application of the public records provision. However, a number of specific types of records are rendered "confidential" by separate legislative act.

**1. Executive branch.**

All records of the Executive Branch, except those specifically exempt and discussed below, are subject to the Constitution and the Public Records Act. Moreover, municipalities are required to make all records available for public inspection except "personal (sic) records, medical records, ... or when the right to individual privacy or law enforcement security exceeds the merits of public disclosure." Mont. Code Ann. § 7-1-4144.

**a. Records of the executives themselves.**

All records of the executives, themselves, are open to the public, except those specifically exempt and described, below.

**b. Records of certain but not all functions.**

See those specifically exempt as described, below.

**2. Legislative bodies.**

The Public Records Act does not specifically exempt legislative records. Further, the Montana Constitution, Article V, § 10(3), requires that "(t)he sessions of the legislature and of the committee of the whole, all committee meetings, and all hearings shall be open to the public." Although no court has addressed legislative records, this constitutional mandate for open meetings coupled with the lack of exemption on legislative branch records all lean in favor of openness.

### 3. Courts.

There is no exemption for court records, and all court records, unless those records are specifically under court seal, are open for public inspection. In *Missoulian v. Montana Twenty-first Judicial District Court*, 281 Mont. 285, 933 P.2d 829 (1997), the Supreme Court held that the district court violated both the Constitution and Mont. Code Ann. § 46-11-701, when it issued a blanket order sealing all evidence in a criminal case without following a strict balancing test between the public's right to know and the defendant's right to a fair trial.

### 4. Nongovernmental bodies.

The Public Records Act is silent as to whether these groups' records are open. See Mont. Code Ann. § 2-6-101(2)(a). However, the state constitution guarantees public access to the records of "public bodies" defined under the open meetings law as bodies "or organizations or agencies supported in whole or in part by public funds," Mont. Code Ann. § 2-3-203(1), and the Supreme Court used definitions found in the Montana Procurement Act to conclude that an advisory committee of the Department of Corrections was subject to the constitutional right to know in *Great Falls Tribune Co. Inc. v. Day*, 289 Mont 155, 959 P.2d 508 (1998). Thus, a requesting party should argue that these entities are covered by the Public Records Act, particularly if they receive public funds. See also *Bryan v. Yellowstone Co. Elem. Sch. Dist. No. 2*, 312 Mont. 257, 60 P.3d 381 (2002) (Montana Supreme Court held that a committee created by a school district to research a proposition and submit a recommendation to the school board was a public or governmental body subject to the right to know provision of the Montana Constitution and held the documents submitted by the committee were public documents subject to disclosure).

#### a. Bodies receiving public funds or benefits.

The state constitution guarantees public access to the records of "public bodies" defined under the open meetings law as bodies "or organizations or agencies supported in whole or in part by public funds." Mont. Code Ann. § 2-3-203(1).

#### b. Bodies whose members include governmental officials.

The Supreme Court used definitions found in the Montana Procurement Act to conclude that an advisory committee of the Department of Corrections made up of some public and some private individuals was subject to the constitutional right to know in *Great Falls Tribune Co. Inc. v. Day*, 289 Mont 155, 959 P.2d 508 (1998).

### 5. Multi-state or regional bodies.

The Public Records Act is silent as to whether these groups' records are open. See Mont. Code Ann. § 2-6-101(2)(a). However, the state constitution guarantees public access to the records of "public bodies" defined under the open meetings law as bodies "or organizations or agencies supported in whole or in part by public funds," Mont. Code Ann. § 2-3-203(1), and the Supreme Court used definitions found in the Montana Procurement Act to conclude that an advisory committee of the Department of Corrections was subject to the constitutional right to know in *Great Falls Tribune Co. Inc. v. Day*, 289 Mont 155, 959 P.2d 508 (1998). Thus, a requesting party should argue that these entities are covered by the Public Records Act, particularly if they receive public funds.

### 6. Advisory boards and commissions, quasi-governmental entities.

The Public Records Act is silent as to whether these groups' records are open. See Mont. Code Ann. § 2-6-101(2)(a). However, the state constitution guarantees public access to the records of "public bodies" defined under the open meetings law as bodies "or organizations or agencies supported in whole or in part by public funds," Mont. Code Ann. § 2-3-203(1), and the supreme court used definitions found in the Montana Procurement Act to conclude that an advisory committee of the Department of Corrections was subject to the constitutional

right to know in *Great Falls Tribune Co. Inc. v. Day*, 289 Mont 155, 959 P.2d 508 (1998). Thus, a requesting party should argue that these entities are covered by the Public Records Act, particularly if they receive public funds.

### 7. Others.

In *Bryan v. Yellowstone Co. Elem. Sch. Dist. No. 2*, 312 Mont. 257, 60 P.3d 381 (2002) the Montana Supreme Court held that a committee created by a school district to research a proposition and submit a recommendation to the school board was a public or governmental body subject to the right to know provision of the Montana Constitution and held the documents submitted by the committee were public documents subject to disclosure; *Goldstein v. Commission on Practice of Supreme Court*, 297 Mont. 493, 995 P.2d 923 (2000) (Montana Supreme Court held that confidentiality provisions of Rules on Lawyer Disciplinary Enforcement did not violate an attorneys' right to know or right to participate in government decisions by excluding attorney from the deliberations of Commission on Practice following the filing of formal complaint and held that Commission was not subject to open meeting requirements and sat in only advisory capacity to Supreme Court).

#### C. What records are and are not subject to the act?

##### 1. What kind of records are covered?

The open records act defines "public writings" to be "the written acts or records of the acts" of governmental bodies and "public records, kept in this state, of private writings." Mont. Code Ann. § 2-6-101(2). "Public writings" are divided into four "classes": laws, judicial records, other official documents, and public records, kept in this state, of private writings. Mont. Code Ann. § 2-6-101(3). Mont. Code Ann. § 2-6-101(4) declares "(a)ll other writings are private." Again, there are several statutory impositions declaring certain records to be "private" and thus excludable from public inspection.

However, if the record is not one generated by the public body and does not relate to the function and duties of that body, it is not a "document of public bodies" referred to in the Constitution. See *Becky v. Butte Silverbow District No. 1*, 274 Mont. 131, 906 P.2d 193 (1995) (request for National Honor Society records).

##### 2. What physical form of records are covered?

Mont. Code Ann. § 2-6-110 states that information "in electronic format or other nonprint media" is open to the public, subject to the same restrictions that apply to information in printed form.

##### 3. Are certain records available for inspection but not copying?

Records are available under the Act for copying as well as inspection.

#### D. Fee provisions or practices.

##### 1. Levels or limitations on fees.

The Public Records Act only binds the public employee having custody of a document to provide the same "on payment of the legal fees for the copy." Mont. Code Ann. § 2-6-102(2). However, the constraint likely to be read into this provision would limit the fees to include reasonable costs associated with the actual copying of the documents. The usual charge levied by state government for copying documents is 10 cents per page. In 1996, the Governor of Montana implemented this practice by executive order for all agency records.

##### 2. Particular fee specifications or provisions.

For information in nonprint form, fees cannot exceed: (1) The cost of purchasing the electronic media used for transferring the data; (2) Mainframe processing charges; (3) Agency's cost of online access; (4) Other out-of-pocket expenses directly related to the request; (5) First half hour of agency employee's time is free; hourly rate thereafter, at \$8.50/hour. Mont. Code Ann. § 2-6-110.

### a. Search.

For information in nonprint form, fees cannot exceed: (1) The cost of purchasing the electronic media used for transferring the data; (2) Mainframe processing charges; (3) Agency's cost of online access; (4) Other out-of-pocket expenses directly related to the request; (5) First half hour of agency employee's time is free; hourly rate thereafter, at \$8.50/hour. Mont. Code Ann. § 2-6-110.

### b. Duplication.

For information in nonprint form, fees cannot exceed: (1) The cost of purchasing the electronic media used for transferring the data; (2) Mainframe processing charges; (3) Agency's cost of online access; (4) Other out-of-pocket expenses directly related to the request; (5) First half hour of agency employee's time is free; hourly rate thereafter, at \$8.50/hour. Mont. Code Ann. § 2-6-110.

### c. Other.

None

## 3. Provisions for fee waivers.

Montana has no code sections regarding fee waivers in special cases such as when disclosure would be in the public interest.

## 4. Requirements or prohibitions regarding advance payment.

Although Mont. Code Ann. § 2-6-103(3) requires advance payment for Secretary of State records, it is rarely followed. Montana has no other statutory provisions requiring or prohibiting advance payments.

## 5. Have agencies imposed prohibitive fees to discourage requesters?

In Montana, agencies do not impose prohibitive fees to discourage requesters. It is more often the case that agencies will simply refuse to provide access to the records as a means of protecting them.

## E. Who enforces the act?

There is no specific provision for enforcement under the act, and most provisions are enforced through citizen-initiated lawsuits. *See* Mont. Code Ann. § 2-6-107.

### 1. Attorney General's role.

The Attorney General has no specific role by statute, but may issue advisory opinions answering questions of law raised by public agencies or officials. Private citizens may not request Attorney General opinions.

### 2. Availability of an ombudsman.

There is no availability of an ombudsman under this act.

### 3. Commission or agency enforcement.

There is no specific provision for commission or agency enforcement under the act, and most provisions are enforced through citizen-initiated lawsuits. *See* Mont. Code Ann. § 2-6-107.

## F. Are there sanctions for noncompliance?

There is no specific provision for sanctions; however, a plaintiff who prevails in an action brought in district court to enforce his rights under Article II, § 9, of the Montana Constitution may be awarded his costs and reasonable attorney's fees. *See* Mont. Code Ann. § 2-3-221.

## II. EXEMPTIONS AND OTHER LEGAL LIMITATIONS

### A. Exemptions in the open records statute.

#### 1. Character of exemptions.

The Public Records Act states that it does not apply to "private writings," and it exempts "(r)ecords and materials that are constitu-

tionally protected from disclosure." Mont. Code Ann. § 2-6-102(3). The Montana Constitution provides that no person may be deprived of the opportunity to examine documents except when "the demand of individual privacy clearly exceeds the merits of public disclosure." Mont. Const., Art II, § 9.

#### a. General or specific?

The constitutional privacy exception is general.

#### b. Mandatory or discretionary?

Discretionary — subject to the balancing test which weighs the individual's privacy interest against the public's interest in disclosure.

#### c. Patterned after federal Freedom of Information Act?

No.

## 2. Discussion of each exemption.

Although "private writings" are excluded from the Public Records Act, the term "private writings" is not defined and has never been judicially construed.

The Montana Constitution sets the standard for exemptions. It provides that no person may be deprived of the opportunity to examine documents except when "the demand of individual privacy clearly exceeds the merits of public disclosure." Mont. Const., Art II, § 9. The Public Records Act states that the constitutional exemption for matters related to individual privacy also includes "legitimate trade secrets" and "matters related to individual or public safety." Mont. Code Ann. § 2-6-102(3).

The Montana Supreme Court has frequently addressed the privacy exemption to the right to know. In 2003, the Montana Supreme Court, in *Great Falls Tribune v. Mont. Pub. Serv. Comm.*, 319 Mont. 38, 82 P.3d 876 (2003), held that the individual privacy exception to the public's right to know and the right of individual privacy in the Montana Constitution are limited to natural human beings only, do not extend to non-human entities such as corporations, and cannot serve as a basis for protecting trade secrets and other confidential proprietary information of non-human entities, overruling *Mountain States, Etc. v. Dept. of Pub. Serv. Reg.* (1981), 194 Mont. 277, 634 P.2d 181, and its progeny. *Great Falls Tribune*, 319 Mont. 38, 82 P.3d 876 (2003). The Court also held that nothing in Article II, § 9, requires disclosure of trade secrets and other confidential proprietary information where the data is protected from disclosure elsewhere in the federal or state constitutions or by statute. *Id.*

In *Svaldi v. Anaconda-Deer Lodge County*, 325 Mont. 365, 106 P.3d 548 (2005), a retired public school teacher sued the county, alleging breach of her right to privacy and seeking damages for severe emotional distress, based upon the county attorney's disclosure of his discussions with the teacher's attorney in connection with the deferred prosecution agreement. The Montana Supreme Court held that the teacher's privacy rights were not violated by the county attorney's disclosure of discussions and the public's right to know outweighed the teacher's right to privacy.

