MONTANA'S RIGHTS TO KNOW AND PARTICIPATE

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PART I - THE CONSTITUTION

Mont. Const., Art. II, Sect. 8

Right of participation. The public has the right to expect governmental agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision as may be provided by law.

Mont. Const., Art. II, Sect. 9

Right to know. No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

Mont. Const., Art. II, Sect. 10

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

Court Interpretation of Rights

There is an "inextricable association between the 'companion' provisions. For, as some commentators have noted, '[t]o participate effectively and knowledgeably in the political process of a democracy one must be permitted the fullest imaginable freedom of speech and one must be fully apprised of what government is doing, has done, and is proposing to do.' Larry M. and Deborah E. Elison, *Comments on Government Censorship and Secrecy*, 55 MONT. L. REV. 175, 177 (1994). Therefore, we will not analyze the two provisions in a vacuum . . . ." *Bryan v. Yellowstone County Elementary Sch. Dist. No. 2*, 2002 MT 264, ¶¶ 31, 46, 312 Mont. 257, 60 P.3d 381 ("In essence, when the District violated Bryan's right to know, it reduced what should have been a genuine interchange into a mere formality. Therefore, we hold that the District did not provide Bryan with a "reasonable opportunity" to participate at the . . . meeting.").

"Article II, Section 9 of the Montana Constitution is 'unambiguous and capable of interpretation from the language of the provision alone.'" *Krakauer v. State by and through Christian*, 2016 MT 230, ¶ 15, 384 Mont. 527, 381 P.3d 524.

"When the delegates adopted Article II, Section 9, they essentially declared a constitutional presumption that every document within the possession of public officials is subject to inspection." *Bryan*, ¶ 39. The court may interpret the constitutional "documents of public bodies" more broadly than the legislature has defined such concepts in statute. *Id*.

PART II – RIGHT TO KNOW

The right to know covers *both* the examination of documents and the observation of deliberations of "public bodies or agencies," so we must first determine what entities are covered.

Public Bodies or Agencies

Mont. Code Ann. § 2-6-1002 [Records: Definitions]

(10) "Public agency" means the executive, legislative, and judicial branches of Montana state government, a political subdivision of the state, a local government, and any agency, department, board, commission, office, bureau, division, or other public authority of the executive, legislative, or judicial branch of the state of Montana.

Compare . . .

Mont. Code Ann. § 2-3-203 [Open Meetings]

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.

<u>Opinions</u>

- The provisions of Art. II, Sec. 9, apply to local government. *Associated Press v. State*, 250 Mont. 299, 302, 820 P.2d 421, 422 (1991). Advisory boards,

commissions, and committees of those local governments are also subject to the right to know. *Bryan v. Yellowstone County Elementary School District No. 2*, 2002 MT 264; 51 Mont. A.G. Op. 12 (2005).

- Private corporations that have entered into contracts to carry out public functions and that are receiving public funds are considered public bodies. 42 Mont. A.G. Op. 168 (1987) (applying the right to the Daly Mansion Preservation Trust); 44 Mont. A.G. Op. 40 (1992) (applying the right to local chamber of commerce and visitors bureau that received and distributed bed tax funds).

- Quasi-governmental organizations that have authority to compel membership, assess members, and exercise powers of the conduct of members are treated as agencies. 46 Mont. A.G. 1 (1995) (applying right to Board of Directors of the Montana Self-Insurers Guaranty Fund).

- The right does not apply to meetings between individual employees that work for a public body or agency, although it likely applies to documents generated as a result of such meetings. *SJL Associates of Mont. Ltd. P'ship v. City of Billings*, 263 Mont. 142 (1993) (city employees could have private meetings with a building contractor). However, if staff engage in regular meetings designed to set policy or guide public body decisions, those meetings can become "public" under the following test:

> We conclude that under Montana's constitution and statutes, which must be liberally interpreted in favor of openness, factors to consider when determining if a particular committee's meetings are required to be open to the public include: (1) whether the committee's members are public employees acting in their official capacity; (2) whether the meetings are paid for with public funds; (3) the frequency of the meetings; (4) whether the committee deliberates rather than simply gathers facts and reports; (5) whether the deliberations concern matters of policy rather than merely ministerial or administrative functions; (6) whether the committee's members have executive authority and experience; and (7) the result of the meetings. This list of factors is not exhaustive, and each factor will not necessarily be present in every instance of a meeting that must be open to the public. A proper consideration of these factors does not mandate that every internal department meeting meet the requirements of the open meeting laws. Meetings where staff report the result of fact gathering efforts would not necessarily be public. Deliberation upon those facts that have been gathered and reported, and the process of reaching decisions would be open to public scrutiny. The guiding principles are those contained in the constitution . . . *Associated Press v. Crofts*, 2004 MT 120.