In *Jefferson County v. Montana Standard*, 318 Mont. 173, 79 P.3d 805 (2003), the Montana Supreme Court held that any expectation that a county commissioner had as to privacy of information regarding her arrest for driving under the influence was unreasonable, and thus, the right to privacy provision of the Montana Constitution did not preclude disclosure of such information to the newspaper pursuant to the "Right to Know" provision of the Montana Constitution.

In *Bryan v. Yellowstone Co. Elem. Sch. Dist. No. 2*, 312 Mont. 257, 60 P.3d 381 (2002), the Montana Supreme Court held that a committee created by a school district to research a proposition and submit a recommendation to the school board was a public or governmental body subject to the right to know provision of the Montana Constitution, that a spreadsheet created by the committee was a public

document subject to inspection, and that the school district violated a parent's right to examine public documents when it failed to divulge the spreadsheet upon request. The Court further held that the school board did not provide parent with reasonable opportunity to participate at the school board meeting due to the board's partial disclosure of information. As a remedy, the Court declared the school board's closure decision null and void.

In *Montana Human Rights Division v. City of Billings*, 199 Mont. 434, 649 P.2d 1283 (1982), the Supreme Court ruled that certain personnel records could be closed, including 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." 649 P.2d at 1287.

Read together, these cases have imposed the following judicial guidelines by which records can be withheld from public inspection under the constitutional balancing test:

1. Did the person involved have an actual or "subjective" expectation of privacy; and, if so
2. Is that expectation "reasonable"?
3. If the answers to paragraphs 1 and 2 are affirmative, then the documents containing private information may be withheld if the demands of individual privacy clearly outweigh the merits of public disclosure. If the answer to either 1 or 2 is negative, then the documents are available for public inspection.

In *Great Falls Tribune Co. Inc. v. Cascade County*, 238 Mont. 103, 775 P.2d 1267 (1989), the Supreme Court held that the privacy of police officers subject to disciplinary proceedings did not outweigh the public's right to know their names and the subject of the disciplinary charges.

*Bozeman Daily Chronicle v. City of Bozeman Police Department*, 260 Mont. 218, 859 P.2d 435 (1993), held that the newspaper was entitled to obtain the name of a police officer and investigative documents regarding alleged unconsented sexual intercourse with a cadet at the State Law Enforcement Academy, even though the documents were confidential criminal justice information, where the alleged misconduct went directly to the police officer's breach of a position of public trust.

A mayor did not have a "reasonable expectation of privacy" in preventing the disclosure of a report regarding an independent investigation of his alleged sexual harassment of a city employee. *Citizens to Recall v. Whitlock, et al*, 255 Mont. 517, 844 P.2d 74 (1992).

None of these opinions involved construction of the open records act itself. However, the open records act has been the subject of several attorney general opinions. In 35 A.G. Op. 27 (1973) the attorney general ruled that the list of registered nurses and licensed practical nurses must be issued to members of the public who wish to purchase it. In 36 A.G. Op. 28 (1975) the attorney general ruled that salaries of teachers and administrators of a public school district are subject to inspection by the public.

## B. Other statutory exclusions.

Although the undefined "private writings" exemption exists in the open records act, there are several separate statutory exemptions that define certain records as falling within the privacy exemption. Mont. Code Ann. § 17-5-1106 prohibits inspection of the names of individuals who own public obligations. § 27-6-703 imposes a confidentiality provision upon records of the Montana medical legal panel. The fact of filing of an attachment is not public until the attachment is actually returned pursuant to § 27-18-111. Adoption records are rendered confidential pursuant to § 40-8-126. Certain criminal justice information is confidential pursuant to §§ 44-5-103 and 44-5-302. Confidential criminal justice information is defined pursuant to include "crimi-

nal investigative information," "criminal intelligence information," fingerprints and photographs, and other criminal justice information made confidential by law. The only criminal justice information made specifically confidential by law are youth court "status offense" records. "Public criminal justice information" includes court records and proceedings, convictions, deferred sentences and deferred prosecutions, initial offense reports originated by a criminal justice agency, initial arrest records, bail records, and daily occupancy rosters. Finally, as discussed above, the state insurance commissioner may withhold certain reports done by a national auditing agency of insurance companies operating in the state under § 33-1-412(5).

In *Engrav v. Cragun*, 236 Mont. 260, 769 P.2d 1224 (1989), the Supreme Court determined that "confidential criminal justice information" as defined by the statute is "beyond the reach of the public sector" and protected under the statute and the Montana Constitutional Right of Privacy.

However, in the same term, the court read the Criminal Justice Information Act language "as authorized by law" (to receive such information) to include an insurance company that was searching for AIDS-infected insured. *See Allstate Ins. Co. v. City of Billings*, 239 Mont. 321, 780 P.2d 186 (1989). This construction was derived from the right to know provision. Under *Allstate*, the court will examine, on an ad hoc basis, whether there is a sufficient showing of entitlement to the information.

In *Great Falls Tribune Co. Inc. v. Day*, 289 Mont. 155, 959 P.2d 508 (1998), the Supreme Court struck down a statute that kept contract proposals confidential during the negotiation process, holding that the state's "(e)conomic advantage is not a privacy interest."

In *Worden v. Montana Board of Pardons & Parole*, 289 Mont. 459, 962 P.2d 1157 (1998), the Court struck down a statute declaring the records of the Board of Pardons confidential.

All statutory exclusions (adoption records, confidential criminal justice information, etc.) are subject to the balancing test set forth in the Montana Constitution. For example, an adoption record could be made available notwithstanding the statutory confidentiality provision imposed on those documents, if the demands of individual privacy did not clearly outweigh the rights of public disclosure. These decisions must be made on a case-by-case basis. *See Lincoln County Comm'n v. Nixon*, 292 Mont. 43, 968 P.2d 1141 (1998); *Worden v. Montana Board of Pardons & Parole*, 289 Mont. 459, 962 P.2d 1157 (1998). The Montana Constitution would override any statutory automatic closure provision.

## C. Court-derived exclusions, common law prohibitions, recognized privileges against disclosure.

The Montana Supreme Court has recognized that other constitutional rights must sometimes be balanced against the right to know. *See Missoulian v. Montana Twenty-first Judicial Dist. Ct.*, 281 Mont. 285, 933 P.2d 829 (1997) (discussing balance between right to know and right to fair trial).

## D. Are segregable portions of records containing exempt material available?

The Montana Supreme Court has not directly addressed whether portions of documents that are not contemplated to be confidential can be segregated. However, as a reasonable matter it is expected that the Montana Supreme Court would likely permit segregation of portions of records containing excluded material. Indeed, the attorney general has issued an opinion construing the Montana Criminal Justice Information Act requiring disclosure of material with confidential portions deleted. 42 A.G. Op. 119 (1988); *see also Engrav v. Cragun*, 236 Mont. 260, 769 P.2d 1224 (1989).

## E. Homeland Security Measures.

There are no specific measures dealing with Homeland Security.

### III. STATE LAW ON ELECTRONIC RECORDS

Electronic information is treated like printed information. Mont. Code Ann. § 2-6-110(1)(a).

**A. Can the requester choose a format for receiving records?**

Yes.

**B. Can the requester obtain a customized search of computer databases to fit particular needs?**

Yes.

**C. Does the existence of information in electronic format affect its openness?**

No cases yet, but electronic information is just like any other information — if it's open, it's open. Mont. Code Ann. § 2-6-110(1)(a). *See Barr v. Great Falls Intern. Airport Authority*, 326 Mont. 93, 107 P.3d 471 (2005) (although the specific issue of whether an electronic record constitutes a public record was not raised, Court held that arrest record from Alaska contained in national computer database was public criminal justice information).

**D. How is e-mail treated?**

No cases yet, but electronic information is just like any other information — if it's open, it's open. Mont. Code Ann. § 2-6-110(1)(a). *See Barr v. Great Falls Intern. Airport Authority*, 326 Mont. 93, 107 P.3d 471 (2005) (although the specific issue of whether an electronic record constitutes a public record was not raised, Court held that arrest record from Alaska contained in national computer database was public criminal justice information).

**1. Does e-mail constitute a record?**

E-mail messages sent or received by a public agency are public records in Montana. Mont. Code Ann. §§ 2-6-101(2)(b) and 2-6-110(1). An agency of the executive branch must keep either electronic or paper copies of e-mailed comments, to the same extent that other comments are retained. § 2-3-301(4). E-mail messages are subject to the same disposal laws as any other public records. § 2-6-401(b). This means just as paper public records cannot be shredded on an employees' whim, e-mails cannot be deleted just because an employee thinks they're no longer useful. Any agency of the executive branch that accepts public comment must provide for the receipt of comment by e-mail. § 2-3-301(1).

**2. Public matter on government e-mail or government hardware**

Public matter on government e-mail are public records (*Id.*)

**3. Private matter on government e-mail or government hardware**

Public records of private writings, including e-mail messages, are public writings. § 2-6-101(3)(d).

**4. Public matter on private e-mail**

Public records on private e-mail are public writings. (*Id.*)

**5. Private matter on private e-mail**

Private matter on private e-mail is not a public writing.

**E. How are text messages and instant messages treated?**

**1. Do text messages and/or instant messages constitute a record?**

No statutory or case law on this issue. Presumably they would be treated like e-mail.

**2. Public matter message on government hardware.**

No statutory or case law on this issue. Presumably they would be treated like e-mail.

**3. Private matter message on government hardware.**

No statutory or case law on this issue. Presumably they would be treated like e-mail messages.

**4. Public matter message on private hardware.**

No statutory or case law on this issue. Presumably they would be treated like e-mail messages.

**5. Private matter message on private hardware.**

No statutory or case law on this issue. Presumably they would be treated like e-mail messages.

**F. How are social media postings and messages treated?**

No statutory or case law on this issue. Presumably they would be treated like e-mail messages.

**G. How are online discussion board posts treated?**

No statutory or case law on this issue. Presumably they would be treated like e-mail messages.

**H. Computer software**

No statutory or case law on this issue.

**1. Is software public?**

No statutory or case law on this issue.

**2. Is software and/or file metadata public?**

No statutory or case law on this issue.

**I. How are fees for electronic records assessed?**

An agency of the executive branch may not charge a fee for providing documents by e-mail instead of by surface mail. Mont. Code Ann. § 2-3-301(3). Every person is entitled to a copy of electronic information of any type (including video and audio tapes, such as 911 calls) in the possession of any public agency in Montana in the same quality as the original record. The same rules apply to information in electronic format as if the information was in print form. Mont. Code Ann. § 2-6-110(1)(a). This law is in place to ensure copies are usable for broadcast or publication.

An agency may charge a fee for the copy, not to exceed the actual cost of reproducing the copy, including the cost of the media. Mont. Code Ann. § 2-6-110(2).

**J. Money-making schemes.**

No statutory or case law on this issue.

**1. Revenues.**

No statutory or case law on this issue.

**2. Geographic Information Systems.**

No statutory or case law on this issue.

**K. On-line dissemination.**

No statutory or case law on this issue.

### IV. RECORD CATEGORIES -- OPEN OR CLOSED

**A. Autopsy reports.**

Open unless demands of individual privacy clearly exceed the merits of public disclosure.

**B. Administrative enforcement records (e.g., worker safety and health inspections, or accident investigations)**

**1. Rules for active investigations.**

Open unless demands of individual privacy clearly exceed the merits of public disclosure.

## 2. Rules for closed investigations.

Open unless demands of individual privacy clearly exceed the merits of public disclosure. See *Disability Rights Montana v. State* 2009 MT 100, 350 Mont. 101, 207 P.3d 1092.

### C. Bank records.

Open unless the demands of individual privacy clearly exceed the merits of public disclosure.

### D. Budgets.

Open.

### E. Business records, financial data, trade secrets.

Open, unless protected by statute, because the privacy exception to the public's right to know does not extend to non-human entities such as corporations, and cannot serve as a basis for protecting trade secrets and other confidential proprietary information of non-human entities. See *Great Falls Tribune v. Montana Public Service Comm.*, 2003 MT 359, 19 Mont. 38, 82 P.3d 876.

### F. Contracts, proposals and bids.

Open. See *Great Falls Tribune Co. Inc. v. Day*, 959 P.2d 508 (1998).

### G. Collective bargaining records.

Open.

### H. Coroners reports.

Open unless the demands of individual privacy clearly exceed the merits of public disclosure.

### I. Economic development records.

Open.