Documents of Public Bodies or Agencies

Bryan v. Yellowstone County Elementary School District No. 2, 2002 MT 264:

> In *Becky* . . . this Court acknowledged that "the Montana Constitution does not define 'documents ... of ... public bodies.' " We noted that the definition of "public writings," contained in § 2-6-101(2), MCA, [repealed in 2015] proved useful in interpreting the constitutional language. However, we then departed somewhat from the narrowly crafted definition of "public writings" and stated:
>
> > Although "documents of public bodies" is not defined in the Montana Constitution, it must reasonably be held to mean **documents generated or maintained by a public body which are somehow related to the function and duties of that body**.
>
> *Becky* . . . . Therefore, while we did discuss the "public writings" factors delineated in § 2-6-101(2), MCA, [repealed in 2015] we ultimately interpreted the constitutional "documents of public bodies" much more broadly than the legislative construct.

Mont. Code Ann. § 2-6-1002 [Records: Definitions]

(11) "Public information" means information prepared, owned, used, or retained by any public agency relating to the transaction of official business, regardless of form, except for confidential information that must be protected against public disclosure under applicable law.

(13) "Public record" means public information that is: (a) fixed in any medium and is retrievable in usable form for future reference; and (b) designated for retention by the state records committee, judicial branch, legislative branch, or local government records committee.

Opinions

- "The Constitutional Convention Bill of Rights Committee, which reviewed article II, section 9 of the Constitution, deleted the word 'public' from the original section allowing examination of public documents 'to avoid tying the viability of this provision to the 1895 legislative efforts [currently Mont. Code Ann. § 2-6-101] to define public and private writings.' The Committee went on to comment that '[the statutory] list of public writings is admirably broad; however, using this type of statutory construction is dangerous when one is attempting to

establish a public right to know.' IV 1972 Mont. Const. Conv. 631-32 (1981)." 45 Mont. A.G. Op. 17 (1993).

Records Procedures

Mont. Code Ann. § 2-6-1003. **Access to public information.** (1) Except as provided in subsections (2) and (3), every person has a right to examine and obtain a copy of any public information of this state.

Mont. Code Ann. § 2-6-1012. Management of public records -- disposal and destruction. (1) (a) Each public officer is responsible for properly managing the public records within the public officer's possession or control through an established records management plan that satisfies the requirements of this chapter.

Mont. Code Ann. § 2-6-1006. Public information requests -- fees. (1) A person may request public information from a public agency. A public agency shall make the means of requesting public information accessible to all persons.

(2) Upon receiving a request for public information, a public agency shall respond in a timely manner to the requesting person by: (a) making the public information maintained by the public agency available for inspection and copying by the requesting person; or (b) providing the requesting person with an estimate of the time it will take to fulfill the request if the public information cannot be readily identified and gathered and any fees that may be charged pursuant to subsection (3).

(3) A public agency may charge a fee for fulfilling a public information request. Except where a fee is otherwise provided for by law, the fee may not exceed the actual costs directly incident to fulfilling the request in the most cost-efficient and timely manner possible. The fee must be documented. The fee may include the time required to gather public information. The public agency may require the requesting person to pay the estimated fee prior to identifying and gathering the requested public information.

(4) A public agency is not required to alter or customize public information to provide it in a form specified to meet the needs of the requesting person.

(5) If a public agency agrees to a request to customize a records request response, the costs of the customization may be included in the fees charged by the agency.

(6) (a) The secretary of state is authorized to charge fees under this section. The fees must be set and deposited in accordance with 2-15-405. The fees must be collected in advance.

(b) The secretary of state may not charge a fee to a member of the legislature or public officer for any search relative to matters pertaining 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.

Mont. Code Ann. § 2-6-1009. Written notice of denial. (1) A public agency that denies an information request to release information or records shall provide a written explanation for the denial.

Privacy & Confidentiality

Mont. Code Ann. § 2-6-1002 [Records: Definitions]

(1) "Confidential information" means information that is accorded confidential status or is prohibited from disclosure as provided by applicable law. The term includes information that is:

(a) constitutionally protected from disclosure because an individual privacy interest clearly exceeds the merits of public disclosure;

(b) related to judicial deliberations in adversarial proceedings;

(c) necessary to maintain the security and integrity of secure facilities or information systems owned by or serving the state; and

(d) designated as confidential by statute or through judicial decisions, findings, or orders.

Mont. Code Ann. § 2-6-1501. Definitions. [Protection of Personal Information]

(2) "Individual" means a human being.

Mont. Code Ann. § 2-6-1003. [Safety and Security Exceptions]. (2) A public officer may withhold from public scrutiny information relating to individual or public safety or the security of public facilities, including public schools, jails, correctional facilities, private correctional facilities, and prisons, if release of the information jeopardizes the safety of facility personnel, the public, students in a public school, or inmates of a facility. A public officer may not withhold from public scrutiny any more information than is required to protect individual or public safety or the security of public facilities.

(3) The Montana historical society may honor restrictions imposed by private record donors as long as the restrictions do not apply to public information. All restrictions must expire no later than 50 years from the date the private record was received. Upon the expiration of the restriction, the private records must be made accessible to the public.

Mont. Code Ann. § 2-6-1502. [Protection Procedures]. (1) Each state agency that maintains the personal information of an individual shall develop procedures to protect the personal information while enabling the state agency to use the personal information as necessary for the performance of its duties under federal or state law.

Mont. Code Ann. § 44-5-103(3) [Definition of "confidential criminal justice information"]

"Confidential criminal justice information" means:
(a) criminal investigative information;
(b) criminal intelligence information;
(c) fingerprints and photographs;
(d) criminal justice information or records made confidential by law; and
(e) any other criminal justice information not clearly defined as public criminal justice information.

Mont. Code Ann. § 44-5-303(1) [Dissemination of confidential criminal justice information]

Except as provided in subsections (2) through (4), dissemination of confidential criminal justice information is restricted to criminal justice agencies, to those authorized by law to receive it, and to those authorized to receive it by a district court upon a written finding that the demands of individual privacy do not clearly exceed the merits of public disclosure. Permissible dissemination of confidential criminal justice information under this subsection includes receiving investigative information from and sharing investigative information with a chief of a governmental fire agency organized under Title 7, chapter 33, or fire marshal concerning the criminal investigation of a fire.

Opinions

- Public bodies should make specific findings concerning privacy or confidentiality of a particular document before withholding it. *Great Falls Tribune v. Montana Pub. Serv. Comm'n*, 2003 MT 359.

- Non-human entities do not enjoy privacy rights under the right of privacy provision of the Montana Constitution. They may, however, be able to protect proprietary and other trade secrets information under other constitutional rights. *Great Falls Tribune v. Montana Pub. Serv. Comm'n*, 2003 MT 359.

- In determining whether a constitutionally recognized privacy interest exists the following factors must be considered: (1) whether the person involved had a subjective or actual expectation of privacy; and (2) whether society is willing to recognize that expectation as reasonable. *Worden v. Montana Bd. of Pardons & Parole*, 1998 MT 168, ¶ 21, 289 Mont. 459, 962 P.2d 1157. Moreover, the legislature cannot specify certain documents to which the right to know does not apply. *Id.* at ¶ 22. The only limitation placed on the right to know is the right of the individual to personal privacy. *Id.* at ¶ 26. Thus, blanket exceptions cannot be placed on classes of information, and a case-by-case analysis is necessary to determine whether a privacy interest outweighs the public's right to know. *Id.* at ¶¶ 29-31.

- A presumption exists in favor of the constitutional right to examine documents of public bodies absent a showing of individual privacy rights sufficient to override the right to know. *T.L.S. v. Mont. Advocacy Program*, 2006 MT 262, ¶ 28, 334 Mont. 146, 144 P.3d 818. Once determined to be public documents subject to public inspection, the party asserting individual privacy rights carries the burden in establishing the privacy rights exceed the merits of public disclosure. *Id.* at ¶¶ 28, 31.

- Privacy interests encompass both legitimate trade secrets and matters related to individual safety. *Great Falls Tribune Co. v. Day*, 1998 MT 133, ¶ 33, 289 Mont. 155, 959 P.2d 508. *But cf. Great Falls Tribune v. Montana Pub. Serv. Comm'n*, 2003 MT 359 (holding non-human entities do not enjoy privacy rights; however, they may be able to protect proprietary and other trade secrets information under other constitutional rights).

- *Allstate Ins. Co. v. City of Billings*, 239 Mont. 321, 325, 780 P.2d 186, 188 (1989) (Mont. Const. Art. II § 9 alone is sufficient to satisfy "authorized by law" contained in Mont. Code Ann. § 44-5-303(1) with respect to the dissemination of confidential criminal justice information).