### J. Election records.

Open after the canvass has been completed. Mont. Code Ann. § 13-15-301.

#### 1. Voter registration records.

Open Unless specifically provided otherwise, all records pertaining to voter registration and elections are public. They must be available for inspection during regular office hours. Mont. Code Ann. § 13-1-109.

The original signed voter registration form is available for public inspection unless the voter's social security number appears on it. 38 Mont. A.G. Op. 65 (1980). Note: It may be possible to obtain a redacted copy of such a form, with the social security number concealed.

#### 2. Voting results.

Open. The canvass of all votes is open to the public. § 13-15-403, Mont. Code Ann.

### K. Gun permits.

Open unless the demands of individual privacy clearly exceed the merits of public disclosure.

### L. Hospital reports.

Open unless related to treatment records of patients, in which case they are closed to the public unless the patient provides written authorization for their disclosure. Uniform Health Care Information Act, Mont. Code Ann. §§ 50-16-501 to 50-16-553. Mont. Code Ann. § 50-16-535 authorizes release of health care information by court order in judicial and administrative proceedings. Such information might then be publicly discussed by a court document.

### M. Personnel records.

In *Montana Human Rights Division v. City of Billings*, 199 Mont. 434, 649 P.2d 1283, 1285 (1982), the Supreme Court ruled that certain personnel records could be closed, including matters related to fam-

ily 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." 649 P.2d at 1287. See also 35 A.G. Op. 27, and 36 A.G. Op. 28.

#### 1. Salary.

Salaries and names of public employees are not "intimate details" of a "highly personal" nature." Disclosure of this information would not thwart the apparent purpose of the exemption to protect against the highly offensive public scrutiny of private personal details. The precise expenditure of public funds is simply not a private fact. See 38 Mont. A.G. Op. 109 (1980), citing *Penokie v. Michigan Technological University*, 93 Mich. App. 650, 287 N.W.2d 304 (1980). The *Penokie* court went on to say that even if the information did infringe on a public employee's expectation of personal privacy, it would have to be disclosed because "the minor invasion occasioned by disclosure of information which a university employee might hitherto have considered is outweighed by the public's right to know precisely how its tax dollars are spent." 38 Mont. A.G. Op. 109 (1980), citing *Penokie v. Michigan Technological University*, 93 Mich. App. 650, 287 N.W.2d 304 (1980).

#### 2. Disciplinary records.

The public has a clear and unambiguous right to know the information involved in the internal investigation of a public employee for any alleged violation of any policy, law or rule. The Montana Supreme Court has made it very clear that "internal investigations" of law enforcement personnel (and other public employees) must be fully disclosed to the public while the investigation is ongoing, as well as when it concludes. The outcome of the investigation into the alleged wrongdoing is not relevant. See particularly *Great Falls Tribune v. Cascade County Sheriff*, 238 Mont. 103, 775 P.2d 1267 (1989); *Citizens to Recall Whitlock v. Whitlock*, 255 Mont. 517, 844 P.2d 74 (1992); *Bozeman Daily Chronicle v. City of Bozeman Police Dept.*, 260 Mont. 218, 859 P.2d 435 (1993). In each of cases, the court found that the individual officer, public employee or elected official has very little expectation of privacy, and the public has a fundamental right to know what public employees are doing.

#### 3. Applications.

No case law or statutory provisions on this issue. However, since an application for employment does not involve disclosure of intimate details which give rise to an expectation of privacy, they should be open.

#### 4. Personally identifying information.

Social security numbers and birth dates are to be redacted from court records.

#### 5. Expense reports.

Open.

#### 6. Other.

N/A

### N. Police records.

Police records including accident reports, police blotters, 911 tapes, and initial arrest records are all public criminal justice information. See *Barr v. Great Falls Intern. Airport Authority*, 326 Mont. 93, 107 P.3d 471 (2005) (holding arrest record from Alaska contained in national computer database was public criminal justice information). For arrest records, also see *Barr v. Great Falls Intern. Airport Authority*, 326 Mont. 93, 107 P.3d 471 (2005) (holding arrest record from Alaska contained in national computer database was public criminal justice information).

Investigative records, active and closed, computation of criminal histories, confessions, confidential informants, and police techniques are all confidential criminal justice information subject to the balanc-

ing test. *See also* Montana Criminal Justice Information Act of 1979, Mont. Code Ann. §§ 44-5-101 to -515; *Engrav v. Cragun*, 769 P.2d 1224 (1989); 42 A.G. Op. 119 (1988).

### 1. Accident reports.

Accident reports and supplemental information filed with them are confidential and not open for viewing by the general public. Mont. Code Ann. § 61-7-114.

### 2. Police blotter.

The initial incident report is public criminal justice information. Mont. Code Ann. § 44-5-104. An incident should not be “not reported or memorialized” so that the incident doesn’t have to be released to the public. *See* Mont. Code Ann. § 2-3-212. The initial incident report is the first recorded report that a criminal offense may have occurred, not that a criminal offense actually did occur. The following information must be included in the initial incident report and shown to the public by any officer or employee: 42 Mont. A.G. Op. 119 (1988).

- 1) factual statement about the event which includes (but is not limited to):
  - a) The general nature of the charges against the accused;
  - b) The offense location
  - c) The name, age and residence of the accused ,
  - d) The name of the victim, unless the offense charged was a sex crime;
  - e) The name of a witness, unless the witness has requested confidentiality.
- 2) report of the seizure of any physical evidence (but not statements made by the accused), limited to a description of the evidence seized.

### 3. 911 tapes.

911 tapes are initial offense reports and public criminal justice information.

### 4. Investigatory records.

#### a. Rules for active investigations.

Investigative records, active and closed, computation of criminal histories, confessions, confidential informants, and police techniques are all confidential criminal justice information subject to the balancing test. *See also* Montana Criminal Justice Information Act of 1979, Mont. Code Ann. §§ 44-5-101 to -515; *Engrav v. Cragun*, 769 P.2d 1224 (1989); 42 A.G. Op. 119 (1988).

#### b. Rules for closed investigations.

See above.

### 5. Arrest records.

An initial arrest report is public criminal justice information. Law enforcement must provide the information below as a part of a public initial arrest record. 42 Mont. A.G. Op. 119 (1988). If the information is in electronic form, the law enforcement agency must provide a copy of that information to a requester and cannot charge a fee exceeding the cost of the report. Mont. Code Ann. § 2-6-110. The initial arrest record must include the facts and circumstances of arrest, including but not limited to:

- 1) day and time of arrest;
- 2) exact place of arrest;
- 3) resistance by the person arrested;
- 4) pursuit of the person arrested; and
- 5) use of weapons

### 6. Compilations of criminal histories.

The rules for disseminating criminal history information are generally determined by whether the information is “public” or “confidential.” Criminal history information that falls in the category of “public criminal justice information” must be released to the public. Mont. Code Ann. § 44-5-302.

Criminal history information that is not “public criminal justice information” can be released if:

- 1) the release is consented to by the person the information is about. Mont. Code Ann. § 44-5-302 (1)(a).
- 2) the district court determines that the release is necessary.
- 3) the dissemination is for statistical use, as provided for in Mont. Code Ann. § 44-5-304.

If a person’s conviction record reflects only misdemeanors and deferred prosecutions and the record contains no convictions for the past years, except traffic and fish and game or regulatory convictions, then the conviction record may be closed to the public. 42 Mont. A.G. Op. 119 (1988). The information remains available from the originating criminal justice agency. 40 Mont. A.G. Op. 35 (1984).

### 7. Victims.

The name of a victim in an initial offense report is public unless the crime is a sex crime. Other victim information cannot be released if “no release” is requested by the victim. If the victim does not request privacy, the information is public. *See* Mont. Code Ann. § 2-3-201. Victim information under this section is information regarding victim and victim’s family members’ address, telephone number and place of employment.

### 8. Confessions.

Confessions are public criminal justice information.

### 9. Confidential informants.

Confidential informants are private criminal justice information and not available for public dissemination.

### 10. Police techniques.

Confidential informants are private criminal justice information and not available for public dissemination. However, any allegation that an officer violated the public trust in carrying out some technique is not “private” information and may be disclosed. *See Great Falls Tribune v. Cascade County Sheriff*, 238 Mont. 103, 775 P.2d 1267 (1989); *Citizens to Recall Whitlock v. Whitlock*, 255 Mont. 517, 844 P.2d 74 (1992); *Bozeman Daily Chronicle v. City of Bozeman Police Dept.*, 260 Mont. 218, 859 P.2d 435 (1993). In each of cases, the court found that the individual officer, public employee or elected official has very little expectation of privacy, and the public has a fundamental right to know what public employees are doing.

### 11. Mug shots.

Confidential criminal justice information.

### 12. Sex offender records.

Any person convicted in Montana (or outside of Montana under a similar state or federal statute) under Mont. Code Ann. § 46-23-502(2), must register with the city or county law enforcement within 10 days of entering a county of the state for purposes of taking up either temporary or permanent residence in the county. 47 Mont. A.G. Op. 15 (1998). At a minimum, the name of the offender must be released to the public. 47 Mont. A.G. Op. 15 (1998). Additional information is now available. See the Montana Department of Justice website for more information and a listing of registered sexual offenders in each Montana community. Web site address is: [www.doj.state.mt.us](http://www.doj.state.mt.us).

### 13. Emergency medical services records.

Generally private and not accessible unless the demands of individual privacy do not clearly exceed the merits of public disclosure.

#### O. Prison, parole and probation reports.

All open unless the demands of individual privacy clearly exceed the merits of public disclosure. See *Worden*, 962 P.2d 1157 (1998). Daily jail logs are open under the Montana Criminal Justice Information of 1979, above.

#### P. Public utility records.

All open unless containing trade secrets clearly identified as such. See *Great Falls Tribune v. Montana Public Service Commission*, 2003 MT 359, 319 Mont. 38, 82 P.3d 876 (disclosure of utility company records).

#### Q. Real estate appraisals, negotiations.

##### 1. Appraisals.

Open. See *Mayer v. City of Kalispell*, 2007 MT 116, 337 Mont. 242, 160 P.3d 869.

##### 2. Negotiations.

Open. See *Great Falls Tribune v. Great Falls Public Schools*, 255 Mont. 125, 841 P.2d 502 (1992).

##### 3. Transactions.

No statutory or case law on this issue.

##### 4. Deeds, liens, foreclosures, title history.

Open.

##### 5. Zoning records.

Open.

#### R. School and university records.

##### 1. Athletic records.

Athletic records are generally private unless the demands of privacy do not clearly exceed the merits of public disclosure.

##### 2. Trustee records.

Trustee records are generally private unless the demands of privacy do not clearly exceed the merits of public disclosure.

##### 3. Student records.

Student records are generally private unless the demands of privacy do not clearly exceed the merits of public disclosure.

##### 4. Other.

N/A

#### S. Vital statistics.

##### 1. Birth certificates.

Immediately upon the filing of a record with the Montana Department of Public Health and Human Services, the fact that a birth occurred may be released to the public. The complete birth record may be released 30 years after the date of birth. Mont. Code Ann. § 50-15-122(5)(a).

##### 2. Marriage & divorce.

Montana clerks of court use a single form as both the application for a marriage license and the marriage license itself. The marriage license itself is open to the public. However, the information that can be released from the license application is specifically limited to: 1) names, ages and places of birth of the bride and groom; 2) date and

place of the marriage; 3) names and addresses of the parents of the bride and groom; 4) name of the officiant; 5) whether the ceremony was civil or religious. Mont. Code Ann. § 50-15-122(5)(b), 48 Mont. A.G. Op. 10 (2000), 48 Mont. A.G. Op. 17 (2000). Anything else on the application is confidential. § 50-15-122(5)(c), Mont. Code Ann. The complete marriage certificate can be released to the public 30 years after the marriage date. Mont. Code Ann. § 50-15-122(5)(d).

##### 3. Death certificates.

Immediately upon the filing of a record with the Montana Department of Public Health and Human Services, the fact that a death occurred may be released to the public. Mont. Code Ann. § 50-15-122(5)(a). A copy of the death certificate must be issued to anyone who requests it. Mont. Code Ann. § 50-15-121(4).

##### 4. Infectious disease and health epidemics.

No statutory or case law on this issue.