- Public officials have a reduced expectation of privacy relating to information that goes to their ability to perform their duties of public office because they hold a position of public trust. *Jefferson County v. Montana Standard*, 2003 MT 304; *see also Svaldi v. Anaconda-Deer Lodge County*, 325 Mont. 365, 106 P.3d 548 (2005) (defendant's right to privacy was outweighed by the public's right to know

because the defendant's position as a school teacher was "one of public trust" and complaint alleged assault of school children, which called into question teacher's ability to carry out duties); *Bozeman Daily Chronicle v. City of Bozeman Police Dept.,* 260 Mont. 218, 859 P.2d 435 (1993) (public's right to know outweighed police officer's right to privacy because police officers hold position of public trust and allegation of sexual intercourse without consent was a breach of that public trust); *In Re Petition of Missoula Cnty. Pub. Schools, Missoula Cnty. v. Bitterroot Star* (2015), 345 P.3d 1035, 378 Mont. 451 (supervisor of public school district's food services, a position of public trust, who had allegedly engaged in fraudulent or illegal financial transactions could not assert a right to privacy with respect to investigatory documents related to her alleged "misuse of public money, misuse of public facilities, and careless management practices."). *Id.* at 1039, ¶ 14. In *Bitterroot Star*, other documents related to a medical evaluation and beneficiary designation forms that had no relation to the investigation were properly not disclosed. *Id*.

- In *Billings Gazette v. Billings* (2011), 362 Mont. 522, 267 P.3d 11, a Police Department Senior Administrative Coordinator who was authorized to use a police department credit card, was investigated for allegations that she had made thousands of dollars of personal purchases using the card. *Billings Gazette,* ¶¶ 3, 25. Following the investigation, the City issued a 16–page "due process letter" notifying the employee of a due process hearing to respond to the allegations against her, and detailing the evidence gathered during the investigation. *Billings Gazette,* ¶ 4. The City denied the Billings Gazette's request for a copy of the investigative documents. The Supreme Court concluded that the employee was in a position of "public trust," that she did not have a reasonable expectation of privacy, and that, therefore, the documents should be released. *Id.*, ¶ 22.

- *See, however, Billings Gazette v. City of Billings* (2013), 313 P.3d 129, 372 Mont. 409. In that case, five City employees were disciplined for using work computers during work hours to view pornography. The Montana Supreme Court held that the five employees' positions were not those of public trust requiring that their names be released to the public (in ¶ 42 of its opinion, the Court noted that the City employees were not "elected officials, department heads or high management"). Accordingly, these employees were entitled to claim a protected privacy right to their disciplinary files. *Id*., ¶ 50. The Court noted that the particular internet usage was not part of the employees' public duties. *Id.*, ¶ 42.

- The Court favors *in camera* review and redaction as a method of determining whether privacy interests should be protected prior to disclosure. *See, e.g., Krakauer v. State by and through Christian,* 2016 MT 230, ¶ 42, 384 Mont. 527, 381 P.3d 524:

> Having concluded that the records in question in this case appear to fall under the "Personally Identifiable Information" protection granted by FERPA, and also having concluded that FERPA and state statute provide an exception for release of information pursuant to a lawfully issued court order, we remand this case to the District Court for an in camera review of the documents in question. After giving due consideration to the unique interests at issue in this case, as discussed herein, the District Court will re-conduct **the constitutional balancing test** and determine what, if any, documents may be released and what redactions may be appropriate. As noted above, the exception to FERPA that allows for release of documents pursuant to a court order requires advance notice to the affected student or parents, and a district court must comply with this directive before releasing protected information.

- In writer's action seeking release of a university athlete's educational records relating to an alleged sexual assault, the district court erred in concluding that the student lacked a right to privacy because the student demonstrated an actual expectation of privacy in his educational records pursuant to the university's student code, FERPA and Mont. Code Ann. § 20-25-515, as well as a lack of notice of possible public disclosure of those records. Further, redacting the student's personal information from his records was futile and would not serve to protect the enhanced privacy interest because the request itself pertained to the student and identified him. Thus, under the facts of the case, disclosure of the records was not warranted because the student's right to privacy outweighed the public's right to know. *Krakauer v. State*, 2019 MT 153, 396 Mont. 247, 445 P.3d 201.

- *Montana Environmental Information Center v. City of Great Falls*, Order on Summary Judgment-Release of Documents, Cause No. CDV-07-614 (Mont. 8th Jud. Dist., Mar. 8, 2010) (denying company request for injunction preventing disclosure because company asserted blanket privacy and attorney-client privilege over an extensive volume of documents that failed to meet the legal standards governing privacy and privilege).

- *Nelson v. City of Billings*, 2018 MT 36, 390 Mont. 290. 412 P.3d, 1058. A city's documents protected by the attorney-client or attorney-work-product privileges were not subject to disclosure under Mont. Const. art. II, § 9 because the Framers intended that those preexisting privileges would carry forward as essential components of the preexisting legal system regardless of the broad, clear, and unambiguous language of Mont. Const. art. II, § 9; [2]-The district court correctly held that documents protected by those privileges were not subject to release under art. II, § 9 because the city and its insurer produced detailed privilege logs from which the validity of their privilege claims could be evaluated, and the

requestor's position that the government could not withhold privileged documents would be antithetical to the public interests the privileges serve and would render the privileges meaningless.

Defining Open Meetings

Mont. Code Ann. § 2-3-201 [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 abdicate their sovereignty to the agencies which serve them. Toward these ends, the provisions of the part shall be liberally construed.

Mont. Code Ann. § 2-3-203 [Open Requirement and 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 . . . must be open to the public. . . .

Mont. Code Ann. § 2-3-202 [Quorum Required]

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.

Opinions

- The gathering of a quorum of County Commissioners to discuss, either among themselves or with members of the public, issues over which the County Commission has authority is a meeting subject to open meeting laws. This rule applies even when the discussions are informal work sessions or information-gathering sessions. 47 Mont. A.G. Op. 13 (1998).

- This right extends to informal meetings between a governing body and its staff. 41 Mont. A.G. Op. 151 (1985).

- This right includes meetings by telephone and email. *Board of Trustees, Huntley Project School Dist. No. 24, Worden v. Bd. of County Comm'rs*, 186 Mont. 148, 606 P.2d 1069 (1980) (telephone meeting); *Anderson and Boulder Monitor v. Jefferson High School District No. 1 School Board*, DV-2011-133, Montana Fifth Judicial District Court, Jefferson County (allegation that e-mail exchanges between school board members in which decision was made amounted to violation of Art. II, Section 9 and Mont. Code Ann. § 2-3-203. Case settled with school board admitting violation and paying plaintiffs' attorney's fees).

Open Meeting Procedures & Closures

Mont. Code Ann. § 2-3-203 [Open Requirement and Exceptions]

. . . (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. . . .

(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.

Mont. Code Ann. § 2-3-212 [Record of Meeting]

(1) Appropriate minutes of all meetings required by 2-3-203 to be open must be kept and must be available for inspection by the public. If an audio recording of a meeting is made and designated as official, the recording constitutes the official record of the meeting. If an official recording is made, a written record of the

meeting must also be made and must include the information specified in subsection (2).

(2) Minutes must include without limitation:

(a) the date, time, and place of the meeting;
(b) a list of the individual members of the public body, agency, or organization who were in attendance;
(c) the substance of all matters proposed, discussed, or decided; and
(d) at the request of any member, a record of votes by individual members for any votes taken.

(3) If the minutes are recorded and designated as the official record, a log or time stamp for each main agenda item is required for the purpose of providing assistance to the public in accessing that portion of the meeting.

(4) Any time a presiding officer closes a public meeting pursuant to 2-3-203, the presiding officer shall ensure that minutes taken in compliance with subsection (2) are kept of the closed portion of the meeting. The minutes from the closed portion of the meeting may not be made available for inspection except pursuant to a court order.

Opinions

- Attorney-client privilege does not trump the right to know in situations where all litigants are public bodies. *Associated Press v. Bd. of Pub. Educ.*, 246 Mont. 386, 392, 804 P.2d 376, 379 (1991). But in a non-cite opinion, the Supreme Court appeared to indicate that where a client is a public body such as a municipal authority, the attorney-client, work-product and other evidentiary privileges exist. *See Nelson v. Mont. Municipal Ins. Authority of Helena* (2015), 353 P.3d 507, ¶¶ 12,13, 379 Mont. 537, ¶¶ 12,13).

- In *Citizens for Open Gov't v. City of Polson* (2015), 343 P.3d 584, 378 Mont. 293, the Polson City Commission held a closed executive session to meet with interview panels and to deliberate on the selection of a City Manager. In holding the closed executive session, the Commission did not determine that the demands of individual privacy (of the 5 applicants) clearly exceeded the merits of public disclosure. The Court stated that the Commission should have done so. *Id.* at 588, ¶ 17. However, the Court also held that, because the City allowed for public participation subsequent to the closed executive session, the district court did not abuse its discretion in not voiding the Commission's hiring decision, a decision that violated Montana's open meeting laws. *Id.* at 589, ¶ 29.

- In *Raap v. Bd. of Trs.*, 2018 MT 58, 391 Mont. 12, 414 P.3d 788, respondent school board (board) was not entitled to summary judgment that it lawfully closed its meeting based on third-party rights because it did not show the nature of third-party privacy interests or how they balanced against public disclosure to overcome the presumption of openness in Mont. Const. art. II, § 9 and Mont. Code Ann. § 2-3-203. The board also was not entitled to summary judgment that it lawfully closed its meeting under the litigation strategy exception in Mont. Code Ann. § 2-3-203(4) because it did not show its pending employee termination related to its defense against the employee's prior discrimination complaint.

PART III - RIGHT OF PARTICIPATION

Scope of Right

Mont. Code Ann. § 2-3-103 [Agency Duty to Provide Process]

(1) (a) Each agency shall develop procedures for permitting and encouraging the public to **participate in agency decisions** that are of significant interest to the public. The procedures must ensure **adequate notice and assist public participation** before a final agency action is taken that is of significant interest to the public. . . . [T]he agency may not take action on any matter discussed unless specific notice of that matter is included on an agenda and public comment has been allowed on that matter. Public comment received at a meeting must be incorporated into the official minutes of the meeting . . . .