## V. PROCEDURE FOR OBTAINING RECORDS

### A. How to start.

Under the public records act, as well as the specific statutes governing confidential documents, the request for a document should be submitted directly to the custodian of the document. The request does not have to be in writing but any refusal can be reduced to affidavit form in the event the requester desires to litigate the issue. Because access to immediate district court resolution is available in Montana, there is no need to reduce the request to writing. However, the attorney general has ruled that governments may require that the request be reduced to writing. He has also ruled that governments should record decisions to grant or deny access. 37 A.G. Op. 107 (1976).

#### 1. Who receives a request?

The custodian of the document.

#### 2. Does the law cover oral requests?

Yes.

##### a. Arrangements to inspect & copy.

A key statute regarding public records is Mont. Code Ann. § 2-6-102, which provides "Every citizen has a right to inspect and take a copy of any public writings of this state." § 2-6-102(1), Mont. Code Ann.

##### b. If an oral request is denied:

#### (1). How does the requester memorialize the refusal?

The requestor should make a written record of the request and the reasons given for denial.

#### (2). Do subsequent steps need to be in writing?

No.

#### 3. Contents of a written request.

##### a. Description of the records.

The request should describe the records requested with particularity.

##### b. Need to address fee issues.

The request should contain an offer to pay for reasonable copying fees.

##### c. Plea for quick response.

The request should include a plea for quick response.

##### d. Can the request be for future records?

Yes.

**e. Other.**

N/A.

**B. How long to wait.**

There are no statutory, regulatory or court set time limits for agency response, and the open records act requires that copies be made available “upon demand.” There is no case law or statutory law that concludes that delay is recognized as a denial for purposes of appeal, and usually the custodian gives an immediate response with respect to whether the documents will be produced.

**1. Statutory, regulatory or court-set time limits for agency response.**

There is no case law or statutory law that concludes that delay is recognized as a denial for purposes of appeal, and usually the custodian gives an immediate response with respect to whether the documents will be produced.

**2. Informal telephone inquiry as to status.**

An informal telephone inquiry is always well-advised.

**3. Is delay recognized as a denial for appeal purposes?**

There is no case law or statutory law that concludes that delay is recognized as a denial for purposes of appeal, and usually the custodian gives an immediate response with respect to whether the documents will be produced.

**4. Any other recourse to encourage a response.**

Threaten to bring court action and recover attorney’s fees.

**C. Administrative appeal.**

There are no administrative appeal requirements. The individual requesting the document may go directly to district court to obtain relief under the statute and the constitutional provision listed above.

**1. Time limit.**

There are no administrative appeal requirements. The individual requesting the document may go directly to district court to obtain relief under the statute and the constitutional provision listed above.

**2. To whom is an appeal directed?**

**a. Individual agencies.**

There are no administrative appeal requirements. The individual requesting the document may go directly to district court to obtain relief under the statute and the constitutional provision listed above.

**b. A state commission or ombudsman.**

There is no state commission or ombudsman available to assist with records requests.

**c. State attorney general.**

The Attorney General rarely becomes involved in records disputes.

**3. Fee issues.**

There is no method for resolving fee issues short of district court action.

**4. Contents of appeal letter.**

**a. Description of records or portions of records denied.**

There are no administrative appeal requirements.

**b. Refuting the reasons for denial.**

There are no administrative appeal requirements.

**5. Waiting for a response.**

There are no administrative appeal requirements.

**6. Subsequent remedies.**

There are no administrative appeal requirements.

**D. Court action.**

**1. Who may sue?**

Any “person” has standing to sue in district court to obtain relief under the constitution and Public Records Act, Mont. Const., Art. II, § 9.

**2. Priority.**

Most courts will respond immediately to open records question and will usually entertain *ex parte* applications from the requester.

**3. Pro se.**

The petition for relief should be drafted by an attorney; but there is no reason why a properly drafted petition could not be presented to the court by the requester *pro se*. Often times a district court will be more willing to talk with a requester *pro se* than to have an *ex-parte* conversation with the attorney for the requester. It is advisable, and probably necessary in any case, for the requester to accompany the attorney to the court. It should be noted, however, that most of the “bad” case law in Montana has come from litigation in which the requestor is *pro se*.

**4. Issues the court will address:**

In response to the petition, the court may consider whether or not there has been a denial of access; whether the fees for the records are excessive and constitute denial; whether a delay was undue and constitutes denial; and courts can even enter continuing restraining orders directing the governmental body to desist from denying access to the same document or something similar in the future. It is not necessary to file a declaratory judgment action in order to obtain continuing relief. The petition seeking the documents will suffice to permit a pleading for future relief.

**a. Denial.**

A district court may consider whether there has been a denial of access, and whether the fees for the records are excessive and constitute denial.

**b. Fees for records.**

A district court may consider whether the fees for the records are excessive and constitute denial.

**c. Delays.**

A district court may consider whether a delay was undue and constitutes denial.

**d. Patterns for future access (declaratory judgment).**

It is not necessary to file a declaratory judgment action in order to obtain continuing relief.

**5. Pleading format.**

A simple petition for relief setting forth the facts supporting the denial of access, as well as a description of the document requested and the relief sought, is sufficient to bring the matter before the district court. See *Board of Trustees v. Board of County Commissioners*, 186 Mont. 148, 606 P.2d 1069 (1980).

The special writs of mandamus and prohibition are inappropriate. A simple petition to the court alleging the violations is all that is required. See *Goyen v. City of Troy*, 276 Mont. 213, 915 P.2d 824 (1996).

## 6. Time limit for filing suit.

There is no time limit for filing a petition under the Montana Constitution or the open records act to obtain records.

## 7. What court.

Any district court has jurisdiction to resolve a petition requesting documents.

## 8. Judicial remedies available.

A court may order that the records be disclosed. It may also issue a continuing restraining order against withholding the documents or similar documents in the future.

## 9. Litigation expenses.

In addition to the present and future relief discussed above, a requester is also entitled to recover attorney's fees pursuant to § 2-3-221, Mont. Code Ann.

### a. Attorney fees.

A "prevailing plaintiff" is entitled to recover attorney's fees. However, whether to award and the amount of fees is discretionary with the courts. When the public body starts the lawsuit by petitioning for declaratory judgment asking the court to decide whether records are public, the requestor is not a "prevailing plaintiff" and cannot recover attorney's fees, even when the court orders disclosure. *Billings High School District v. Billings Gazette*, 2006 MT 329, 335 Mont. 94, 149 P.3d 565.

### b. Court and litigation costs.

A governmental body does not pay "costs" of a court action, so the only cost recovery occurs when the requestor prevails. In such case the requestor usually always recovers costs.

## 10. Fines.

There are no fines associated with a refusal to provide access to documents.

## 11. Other penalties.

There are no other penalties associated with a refusal to provide access to documents.

## 12. Settlement, pros and cons.

The statutory provision authorizes recovery of attorney's fees in connection with an access challenge either to obtain documents or to assure an open meeting. § 2-3-221, Mont. Code Ann. The authorization is discretionary, and a district court is not obliged to award the fees to the prevailing party. Although fees are generally awarded, see *In Re Investigative Records v. City of Columbus*, 272 Mont. 486, 901 P.2d 565 (1995) for example of a case where they were not. The Montana Supreme Court, in *Pengra v. State of Montana*, 302 Mont. 276, 14 P.3d 499 (2000), considered the issue of fees where an individual claims a privacy right and the state purports to take no position but nonetheless withholds the document. The Court held that Pengra failed to establish that his and his minor daughter's rights to privacy clearly outweighed public's right to know what costs it incurred in settlement agreement, and that legal publication was not entitled to prevailing party attorney's fees.

In better than half of the petitions filed, the record holder will provide access rather than run up attorney's fees as well as increase the exposure to paying the requester's attorney's fees. Therefore, settlement is not only a possibility but a likelihood in many cases.

Obviously, as in any other judicially construed constitutional provision, if a case is good on its facts and the custodian continues to deny access, the case should be considered one in which no settlement discussion should be had. Rather, it may be a case which should be taken to the Supreme Court in order to resolve issues upon which there is no present law. If there is no clear right of privacy at issue, the case should be taken to the Supreme Court asking for narrowly drawn criteria with respect to the right of privacy as it relates to document access.

## E. Appealing initial court decisions.

### 1. Appeal routes.

Appeal of a district court decision is to the Montana Supreme Court.

### 2. Time limits for filing appeals.

The time for filing a notice of appeal from a district court decision denying access to *state* government documents is sixty days. All other district court decisions must be appealed within thirty days of notice of entry of judgment denying access. Rule 5(a)(1), M. R. App. P.

### 3. Contact of interested amici.

Most trial courts will readily permit *amici* participation in constitutional issues and such participation should probably begin at the district court level, if possible. If not, the Montana Supreme Court is fairly open to receiving *amicus curiae* briefs on similar constitutional issues.

The Reporters Committee for Freedom of the Press often files *amicus* briefs in cases involving significant media law issues before a state's highest court.

## F. Addressing government suits against disclosure.

In the last several years, some governmental entities have been filing pre-emptive actions in district court pursuant to the Constitutional right-to-know provision, arguing that certain documents in their custody are private. The action is usually triggered by a media request for those documents. On several occasions, the entity declined to name a respondent, asking the court for an *in camera* advisory opinion. Fortunately the district court has dismissed the suits. Most recently, and likely as a response to these dismissals, a school board commenced suit and named the local newspaper as a respondent. The board then asked the court to conduct an *in camera* review to determine whether the documents should be kept secret. In this instance, the newspaper fully participated and the court denied access to the documents on the basis of federal law (Family Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. § 1232g). At press time, the case was on appeal to the Montana Supreme Court. Among the issues to be decided are whether the state constitutional provision is pre-empted by FERPA, and whether a prevailing respondent is entitled to recover attorney's fees, even though it did not commence the suit. The case is *Board of Trustees, Cut Bank Public Schools v. Cut Bank Pioneer Press*. The briefing has not started, but can later be accessed through the Supreme Court's website at [www.lawlibrary.state.mt.us/dscgi/ds.py/View/Collection-1981](http://www.lawlibrary.state.mt.us/dscgi/ds.py/View/Collection-1981)

# Open Meetings

## I. STATUTE -- BASIC APPLICATION.

As indicated in the preface, Montana has a constitutional provision guaranteeing all persons the right to observe the deliberations of public bodies. Montana's "sunshine" statute, initially adopted in 1963, was amended in 1975 to conform to the new constitutional provision. Mont. Code Ann. §§ 2-3-201 to 221.

Taken together, the Montana constitutional and statutory provisions guarantee every citizen the right to observe the deliberations of all public bodies or agencies of state government, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

### A. Who may attend?

Article II, § 9 of the Montana Constitution guarantees any person the right to observe the deliberations of public bodies and agencies in Montana. "Person" includes citizen, alien, resident, nonresident, media person, or member of the public.

### B. What governments are subject to the law?

#### 1. State.

Both the state Constitution and the implementing statute guarantee access to any state, county, local, or municipal governmental body.

#### 2. County.

Both the state Constitution and the implementing statute guarantee access to any state, county, local, or municipal governmental body.

#### 3. Local or municipal.

Both the state Constitution and the implementing statute guarantee access to any state, county, local, or municipal governmental body.

### C. What bodies are covered by the law?

#### 1. Executive branch agencies.

The constitutional provision guarantees access to "the deliberations of all public bodies or agencies of state government and its subdivisions." Mont. Const., Art. II, § 9 (1972). When any executive branch official is functioning in a deliberative sense, that is, conducting or participating in a meeting by which issues within that agency's jurisdiction are discussed, the deliberations must be open. The deliberations must be open regardless of whether the agency or body is merely discussing or actually taking action on an issue. Hearings are also covered by the Open Meetings Law. Mont. Code Ann. § 2-3-202.

##### a. What officials are covered?

The Supreme Court has ruled that "agency" does not include individual employees. A television station argued it had the right to have a reporter cover a meeting of the Billings city engineer, the public works director, and a private construction company. The court determined Art. II, § 9 of the Constitution limits the right to know to agencies, so journalists are not entitled to attend meetings between an individual public employee and a private party. *SJL of Mont. v. City of Billings*, 263 Mont. 142, 867 P.2d 1084 (1993). However, in another case, a representative of the Commissioner of Higher Education conducting meetings around the state with representatives of each of the branches of the University system was subject to the open meetings law. *Associated Press v. Crofts*, 2004 MT 120, 321 Mont. 193, 89 P.3d 921.

##### b. Are certain executive functions covered?

No.

##### c. Are only certain agencies subject to the act?

No. All agencies are subject to the Act.

## 2. Legislative bodies.

Article V, § 10(3) of the Montana Constitution declares: "The sessions of the legislature and the committee of the whole, all committee meetings, and all hearings shall be open to the public." Indeed, there is no "privacy exception" to this rather broad constitutional provision. Arguably, then, legislative deliberative bodies may not, in any circumstance, close their meetings.

## 3. Courts.

Although the constitutional provision does not specifically exempt courts from its open deliberations requirements, the Constitutional Convention debates suggest that Article II, § 9 does not apply to the judicial branch. Jury deliberations are considered exempt, and the Montana Supreme Court has rejected suggestions that conferences and deliberations of the Court, or even its advisory committees, should be open. See *Goldstein v. Commission on Practice*, 297 Mont. 493, 995 P.2d 923 (2000); *Order In Re Selection of a Fifth Member to the Montana Apportionment Commission* (August 3, 1999).

Mont. Code Ann. §§ 3-1-312 and 313 require "the sittings of every court" to be public "except [i]n an action for dissolution of marriage, criminal conversation or seduction" in which case the public may be excluded. Furthermore, the Montana Supreme Court has embraced the ABA standards and requires a defendant in a criminal proceeding to show a clear and present danger of prejudice to the right to a fair trial before closing a criminal proceeding and requires the court to exhaust all alternatives to closure before closing, even upon such a showing. *State ex. rel Smith v. District Court*, 201 Mont. 376, 654 P.2d 982 (1982).

In *State ex rel Tribune v. District Court*, 238 Mont 310, 777 P.2d 345 (1989), the court held that the public has a right to access probation revocation proceedings. However, the court gave fairly wide latitude to trial judges to close such hearings to protect certain privacy interests.

## 4. Nongovernmental bodies receiving public funds or benefits.

Nongovernmental bodies receiving public funds or benefits are covered under Mont. Code Ann. § 2-3-203(1), which requires that all meetings of public bodies "or organizations or agencies supported in whole or in part by public funds or expending funds must be open to the public."

## 5. Nongovernmental groups whose members include governmental officials.

The operative language of Montana's "sunshine" statute turns upon "funding." Nongovernmental groups whose members include governmental officials are included under Mont. Code Ann. § 2-3-203(1), if any public funds support the entity. Thus, payment of salary or per diem expenses for the governmental officials renders the body liable to follow the open meetings law. (See ¶¶ 7-9.)

The public entity must be a constituent body. *Ad Hoc* meetings of various state officials to discuss a matter of public concern are not "public bodies" within the meaning of the Constitution and statute. *S.J.L. of Montana Associates v. City of Billings*, 263 Mont. 142, 867 P.2d 1084 (1993).

## 6. Multi-state or regional bodies.

Multistate or regional bodies that receive public funds are subject to the law. See Mont. Code Ann § 2-3-203(1).

## 7. Advisory boards and commissions, quasi-governmental entities.

Advisory boards and commissions or quasi-governmental entities, or any other body appointed or elected that receives public funds is subject to the law. See Mont. Code Ann. § 2-3-203(1). See also *Bryan v. Yellowstone Co. Elem. Sch. Dist. No. 2*, 312 Mont. 257, 60 P.3d 381

(2002) (Montana Supreme Court held that a committee created by a school district to research a proposition and submit a recommendation to the school board was a public or governmental body subject to the right to know provision of the Montana Constitution); *but see Goldstein v. Commission on Practice of Supreme Court*, 297 Mont. 493, 995 P.2d 923 (2000), the Montana Supreme Court held that confidentiality provisions of Rules on Lawyer Disciplinary Enforcement did not violate an attorneys' right to know or right to participate in government decisions by excluding attorney from the deliberations of Commission on Practice following the filing of formal complaint and held that Commission was not subject to open meeting requirements and sat in only advisory capacity to Supreme Court.

#### 8. Other bodies to which governmental or public functions are delegated.

Any government body that receives public funds is subject to the law. *See* Mont. Code Ann. § 2-3-203(1).

#### 9. Appointed as well as elected bodies.

Any government body *appointed or elected* that receives public funds is subject to the law. *See* Mont. Code Ann. § 2-3-203(1).

### D. What constitutes a meeting subject to the law.

#### 1. Number that must be present.

##### a. Must a minimum number be present to constitute a "meeting"?

In order for a "meeting" to occur within the meaning of the Montana open meetings law a quorum must be present. Mont. Code Ann. § 2-3-202. However, a public body 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 constraints of the open meetings law. *See* Mont. Code Ann. § 2-3-203(5).

##### b. What effect does absence of a quorum have?

If there is no quorum then the "meeting" is not subject to the open meetings law unless the agency is clearly intending to avoid scrutiny under the act.

#### 2. Nature of business subject to the law.

##### a. "Information gathering" and "fact-finding" sessions.

Except for privacy rights, the Montana open meetings law and Constitution do not differentiate on the basis of subject matter to be discussed in determining whether a meeting shall be open. Indeed, any time the body meets to hear, discuss, or act on any matter, the meeting is deemed to be open regardless of the matter to be discussed, Mont. Code Ann. § 2-3-202, except for certain specific exemptions. "Executive Sessions," for example, are subject to the law. *See Goyen v. City of Troy*, 276 Mont. 213, 915 P.2d 824 (1996).

##### b. Deliberations toward decisions.

Except for privacy rights, the Montana open meetings law and Constitution do not differentiate on the basis of subject matter to be discussed in determining whether a meeting shall be open.

#### 3. Electronic meetings.

Both conference calls and e-mail messages are open to the public and subject to the requirements of the "sunshine" statute.

##### a. Conference calls and video/Internet conferencing.

The convening of a quorum of the constituent membership of a public agency or association to hear, discuss, or act upon a matter over which the agency has control constitutes a meeting. A meeting can be either in-person or electronic, as in a conference call. Mont. Code Ann. § 2-3-202.

##### b. E-mail.

Since electronic discussion during the convening of a quorum of a public body constitutes a meeting, it is prohibited unless the public has contemporaneous access to the e-mail message.

##### c. Text messages.

Since electronic discussion during the convening of a quorum of a public body constitutes a meeting, it is prohibited unless the public has contemporaneous access to the texting.

##### d. Instant messaging.

Since electronic discussion during the convening of a quorum of a public body constitutes a meeting, it is prohibited unless the public has contemporaneous access to the instant messaging.

##### e. Social media and online discussion boards.

Since electronic discussion during the convening of a quorum of a public body constitutes a meeting, it is prohibited unless the public has contemporaneous access to the on line discussion.

### E. Categories of meetings subject to the law.

#### 1. Regular meetings.

##### a. Definition.

There is no statutory distinction between "regular" or "special" meetings. A meeting takes place whenever there is a gathering of a quorum of the members of a public body. Mont. Code Ann. § 2-3-202.

##### b. Notice.

There is no notice provision contained in the Montana open meetings law. However, several district courts, in opinions not found among the national reporters, have issued rulings requiring as a precondition and part of the Montana open meetings law that notice of meetings be given sufficiently in advance of the meeting to permit the public to attend, and to publish an agenda which would generally apprise the public of the matters to be discussed during the meeting. *See, e.g., Wilson, et al. v. Trustees of School District No. 3*, No. 42522, First Judicial District (1978); *Board of Trustees v. Board of County Commissioners*, 186 Mont. 148, 606 P.2d 1069 (1980). Failure to comply with this notice requirement subjects any decision made in violation of this requirement to voidability under Mont. Code Ann. § 2-3-213. This latter section authorizes district courts to void any decision of any public body made in violation of the Montana open meetings law.

When a closed meeting is contemplated for reasons of privacy, it may only be closed when the public body has notified the person about whom the privacy pertained and given that person the opportunity to waive the right of privacy. *See Goyen v. City of Troy*, 276 Mont. 213, 915 P.2d 824 (1996). However, the public body may assert the right on behalf of the individual.

#### (1). Time limit for giving notice.

No specific time limit for giving notice, except that County commissioners must give 48-hour notice before changing the time, manner, place or date of a regular meeting, or hold a special meeting. § 7-5-2122, M.C.A. *Board of Trustees, Huntley Project School District 24 v. Board of County Commissioners*, 186 Mont. 148, 606 P.2d 1069 (1980). Except in an emergency, special meetings of school boards require 48-hour written notice to the trustees. Mont. Code Ann. § 20-3-322(3).

Providing this notice to trustees does not release the district from its duty to provide adequate public notice. *Sonsteli v. Bd. of Trustees*, 202 Mont. 414, 658 P.2d 413 (1983).

#### (2). To whom notice is given.

Notice provisions give the public the right to know all the facts in possession of an agency and to have reasonable opportunity to review those facts before a hearing. This is to prevent what should be

genuine interchange from being reduced to mere formality. *Bryan v. Yellowstone County Elementary School District No. 2*, 312 Mont. 257, 60 P.3d 381 (2002). A clear abuse of discretion took place when a district court failed to nullify actions of a county commission that disregarded statutes regulating the place, time, and voting procedure of open meetings. *Board of Trustees, Huntley Project School District 24 v. Board of County Commissioners*, 186 Mont. 148, 606 P.2d 1069 (1980).

**(3). Where posted.**

No specific statutory or case law governing where posted.

**(4). Public agenda items required.**

An 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. § 2-3-103(1), Mont. Code Ann. The agenda for a meeting must include an item allowing public comment on any public matter that is not on the agenda and that is within the jurisdiction of the agency. 2-3-103(1), Mont. Code Ann.

**(5). Other information required in notice.**

Notice provisions give the public the right to know all the facts in possession of an agency and to have reasonable opportunity to review those facts before a hearing. This is to prevent what should be genuine interchange from being reduced to mere formality. *Bryan v. Yellowstone County Elementary School District No. 2*, 312 Mont. 257, 60 P.3d 381 (2002).

**(6). Penalties and remedies for failure to give adequate notice.**

Any decisions made during the course of an inadequately noticed meeting subject those decisions to being voided by a district court. *Bryan v. Yellowstone County Elementary School District No. 2*, 312 Mont. 257, 60 P.3d 381 (2002).

**c. Minutes.**

**(1). Information required.**

Mont. Code Ann. § 2-3-212 requires that minutes be kept and made available for public inspection. Such minutes must include the date, the time, the place of the meeting, a list of the individual members in attendance, the substance of all matters discussed, and a record of any votes taken.

**(2). Are minutes public record?**

Anybody subject to Montana’s open-meeting laws must keep minutes of its meetings and make them available for public inspection. Mont. Code Ann. § 2-3-212. The minutes must include: 1) date, time and place of the meeting; 2) list of the members in attendance; 3) substance of all matters, discussed; and 4) at the request of any member, a record by individual members of any votes taken. Mont. Code Ann. § 2-3-212. *Board of Trustees, Huntley Project School District 24 v. Board of County Commissioners*, 186 Mont. 148, 606 P.2d 1069 (1980).

**2. Special or emergency meetings.**

There is no specific requirement related to notice of special or emergency meetings, and there is no Montana Supreme Court decision on that issue.

**a. Definition.**

There is no specific requirement related to notice of special or emergency meetings, and there is no Montana Supreme Court decision on that issue.

**b. Notice requirements.**

There is no specific requirement related to notice of special or emergency meetings, and there is no Montana Supreme Court decision on that issue.

N/A

**(1). Time limit for giving notice.**

**(2). To whom notice is given.**

**(3). Where posted.**

**(4). Public agenda items required.**

**(5). Other information required in notice.**

**(6). Penalties and remedies for failure to give adequate notice.**

**c. Minutes.**

**(1). Information required.**

**(2). Are minutes a public record?**

**3. Closed meetings or executive sessions.**

The Montana open meetings law does not require the keeping of minutes for meetings that are closed, nor is there any penalty or remedy for failure to provide notice of any closed meeting; however, before closing a meeting the presiding officer of the governmental body must balance the demands of individual privacy against the merits of public disclosure to determine that closure is warranted.

**a. Definition.**

**b. Notice requirements.**

**(1). Time limit for giving notice.**

**(2). To whom notice is given.**

**(3). Where posted.**

**(4). Public agenda items required.**

**(5). Other information required in notice.**

**(6). Penalties and remedies for failure to give adequate notice.**

**c. Minutes.**

**(1). Information required.**

**(2). Are minutes a public record?**

**d. Requirement to meet in public before closing meeting.**

All decisions made after a closed meeting must be made in open session.