Mont. Code Ann. § 2-3-102 [Definition of Agency and Action]

(1) "Agency" means any board, bureau, commission, department, authority, or officer of the state or local government authorized by law to make rules, determine contested cases, or enter into contracts . . .

(2) "Agency action" means the whole or a part of the adoption of an agency rule, the issuance of a license or order, the award of a contract, or the equivalent or denial thereof.

Mont. Code Ann. § 2-3-112 [Exceptions]

The provisions of 2-3-103 and 2-3-111 do not apply to:
(1) an agency decision that must be made to deal with an emergency situation affecting the public health, welfare, or safety;

(2) an agency decision that must be made to maintain or protect the interests of the agency, including but not limited to the filing of a lawsuit in a court of law or becoming a party to an administrative proceeding; or

(3) a decision involving no more than a ministerial act.

Opinions

- "Meetings" involving the consideration of matters of significant public interest, meaning decisions involving more than a ministerial act requiring no exercise of judgment, are subject to public participation mandates, including notice requirements and the opportunity for public participation in the decision making process. 47 Mont. A.G. Op. 13 (1998); *Jones v. County of Missoula, et al*., 330 Mont 205, 127 P3d 406 (2006).

- This right applies to local governments and advisory boards, commissions, and committees of those local governments when taking any action that is of significant interest to the public. 51 Mont. A.G. Op. 12 (2005).

Adequate Notice

Mont. Code Ann. § 2-3-104 [Forms of Acceptable Notice]

An agency shall be considered to have complied with the notice provisions of 2-3-103 if:

(1) an environmental impact statement is prepared and distributed as required by the Montana Environmental Policy Act, Title 75, chapter 1;

(2) a proceeding is held as required by the Montana Administrative Procedure Act;

(3) a public hearing, after appropriate notice is given, is held pursuant to any other provision of state law or a local ordinance or resolution; or

(4) a newspaper of general circulation within the area to be affected by a decision of significant interest to the public has carried a news story or advertisement concerning the decision sufficiently prior to a final decision to permit public comment on the matter.

Opinions

- Extension of health care benefits to domestic partners is an issue of significant public interest, requiring notice and opportunity for public participation. Notice

provided 24 hours prior to a regularly scheduled meeting was sufficient. *Jones v. County of Missoula*, 2006 MT 2, 330 Mont 205, 127 P3d 406.

Form of Participation

Mont. Code Ann. § 2-3-111. [Opportunity to Submit Views] (1) Procedures for assisting public participation must include a method of affording interested persons reasonable opportunity to submit data, views, or arguments, orally or in written form, prior to making a final decision that is of significant interest to the public. . . . (2) . . . the hearing must be held in an accessible facility in the impacted community or area or in the nearest community or area with an accessible facility.

Mont. Code Ann. § 2-3-301 [Electronic Comment]

(1) An agency that accepts public comment pursuant to a statute, administrative rule, or policy, including an agency adopting rules pursuant to the Montana Administrative Procedure Act or an agency to which 2-3-111 applies, shall provide for the receipt of public comment by the agency by use of an electronic mail system.

Opinions

- Relying on information not of record in reaching a decision violates the public's right of participation. *Bryan v. Yellowstone County Elementary School District No. 2*, 2002 MT 264, 312 Mont. 257, 60 P.3d 381 (withholding of comparison spreadsheet upon which school closure decision was based violated rights to know and participate).

- Failure to address public comments before issuing a decision violates the public's right to participate and renders it meaningless. *North 93 Neighbors, Inc. v. Board of County Comm'rs of Flathead County*, 2006 MT 132, 332 Mont. 327, 137 P.3d 557.

- Failure to note when a subdivision application is complete, and to note what documents comprise what parts of a subdivision application, violates procedural requirements and creates an incoherent record that undermines the public's right to participate. *Citizens for Responsible Development v. Bd. of County Commrs. for Sanders County*, 2009 MT 182, 351 Mont. 40 (2009).

Participation in Rulemaking

Mont. Code Ann. § 2-4-102(11) [Definition of "rule"]

(a) "Rule" means each agency regulation, standard, or statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedures, or practice requirements of an agency. The term includes the amendment or repeal of a prior rule.

(b) The term does not include:

(i) statements concerning only the internal management of an agency or state government and not affecting private rights or procedures available to the public, including rules implementing the state personnel classification plan, the state wage and salary plan, or the statewide accounting, budgeting, and human resource system;

(ii) formal opinions of the attorney general and declaratory rulings issued pursuant to 2-4-501;

(iii) rules relating to the use of public works, facilities, streets, and highways when the substance of the rules is indicated to the public by means of signs or signals;

(iv) seasonal rules adopted annually or biennially relating to hunting, fishing, and trapping when there is a statutory requirement for the publication of the rules and rules adopted annually or biennially relating to the seasonal recreational use of lands and waters owned or controlled by the state when the substance of the rules is indicated to the public by means of signs or signals; or

(v) uniform rules adopted pursuant to interstate compact, except that the rules must be filed in accordance with 2-4-306 and must be published in the ARM.

Opinions

- *Friends of the Wild Swan v. Clinch and Mont. Dept. of Nat. Resources and Conservation*, Order on Motions for Summary Judgment (Cause No. BDV 2000-369, Montana First Judicial Court, Lewis and Clark County). Where state agency "guidance" applies to all timber sales on state lands and constitutes the implementation of the agency's approach to old growth management on state forest lands, it implements and interprets the agency's old-growth retention and timber harvesting policy and must be adopted as a rule under MAPA.

- *Rosebud County v. Dept. of* Revenue, 257 Mont. 306, 849 P.2d 177 (1993) (hearings under MAPA must be held prior to adoption of administrative rule).

- *State v. Vainio*, 306 Mont. 439, 35 P.3d 948 (2001) (administrative agency may not rely on informal policy as basis for criminal prosecution; policy must be adopted as a rule under MAPA to be effective).

- A Montana Fish, Wildlife and Parks Commission press release announcing a meeting and detailing agenda materials for that meeting provided that the meeting's purpose was "to take final action on three land matters and to hear an update on the state's wolf hunting season." The press release explained that "[t]he wolf hunting update will include information on the 2012 season's harvest so far and additional information on the upcoming trapping season, which opens Dec. 15. The wolf hunting and trapping season will close Feb. 28, 2013," Finally, the press release noted that FWP would be discussing: "Wolf Harvest Update—Informational"; "Review of 2012 Wolf Harvest"; and "Action Needed—Informational." Against the concern of several Commission members, the Commission voted to close wolf hunting and trapping in certain areas within Park County. In *Citizens for Balanced Use v. Mont. Fish, Wildlife & Parks Com'n.* (2014), 331 P.3d 844, 848, ¶ 19, 376 Mont. 202, 210, the Montana Supreme Court affirmed the district court's award of attorneys' fees to Plaintiffs based on its issuance of a preliminary injunction that prohibited the Commission, pursuant to Article II, Section 8 and Article II, Section 9, and applicable implementing legislation, from enforcing its vote.

PART IV - ENFORCEMENT

Standing to Assert Rights

"[A] complaining party must satisfy the following criteria to establish standing: (1) the party must clearly allege past, present, or threatened injury to a property or civil right; and (2) the alleged injury must be distinguishable from the injury to the public generally, but the injury need not be exclusive to the complaining party. Stated another way, to satisfy the standing requirement, a plaintiff must have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens presentation of issues." *Bryan v. Yellowstone County Elementary Sch. Dist. No. 2*, 2002 MT 264, ¶ 20, 312 Mont. 257, 60 P.3d 381. In *Bryan*, the Court also concluded it was not fatal that one parent in a school closure proceeding has originally requested the records, and it was another parent who later filed suit, because all the parents were "working in concert." *Id.*, ¶ 21.

In *Fleenor v. Darby School Dist.* (2006), 128 P.3d 1048, 331 Mont. 124, the Montana Supreme Court held that being a tax payer does not by itself provide citizens standing to assert that their rights to participate and to know have been violated

(local school board of trustees hired a new superintendent and did not provide public notice of the votes and decisions leading to the hiring).

However, the Supreme Court recently overruled this decision in *Schoof v. Nesbit* (2014), 316 P.3d 831, 373 Mont. 226. In *Schoof*, a resident of Custer County filed suit against the Board of County Commissioners alleging that the Board violated his right to participate and right to know when it decided in an unannounced meeting to allow elected county officials to receive cash in lieu of county contributions to a group health insurance plan. As in *Fleenor*, the citizen did not allege a more particularized injury than any other member of the public. This time, however, the Court, in overruling *Fleenor*, held that it had misapplied the standing requirement that "persons who fail to allege any personal interest or injury, beyond that common interest of all citizens and taxpayers, lack standing." *Id.*, ¶ 20. The Court concluded that Schoof, both due to the gravity of the rights being asserted, and his status as a resident of Custer County, possessed standing. *Id.*, ¶ 25. (*Schoof* was extended in *Shockley v. Cascade Cnty.* (2014), 336 P.3d 375, 377, ¶ 10, 376 Mont. 493, 495 (citizen of one county has standing to assert right to know in another county)).