**e. Requirement to state statutory authority for closing meetings before closure.**

The chair of the body must disclose the reasons for closing the meeting at the outset and give citizens in attendance the right to state objections.

**f. Tape recording requirements.**

There are no statutory or case law decisions requiring tape recordings of closed sessions.

**F. Recording/broadcast of meetings.**

**1. Sound recordings allowed.**

Mont. Code Ann. § 2-3-211, guarantees “[a]ccredited press representatives” the right to take photographs, televise, or record meetings so long as these activities do not interfere with the conduct of the meeting. The judicial branch follows the ABA standards on recording or televising court proceedings. Generally, the district courts, both federal and state are vested with discretion to regulate the recording of any judicial proceeding to guarantee the decorum of the court.

**2. Photographic recordings allowed.**

See above.

**G. Are there sanctions for noncompliance?**

There is no provision for sanctions, however, a plaintiff who prevails in an action brought in district court to enforce his rights under Article II, § 9, of the Montana Constitution may be awarded his costs and reasonable attorney’s fees. *See* Mont. Code Ann. § 2-3-221. Further, any action taken in a meeting in violation of Article II, § 9, can be voided. Mont. Code Ann. § 2-3-114. *See Bryan v. Yellowstone Co. Elem. Sch. Dist. No. 2*, 312 Mont. 257, 60 P.3d 381 (2002) (holding school board decision in violation of Article II, § 9, null and void).

**II. EXEMPTIONS AND OTHER LEGAL LIMITATIONS**

**A. Exemptions in the open meetings statute.**

**1. Character of exemptions.**

The constitutional privacy exemption is a general exemption and is discretionary subject to the same three-part balancing test used for determining whether records may be kept confidential.

**a. General or specific.**

N/A

**b. Mandatory or discretionary closure.**

N/A

**2. Description of each exemption.**

Prior to 1991, the Montana open meetings law permitted the closing of a meeting to discuss collective bargaining or litigation strategy “when an open meeting would have a detrimental effect on the bargaining or litigating position of the public agency.” Mont. Code Ann. § 2-3-203(4). In two successive cases in 1991 and 1992, the Montana Supreme Court struck down the litigation exception, at least insofar as the litigation under discussion is between two governmental entities, and struck down the collective bargaining strategy exception in its entirety. *Great Falls Tribune Co. Inc. v. Great Falls Pub. Sch.*, 255 Mont. 125, 841 P.2d 502, (1992); *Associated Press v. Board of Pub. Educ.*, 246 Mont. 386, 804 P.2d 376 (1991). The statute has been amended to conform to these decisions, although the continuing viability of what remains of the litigation exception is open to question.

The privacy “exemption” analysis is made following the same three-part test used for determining whether records may be kept confidential. The state supreme court has imposed the following judicial guidelines by which public access to records and meetings may be denied under a constitutional balancing test:

1. Did the person involved have an actual or “subjective” expectation of privacy; and, if so

2. Is that expectation “reasonable”?

3. If the answers to paragraphs 1 and 2 are affirmative, then the documents containing private information may be withheld if the demands of individual privacy clearly outweigh the merits of public disclosure. If the answer to either 1 or 2 is negative, then the documents are available for public inspection.

*See Missoulian v. Board of Regents*, 207 Mont. 513, 675 P.2d 962 (1984); *Flesch v. Board of Trustees*, 241 Mont.158, 786 P.2d 4 (1990).

A public body may not close a meeting to discuss matters of individual privacy without first notifying the person who holds the privacy rights. Failure to do so will constitute a basis for voiding a decision made in that session.

**B. Any other statutory requirements for closed or open meetings.**

A public body may close a meeting “when an open meeting would have a detrimental effect on the litigating position of the public agency.” Mont. Code Ann. § 2-3-203(4). A lawsuit must actually be filed before this statutory protection is provided. The mere threat of litigation does not trigger the right to close a meeting. However, a meeting cannot be closed to discuss litigation in which only public agencies are involved. *Associated Press v. Bd. of Pub. Educ.*, 246 Mont. 386, 804 P.2d 376 (1991).

**C. Court mandated opening, closing.**

No statutory or case law governing this issue.

**III. MEETING CATEGORIES -- OPEN OR CLOSED.**

Excluding the privacy exception, there are no rules, judicially or legislatively imposed, that exempt certain discussions from the Montana open meetings law. Rather, the court will examine on a case-by-case basis the necessity for closing the meeting and the presiding officer’s determination that the demand of individual privacy clearly exceeds the merits of public disclosure. The Montana Supreme Court, in that regard, has determined that the Montana Board of Regents may close its meeting when discussing matters related to the qualifications of individual applicants for presidency of any of the branches of the Montana University System. *Missoulian v. Board of Regents*, 207 Mont. 513, 675 P.2d 962 (1984). In construing the “individual privacy” provision of the Montana Constitution, the Montana Supreme Court has refused to extend the privacy protection to corporations. *See Great Falls Tribune v. Mont. Pub. Serv. Commn.*, 319 Mont. 38, 82 P.3d 876 (2003).

In *Associated Press v. Crofts*, 321 Mont. 193, 89 P.3d 971 (2004), media organizations brought an action against the Commissioner of Higher Education, seeking a declaration that the meetings between the Commissioner and the state university policy committee, which was made up of senior university employees, were subject to open meetings laws and enjoining Commissioner from excluding the public from meetings. The Montana Supreme Court held that the meetings between the Commissioner and the university policy committee were subject to open meetings laws, and that the media organizations were not entitled to attorney’s fees.

In *Goldstein v. Commission on Practice of Supreme Court*, 297 Mont. 493, 995 P.2d 923 (2000), the Montana Supreme Court held that confidentiality provisions of Rules on Lawyer Disciplinary Enforcement did not violate an attorneys’ right to know or right to participate in government decisions by excluding attorney from the deliberations of Commission on Practice following the filing of formal complaint and held that Commission was not subject to open meeting requirements and sat in only advisory capacity to Supreme Court.

A woman who would testify in a personnel disciplinary proceeding that she had sex with the police chief in or near the patrol car while the chief was on duty had a constitutionally protected right of privacy

which exceeded the merits of public disclosure, and the meeting could be closed. *Goyen v. City of Troy*, 276 Mont. 213, 915 P.2d 824 (1996).

The Montana Supreme Court has not yet addressed extension of the Montana open meetings law to hospital board discussions of patients, parole board meetings, or any other deliberation involving questions related to individual privacy. However, given the predilection of the court to protect individual privacy, any determination to close a meeting based upon privacy considerations will not likely be overturned.

*Negotiations and collective bargaining of public employees.* In *Motta v. Philipsburg School Bd. Trustees*, 323 Mont. 72, 98 P.3d 673 (2004), a citizen brought an action against a school district, alleging violation of open meeting laws. The district court granted the citizen's motion for partial summary judgment, but refused to void the collective bargaining agreement reached at the school board meeting, and did not award the citizen his costs. On appeal, the Montana Supreme Court held that the trial court did not abuse its discretion when it refused to void the agreement reached at the meeting held in violation of open meeting laws; remand was necessary so that district court could determine whether to award citizen his costs; and citizen prevailed, even though he did not receive all of the remedy he desired, and thus it was up to discretion of district court to determine whether to award citizen his costs.

**A. Adjudications by administrative bodies.**

**1. Deliberations closed, but not fact-finding.**

An entity may not close a meeting for this reason.

**2. Only certain adjudications closed, i.e. under certain statutes.**

N/A

**B. Budget sessions.**

Not a basis for closing a meeting.

**C. Business and industry relations.**

Not a basis for closing a meeting.

**D. Federal programs.**

Not a basis for closing a meeting.

**E. Financial data of public bodies.**

Not a basis for closing a meeting.

**F. Financial data, trade secrets or proprietary data of private corporations and individuals.**

A meeting may be closed if necessary to protect trade secrets of a corporation under certain limited circumstances. *Great Falls Tribune v. Montana Public Service Commission*, 2003 MT 359, 319 Mont. 38, 82 P.3d 876 (disclosure of utility company records).

**G. Gifts, trusts and honorary degrees.**

Not a basis for closing a meeting.

**H. Grand jury testimony by public employees.**

No statutory or case law on this issue.

**I. Licensing examinations.**

Not a basis for closing a meeting.

**J. Litigation; pending litigation or other attorney-client privileges.**

See 2B, above.

**K. Negotiations and collective bargaining of public employees.**

Not a basis for closing a meeting.

**1. Any sessions regarding collective bargaining.**

N/A.

**2. Only those between the public employees and the public body.**

N/A.

**L. Parole board meetings, or meetings involving parole board decisions.**

Open, according to the Montana Constitution, only an individual right to privacy that passes the test trumps the public's right to know. Discretionary disclosure based on "best interests" or "desirable or helpful" fail to withstand constitutional scrutiny. *Wordan v. Mt. Board of Pardons and Parole*, 289 Mont. 459, 962 P.2d 1157 (1998), *Bozeman Daily Chronicle v. City of Bozeman Police Dept.*, 260 Mont. 218, 859 P.2d 435 (1993).

**M. Patients; discussions on individual patients.**

Closed, unless the demands of privacy do not clearly exceed the merits of disclosure.

**N. Personnel matters.**

**1. Interviews for public employment.**

Employment evaluations may be closed.. *Missoulian v. Board of Regents*, 207 Mont. 513, 675 P.2d 962 (1984), *Montana Human Rights Division v. City of Billings*, 199 Mont. 434, 649 P.2d 1283 (1982).

**2. Disciplinary matters, performance or ethics of public employees.**

Generally, disciplinary matters may be discussed in private unless the employee waives the right of privacy. However, if the offense charged constitutes a breach of the employees fiduciary duties, there is no expectation of privacy and the meeting should be open.. The public has a clear and unambiguous right to know the information involved in the internal investigation of a public employee for any alleged violation of any policy, law or rule. The Montana Supreme Court has made it very clear that "internal investigations" of law enforcement personnel (and other public employees) must be fully disclosed to the public while the investigation is ongoing, as well as when it concludes. The outcome of the investigation into the alleged wrongdoing is not relevant. See particularly *Great Falls Tribune v. Cascade County Sheriff*, 238 Mont. 103, 775 P.2d 1267 (1989); *Citizens to Recall Whitlock v. Whitlock*, 255 Mont. 517, 844 P.2d 74 (1992); *Bozeman Daily Chronicle v. City of Bozeman Police Dept.*, 260 Mont. 218, 859 P.2d 435 (1993). In each of cases, the court found that the individual officer, public employee or elected official has very little expectation of privacy, and the public has a fundamental right to know what public employees are doing.

**3. Dismissal; considering dismissal of public employees.**

See above.

**O. Real estate negotiations.**

No right of privacy is involved in real estate negotiations, so the meetings must be open even if the open session may cause the entity some economic disadvantage.

**P. Security, national and/or state, of buildings, personnel or other.**

No right of privacy is involved in real estate negotiations, so the meetings must be open even if the open session may cause the entity some economic disadvantage.

**Q. Students; discussions on individual students.**

Generally private.

## IV. PROCEDURE FOR ASSERTING RIGHT OF ACCESS

### A. When to challenge.

The open meetings law and the constitutional provision may be asserted by petition either requesting voidability under Mont. Code Ann. § 2-3-213, or for general injunctive relief. There is no time limit on challenging a closed meeting when the petitioner seeks injunctive or prospective relief. However, if the petitioner intends to have the decision made in the closed meeting voided, the action must be brought within thirty days of the decision. *Id.*

Since most closure decisions turn on questions of individual privacy, the “legs” of the government’s legal basis for a closed session may be summarily removed by contacting the individual about whom the discussion will pertain. Usually, that person has no objection to an open meeting and the privacy consideration is removed. This method of obtaining open meetings is particularly successful when the body indicates an intention, in advance of the meeting, to close the meeting to discuss “personnel” matters.

Moreover, in most instances, the chairman is not a lawyer or is relatively unschooled about open meetings law. A call from the media lawyer to the governmental body’s lawyer will usually produce compliance with the law short of going to court.

#### 1. Does the law provide expedited procedure for reviewing request to attend upcoming meetings?

No.

#### 2. When barred from attending.

No.

#### 3. To set aside decision.

A decision made in an illegally closed session be be set aside by a district court.

#### 4. For ruling on future meetings.

Prospective relief is not favored by the courts because whether a matter is private must always be made on a case-by-case basis. See. *Havre Daily News v. City of Havre*, 2006 MT 215, 333 Mont. 331, 143 P.3d 864.

#### 5. Other.

N/A.

### B. How to start.

The petition for relief may be styled in any way that alleges violation of the Montana Constitutional provision and/or Montana open meetings law. It requires no administrative remedy, so there is no exhaustion issue. The matter may be started directly in district court and most courts will expedite resolution of open meetings requests.

#### 1. Where to ask for ruling.

State District Court.

##### a. Administrative forum.

None.

##### (1). Agency procedure for challenge.

None.

##### (2). Commission or independent agency.

None.

##### b. State attorney general.

None.

##### c. Court.

Yes.

#### 2. Applicable time limits.

Must be filed within 30 days of the challenged decision.

#### 3. Contents of request for ruling.

Regular pleading standards apply under Montana Rules of Civil Procedure

#### 4. How long should you wait for a response?

Regular pleading standards apply under Montana Rules of Civil Procedure

### C. Court review of administrative decision.

#### 1. Who may sue?

Any “person” within the meaning of the Montana Constitution may bring this petition to enforce constitutional rights.

#### 2. Will the court give priority to the pleading?

The court virtually always gives priority to the pleading.

#### 3. Pro se possibility, advisability.

The court will permit *pro se* application. However, since the efficacy of quick resolution of an open meetings question may depend upon appropriate pleading and proof, it is not advisable for a person to attempt to gain access to a public body through *pro se* court action.

#### 4. What issues will the court address?

Courts will issue injunctions requiring meetings to be opened or enjoining the presiding officer from closing a meeting in violation of the statute. The court may also void the decision or order prospective relief requiring future meetings to be open.

##### a. Open the meeting.

See above.

##### b. Invalidate the decision.

See above.

##### c. Order future meetings open.

See above.

#### 5. Pleading format.

There is no particular pleading format and the court suggests that a petition rather than a formal complaint under the Montana Rules of Civil Procedure may be filed.

#### 6. Time limit for filing suit.

There is no time limit on challenging a closed meeting when the petitioner seeks injunctive or prospective relief. However, if the petitioner intends to have the decision made in the closed meeting voided, that action must be brought within thirty days of the decision. Mont. Code Ann. § 2-3-213.

#### 7. What court.

This action should be filed in the state district courts.

#### 8. Judicial remedies available.

Injunctive or prospective relief is available. A decision made in an illegally closed meeting may be voided.

#### 9. Availability of court costs and attorneys’ fees.

Pursuant to Mont. Code Ann. § 2-3-221, a petitioner who prevails in an action to enforce constitutional access rights (open meetings or open records rights) may be awarded costs and reasonable attorney’s fees. Courts routinely award such fees and costs particularly when the decision to close the meeting is arbitrary or made without regard to

the obvious provisions of the Montana open meetings law and the Constitution.

#### 10. Fines.

Costs and reasonable attorney's fees only.

#### 11. Other penalties.

N/A.

#### D. Appealing initial court decisions.

##### 1. Appeal routes.

There is only one appeal, and that is to the Montana Supreme Court.

##### 2. Time limits for filing appeals.

That appeal must be filed within thirty days of notice of entry of judgment from the district court with respect to all public bodies except the State of Montana. A district court order in which the State of Montana is a defendant or respondent may be appealed within sixty days following notice of entry of judgment.

##### 3. Contact of interested amici.

The State of Montana is sufficiently small in population that it is relatively easy to obtain assistance from other interested public or media groups, and the courts readily accept participation from those various groups. The Montana Newspaper Association, Society of Professional Journalists, League of Women Voters, Montana Press Women, and various daily newspapers routinely participate in media litigation as *amici*.

The Reporters Committee for Freedom of the Press often files *amicus* briefs in cases involving significant media law issues before a state's highest court.

#### V. ASSERTING A RIGHT TO COMMENT.

The Montana Constitution declares:

The public has a 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.

Mont. Const., Art. II, § 8 (1972). The Montana Supreme Court has

rarely construed this provision, but it has indicated that the language "as may be provided by law" means that the Constitution does not create any rights of participation beyond what is created by statute. See *Kadillak v. Anaconda Co.*, 184 Mont. 127, 602 P.2d 147 (1979).

The legislature implemented the constitutional intent by enacting Mont. Code Ann. §§ 2-3-101 to 114. These provisions provide general guidelines for public participation in governmental decisions.

##### A. Is there a right to participate in public meetings?

§ 2-3-103, Mont. Code Ann., requires all state agencies to develop procedures for encouraging public participation in all decisions "of significant interest to the public." The procedures must include providing adequate notice. Local governments are more specifically required to open all meetings to the public and allow reasonable participation before reaching a decision, and "reasonable opportunity to submit data, views, or argument" regarding any decision of significant interest to the public. § 7-1-4142, Mont. Code Ann.

##### B. Must a commenter give notice of intentions to comment?

Public bodies do not generally require commenters to give notice of their intentions, but there are no cases addressing whether such a requirement would be permissible.

##### C. Can a public body limit comment?

Public bodies in Montana sometimes limit comments on an *ad hoc* basis depending on the number of people who wish to speak on an issue. There are no cases addressing the reasonableness of such limitations.

##### D. How can a participant assert rights to comment?

If the right to participate is denied, an action can be brought in district court to set aside the agency's decision. The action must be brought within 30 days. § 2-3-114, Mont. Code Ann. A court may also award prospective relief ordering the agency to accept public comments.

##### E. Are there sanctions for unapproved comment?

Some public bodies have attempted to impose sanctions for "out of order" comments, including barring the speaker from future participation. The Montana Supreme Court has not addressed whether such sanctions are permissible.

# Statute

## Open Records

### Montana Code

#### Title 2. Government Structure and Administration

#### Chapter 6. Public Records

#### Part 1. Public Records Generally

#### 2-6-101. Definitions

(1) Writings are of two kinds:

- (a) public; and
- (b) private.

(2) Public writings are:

(a) the written acts or records of the acts of the sovereign authority, of official bodies and tribunals, and of public officers, legislative, judicial, and executive, whether of this state, of the United States, of a sister state, or of a foreign country, except records that are constitutionally protected from disclosure;

(b) public records, kept in this state, of private writings, including electronic mail, except as provided in 22-1-1103 and 22-3-807 and except for records that are constitutionally protected from disclosure.

(3) Public writings are divided into four classes:

- (a) laws;
- (b) judicial records;
- (c) other official documents;

(d) public records, kept in this state, of private writings, including electronic mail.

(4) All other writings are private.

#### 2-6-102. Citizens entitled to inspect and copy public writings

(1) Every citizen has a right to inspect and take a copy of any public writings of this state, except as provided in 22-1-1103, 22-3-807, or subsection (3) of this section and as otherwise expressly provided by statute.

(2) Every public officer having the custody of a public writing that a citizen has a right to inspect is bound to give the citizen on demand a certified copy of it, on payment of the legal fees for the copy, and the copy is admissible as evidence in like cases and with like effect as the original writing. The certified copy provision of this subsection does not apply to the public record of electronic mail provided in an electronic format.

(3) Records and materials that are constitutionally protected from disclosure are not subject to the provisions of this section. Information that is constitutionally protected from disclosure is information in which there is an individual privacy interest that clearly exceeds the merits of public disclosure, including legitimate trade secrets, as defined in 30-14-402, and matters related to individual or public safety.

(4) A public officer may withhold from public scrutiny information relating to individual privacy or individual or public safety or security of public facilities, including jails, correctional facilities, private correctional facilities, and prisons, if release of the information may jeopardize the safety of facility personnel, the public, or inmates of a facility. Security features that may be protected under this section include but are not limited to architectural floor plans, blueprints, designs, drawings, building materials, alarms system plans, surveillance techniques, and facility staffing plans, including staff numbers and locations. A public officer may not withhold from public scrutiny any more information than is required to protect an individual privacy interest or safety or security interest.

#### 2-6-103. Filing and copying fees

(1) The secretary of state shall charge and collect fees for filing and copying services.

(2) A member of the legislature or state or county officer may not be charged for any search relative to matters appertaining to the duties of the member's office or for a certified copy of any law or resolution passed by the legislature relative to the member's official duties.

(3) The secretary of state may not charge a fee, other than the fees authorized in 2-6-110, for providing electronic information.

(4) Fees must be collected in advance and, when collected by the secretary of state, are not refundable.

(5) Fees authorized by this section must be set and deposited in accordance with 2-15-405.

#### 2-6-104. Records of officers open to public inspection

Except as provided in 27-18-111 and 42-6-101, the public records and other matters, except records that are constitutionally protected from disclosure, in the office of any officer are at all times during office hours open to the inspection of any person.

#### 2-6-105. Removal of public records

Any record, a transcript of which is admissible in evidence, must not be removed from the office where it is kept, except upon the order of a court or judge in cases where the inspection of the record is shown to be essential to the just determination of the cause or proceeding pending or where the court is held in the same building with such office.

#### 2-6-106. Possession of records

Every public officer is entitled to the possession of all books and papers pertaining to his office or in the custody of a former incumbent by virtue of his office.

#### 2-6-107. Proceedings to compel delivery of records

If any person, whether a former incumbent or another person, refuses or neglects to deliver to the actual incumbent any such books or papers, such actual incumbent may apply, by complaint, to any district court or judge of the county where the person so refusing or neglecting resides and the court or judge must proceed in a summary way, after notice to the adverse party, to hear the allegations and proofs of the parties and to order any such books and papers to be delivered to the petitioners.

#### 2-6-108. Attachment and warrant to enforce

The execution of the order and delivery of the books and papers may be enforced by attachment as for a witness and also, at the request of the plaintiff, by a warrant directed to the sheriff or a constable of the county, commanding the sheriff or constable to search for such books and papers and to take and deliver them to the plaintiff.

#### 2-6-109. (Temporary) Prohibition on distribution or sale of mailing lists — exceptions — penalty

(1) Except as provided in subsections (3) through (9), in order to protect the privacy of those who deal with state and local government:

(a) an agency may not distribute or sell for use as a mailing list any list of persons without first securing the permission of those on the list; and

(b) a list of persons prepared by the agency may not be used as a mailing list except by the agency or another agency without first securing the permission of those on the list.

(2) As used in this section, "agency" means any board, bureau, commission, department, division, authority, or officer of the state or a local government.

(3) This section does not prevent an individual from compiling a mailing list by examination of records that are otherwise open to public inspection.

(4) This section does not apply to the lists of:

- (a) registered electors and the new voter lists provided for in 13-2-115;
- (b) the names of employees governed by Title 39, chapter 31;

(c) persons holding driver's licenses or Montana identification cards provided for under 61-5-127;

(d) persons holding professional or occupational licenses governed by Title 23, chapter 3; Title 37, chapters 1 through 4, 6 through 29, 31,34 through 36, 40, 47,48,50, 51, 53, 54, 60, 65 through 69, 72, and 73; and Title 50, chapters 39, 72, 74, and 76; or

(e) persons certified as claims examiners under 39-71-320.

(5) This section does not prevent an agency from providing a list to persons providing prelicensing or continuing educational courses subject to state law or subject to Title 33, chapter 17.

(6) This section does not apply to the right of access by Montana law enforcement agencies.

(7) This section does not apply to a corporate information list developed by the secretary of state containing the name, address, registered agent, officers, and directors of business, nonprofit, religious, professional, and close corporations authorized to do business in this state.

(8) This section does not apply to the use by the public employees' retirement board of a mailing list of board-administered retirement system participants to send materials on behalf of a retiree organization formed for board-administered retirement system participants and with tax-exempt status under section 501(c)(4) of the Internal Revenue Code, as amended, for a fee determined by rules of the board, provided that the mailing list is not released to the organization.

(9) This section does not apply to a public school providing lists of graduating students to representatives of the armed forces of the United States or to the national guard for the purposes of recruitment.

(10) A person violating the provisions of subsection (1)(b) is guilty of a misdemeanor.

#### 2-6-110. *Electronic information and nonprint records — public access — fees*

(1)

(a) Except as provided by law, each person is entitled to a copy of public information compiled, created, or otherwise in the custody of public agencies that is in electronic format or other nonprint media, including but not limited to videotapes, photographs, microfilm, film, or computer disk, subject to the same restrictions applicable to the information in printed form. All restrictions relating to confidentiality, privacy, business secrets, and copyright are applicable to the electronic or nonprint information.

(b) The provisions of subsection (1)(a) do not apply to collections of the Montana historical society established pursuant to 22-3-101.

(2) Except as provided by law and subject to subsection (3), an agency may charge a fee, not to exceed:

(a) the agency's actual cost of purchasing the electronic media used for transferring data, if the person requesting the information does not provide the media;

(b) expenses incurred by the agency as a result of mainframe and midtier processing charges;

(c) expenses incurred by the agency for providing online computer access to the person requesting access;

(d) other out-of-pocket expenses directly associated with the request for information, including the retrieval or production of electronic mail; and

(e) the hourly market rate for an administrative assistant in pay band 3 of the broadband pay plan, as provided for in 2-18-301, in the current fiscal year for each hour, or fraction of an hour, after one-half hour of copying service has been provided.

(3)

(a) In addition to the allowable fees in subsection (2), the department of revenue may charge an additional fee as reimbursement for the cost of developing and maintaining the property valuation and assessment system database from which the information is requested. The fee must be charged to persons, federal agencies, state agencies, and other entities requesting the database or any part of the database from any department property valuation and assessment system. The fee may not be charged to the governor's office of budget and program planning, the state tax appeal board, or any legislative agency or committee.

(b) The department of revenue may not charge a fee for information provided from any department property valuation and assessment system database to a local taxing jurisdiction for use in taxation and other governmental functions or to an individual taxpayer concerning the taxpayer's property.

(c) All fees received by the department of revenue under subsection (2) and this subsection (3) must be deposited in a state special revenue fund as provided in 15-1-521.

(d) Fees charged by the secretary of state pursuant to this section must be set and deposited in accordance with 2-15-405.

(4) For the purposes of this section, the term "agency" has the meaning provided in 2-3-102 but includes legislative, judicial, and state military agencies.

(5) An agency may not charge more than the amount provided under subsection (2) for providing a copy of an existing nonprint record.

(6) An agency shall ensure that a copy of information provided to a requester is of a quality that reflects the condition of the original if requested by the requester.

(7) This section does not authorize the release of electronic security codes giving access to private information.

#### 2-6-111. *Custody and reproduction of records by secretary of state*

(1) The secretary of state is charged with the custody of:

(a) the enrolled copy of the constitution;

(b) all the acts and resolutions passed by the legislature;

(c) the journals of the legislature;

(d) the great seal;

(e) all books, records, parchments, maps, and papers kept or deposited in the secretary of state's office pursuant to law.

(2) All records included in subsection (1) may be kept and reproduced in accordance with rules adopted by the secretary of state in consultation with the state records committee provided for in 2-15-1013.

(3) The state records committee created by 2-15-1013 may approve the disposal of original records once those records are reproduced as provided for in subsection (2), unless disposal takes the form of transfer of records. Reproduction is not necessary for transferred records. The reproduction or certified copy of a record may be used in place of the original for all purposes, including as evidence in any court or proceeding, and has the same force and effect as the original record.

(4) The secretary of state shall prepare enlarged typed or photographic copies of the records whenever their production is required by law.

(5) At least two copies shall be made of all records reproduced as provided for in subsection (2). The secretary of state shall place one copy in a fireproof storage place and shall retain the other copy in the office with suitable equipment for displaying a record by projection to not less than its original size and for preparing for persons entitled to copies.

(6) All duplicates of all records shall be identified and indexed.

#### 2-6-112. *Concealment of public hazards prohibited — concealment of information related to settlement or resolution of civil suits prohibited*

(1) This section may be cited as the "Gus Barber Antisecrecy Act".

(2) As used in this section, "public hazard" means a device, instrument, or manufactured product, or a condition of a device, instrument, or manufactured product, that endangers public safety or health and has caused injury, as defined in 27-1-106.

(3) Except as provided in this section, a court may not enter a final order or judgment that has the purpose or effect of concealing a public hazard.

(4) Any portion of a final order or judgment entered or written final settlement agreement entered into that has the purpose or effect of concealing a public hazard is contrary to public policy, is void, and may not be enforced. This section does not prohibit the parties from keeping the monetary amount of a written final settlement agreement confidential.

(5) A party to civil litigation may not request, as a condition to the production of discovery, that another party stipulate to an order that would violate this section.

(6) This section does not apply to:

- (a) trade secrets, as defined in 30-14-402, that are not pertinent to public hazards and that are protected pursuant to Title 30, chapter 14, part 4;
- (b) other information that is confidential under state or federal law; or
- (c) a health care provider, as defined in 27-6-103.

(7) Any affected person, including but not limited to a representative of the news media, has standing to contest a final order or judgment or written final settlement agreement that violates this section by motion in the court in which the case was filed.

(8) The court shall examine the disputed information or materials in camera. If the court finds that the information or materials or portions of the information or materials consist of information concerning a public hazard, the court shall allow disclosure of the information or materials. If allowing disclosure, the court shall allow disclosure of only that portion of the information or materials. If allowing disclosure, the court shall allow disclosure of only that portion of the information or materials necessary or useful to the public concerning the public hazard.

(9) This section has no applicability to a protective order issued under Rule 26(c) of the Montana Rules of Civil Procedure or to any materials produced under the order. Any materials used as exhibits may be publicly disclosed pursuant to the provisions of subsections (7) and (8).

## PART 2. PUBLIC RECORDS MANAGEMENT

### 2-6-201. Purpose

The purpose of this part is to create an effective records management program for executive branch agencies of the state of Montana and political subdivisions by establishing guidelines and procedures for the efficient and economical control of the creation, utilization, maintenance, and preservation of state and local records.

### 2-6-202. Definitions

As used in this part, the following definitions apply:

(1)

(a) "Public records" includes:

(i) any paper, correspondence, form, book, photograph, microfilm, magnetic tape, computer storage media, map, drawing, or other document, including copies of the record required by law to be kept as part of the official record, regardless of physical form or characteristics, that:

(A) has been made or received by a state agency to document the transaction of official business;

(B) is a public writing of a state agency pursuant to 2-6-101(2)(a); and

(C) is designated by the state records committee for retention pursuant to this part; and

(ii) all other records or documents required by law to be filed with or kept by any agency of the state of Montana.

(b) The term includes electronic mail sent or received in connection with the transaction of official business.

(c) The term does not include any paper, correspondence, form, book, photograph, microfilm, magnetic tape, computer storage media, map, drawing, or other type of document that is for reference purposes only, a preliminary draft, a telephone messaging slip, a routing slip, part of a stock of publications or of preprinted forms, or a superseded publication.

(2) "State records committee" or "committee" means the state records committee provided for in 2-15-1013.

### 2-6-203. Secretary of state's powers and duties

(1) In order to insure the proper management and safeguarding of public records, the secretary of state shall undertake the following:

(a) establish guidelines for inventorying, cataloging, retaining, and transferring all public records of state agencies;

(b) review and analyze all state agency filing systems and procedures and approve filing system equipment requests;

(c) establish and operate the state records center, as authorized by appropriation, for the purpose of storing and servicing public records not retained in office space;

(d) gather and disseminate information on all phases of records management, including current practices, methods, procedures, and devices for the efficient and economical management of records;

(e) operate a central microfilm unit which will microfilm, on a cost recovery basis, all records approved for filming by the office of origin and the secretary of state; and

(f) approve microfilming projects and microfilm equipment purchases undertaken by all state agencies.

(2) Upon request, the secretary of state shall assist and advise in the establishment of records management procedures in the legislative and judicial branches of state government and shall, as required by them, provide services similar to those available to the executive branch.

### 2-6-204. State records committee approval

The committee shall approve, modify, or disapprove the recommendations on retention schedules of all public records to determine which documents not included in the provisions of this part are to be designated public records and approve agency requests to dispose of such public records.

### 2-6-205. Preservation of public records

All public records are and shall remain the property of the state. They shall be delivered by outgoing officials and employees to their successors and shall be preserved, stored, transferred, destroyed, or disposed of and otherwise managed only in accordance with the provisions of this part.

### 2-6-206. Protection and storage of essential records

(1) In order to provide for the continuity and preservation of civil government, each elected and appointed officer of the executive branch shall designate certain public records as essential records needed for an emergency or for the reestablishment of normal operations after the emergency. A list of essential records must be forwarded to the secretary of state. The list must be reviewed from time to time by the elected or appointed officers to ensure its accuracy. Any changes or revisions must be forwarded to the secretary of state.

(2) Each elected and appointed officer of state government shall ensure that the security of essential records is accomplished by the most economical means possible. Protection and storage of essential records may be by vaulting, planned or natural dispersal of copies, storage in the state archives or in an alternative location provided pursuant to 2-6-211(2), or any other method approved by the secretary of state.

(3) Reproductions of essential records may be by photocopy, magnetic tape, microfilm, or other methods approved by the secretary of state.

### 2-6-207. Certified copies of public records

(1) The Montana historical society shall reproduce and certify copies of public records in its possession upon application of any citizen of this state.

(2) The certified copy of a public record has the same force in law as if made by the original custodian.

### 2-6-211. Transfer and storage of public records

(1) All public records not required in the current operation of the office where they are made or kept and all records of each agency, commission, committee, or any other activity of the executive branch of state government that may be abolished or discontinued must be, in accordance with approved records retention schedules, either transferred to the state records center or transferred to the custody of the state archives if the records are considered to have permanent administrative or historical value.

(2) Subject to approval by the secretary of state pursuant to 2-6-206, the state records center and the state archives may store transferred permanent public records in locations other than in the buildings occupied by the state records center or the state archives when it is in the best interests of the state.

(3) When records are transferred to the state records center, the transferring agency does not lose its rights of control and access. The state records center is

only a custodian of the agency records, and access is only by agency approval. Agency records for which the state records center acts as custodian may not be subpoenaed from the state records center but must be subpoenaed from the agency to which the records belong. Fees may be charged to cover the cost of records storage and servicing.

(4) If an agency does not wish to transfer records as provided in an approved retention schedule, the agency shall, within 30 days, notify the secretary of state and request a change in the schedule.

#### 2-6-212. Disposal of public records

(1) Except as provided in subsection (2), no public record may be disposed of or destroyed without the unanimous approval of the state records committee. When approval is required, a request for the disposal or destruction must be submitted to the state records committee by the agency concerned.

(2) The state records committee may by unanimous approval establish categories of records for which no disposal request is required, providing those records are retained for the designated retention period.

#### 2-6-213. Agency responsibilities and transfer schedules

Each executive branch agency of state government shall administer its records management function and shall:

(1) coordinate all aspects of the agency records management function;

(2) manage the inventorying of all public records within the agency for disposition, scheduling, and transfer action in accordance with procedures prescribed by the secretary of state and the state records committee;

(3) analyze records inventory data, examine and compare divisional or unit inventories for duplication of records, and recommend to the secretary of state and the state records committee minimal retentions for all copies of public records within the agency;

(4) approve all records disposal requests that are submitted by the agency to the state records committee;

(5) review established records retention schedules to ensure that they are complete and current; and

(6) officially designate an agency records custodian to manage the functions provided for in this section.

#### 2-6-214. Department of administration — powers and duties

(1) In order to ensure compatibility with the information technology systems of state government, the department of administration shall develop standards for technological compatibility for state agencies for records management equipment or systems used to electronically capture, store, or retrieve public records through computerized, optical, or other electronic methods.

(2) The department of administration shall approve all acquisitions of executive agency records management equipment or systems used to electronically capture, store, or retrieve public records through computerized, optical, or other electronic methods to ensure compatibility with the standards developed under subsection (1).

(3) The department of administration is responsible for the management and operation of equipment, systems, facilities, or processes integral to the department's central computer center and statewide telecommunications system.

### Open Meetings

#### Montana Code Annotated

#### Title 2. Government Structure and Administration

#### Chapter 3. Public Participation in Governmental Operations

#### Part 2. Open Meetings

#### 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 ab-

rogate their sovereignty to the agencies which serve them. Toward these ends, the provisions of the part shall be liberally construed.

#### 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.

#### 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.

#### 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.

#### 2-3-212. Minutes of meetings — public inspection

(1) Appropriate minutes of all meetings required by 2-3-203 to be open shall be kept and shall be available for inspection by the public.

(2) Such minutes shall include without limitation:

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

(b) a list of the individual members of the public body, agency, or organization in attendance;

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

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

#### 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 any such 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.

#### 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 his costs and reasonable attorneys' fees.