The rights extend to persons outside Montana. *Krakauer v. State by and through Christian*, 2016 MT 230, ¶ 15, 384 Mont. 527, 381 P.3d 524.

Remedies

Mont. Code Ann. § 2-3-114 [Participation]

(1) The district courts of the state have jurisdiction to set aside an agency decision under this part upon petition of any person whose rights have been prejudiced. A petition pursuant to this section must be filed within 30 days of the date on which the person learns, or reasonably should have learned, of the agency's decision.

(2) A person alleging a deprivation of rights who prevails in an action brought in district court to enforce the person's rights under Article II, section 8, of the Montana constitution may be awarded costs and reasonable attorney fees.

Mont. Code Ann. § 2-3-213 [Open Meeting]

Any decision made in violation of 2-3-203 may be declared void by a district court having jurisdiction. A suit to void a 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.

Mont. Code Ann. § 2-3-221 [Records or Open Meeting]

A person alleging a deprivation of rights who prevails in an action brought in district court to enforce the person's rights under Article II, section 9, of the Montana constitution may be awarded costs and reasonable attorney fees.

Mont. Code Ann. § 2-6-1009. [Appealing Denial of Records Request]

(1) A public agency that denies an information request to release information or records shall provide a written explanation for the denial.

(2) If a person who makes an information request receives a denial from a public agency and believes that the denial violates the provisions of this chapter, the person may file a complaint pursuant to the Montana Rules of Civil Procedure in district court.

(3) A person alleging a deprivation of rights who prevails in an action brought in district court to enforce the person's rights under Article II, section 9, of the Montana constitution or under the provisions of Title 2, chapter 6, parts 10 through 12, may be awarded costs and reasonable attorney fees.

Mont. Code Ann. § 45-7-401 [Official Misconduct]

(1) A public servant commits the offense of official misconduct when in an official capacity the public servant commits any of the following acts:
. . . .
(e) knowingly conducts a meeting of a public agency in violation of 2-3-203.
. . . .
(4) A public servant who has been charged [with official misconduct] may be suspended from office without pay pending final judgment. Upon final judgment of conviction, the public servant shall permanently forfeit the public servant's office. Upon acquittal, the public servant must be reinstated in office and must receive all backpay.

Opinions

- Party challenging agency/body decision to withhold documents from public must exhaust administrative remedies before the agency/body prior to seeking relief in state district court. *Great Falls Tribune v. Montana Pub. Serv. Comm'n*, 2003 MT 359; *Good Sch. Missoula, Inc. v. Missoula County Pub. Sch. Dist. No. 1*, 2008 MT 231; *Jarussi v. Board of Trustees of School Dist. No. 28, Lake County*, 204 Mont. 131, 664 P.2d 316 (1983).

- Fee awards are discretionary. A party is deemed to prevail even if the court does not award all of the remedy requested. *Motta v. Philipsburg Sch. Bd. Trustees, Dist. No. 1*, 2004 MT 256.

- So, too, is a decision to void an agency action for violations of open meeting law within the sound discretion of the district court. *Id*.; *Worden v. Board of County Com'rs of Yellowstone County*, 1980, 186 Mont. 148, 606 P.2d 1069; *see also e.g., Goyen v. City of Troy,* 276 Mont. 213, 915 P.2d 824 (1996) (meeting that violated open meeting law will not result in voidance of final decision when that final decision was not based upon actions taken at illegal meeting).

- A successful remedy of a meeting in violation of the open meetings law generally cures the previous violation and thereby renders moot potential controversies about the illegality. *Zunski v. Frenchtown Rural Fire Dept. Bd. of Trustees*, 309 P.3d 21, 371 Mont. 552 (2013) (holding that the the governing body is required, at a minimum, to re-adopt the challenged action in a manner that comports with the law). In *Bryan*, the court explained when voiding a decision is appropriate: "While the District did notify the public about the April 9, 2001, meeting and allow for public comment prior to reaching its decision, the public was not provided all of the information presented to the School Board for its consideration. Therefore, the constitutional violation "taint[ed] the entire process from start to finish." . . . To simply declare a constitutional violation and yet allow the decision to stand would set a regrettable precedent. In the future, we presume that the prospect of negligible consequences would invoke concomitantly negligible deterrence. Here, we simply are not prepared to sacrifice Bryan's constitutionally prescribed right to know and participate for the sake of convenience. Therefore, we declare the School Board's closure decision null and void and hold that the District Court erred when it failed to do so." *Bryan v. Yellowstone County Elementary Sch. Dist. No. 2*, 2002 MT 264, ¶ 52, 312 Mont. 257, 60 P.3d 381.

- An agency decision reached in violation of the open meeting laws may be voided. But a court cannot void actions taken by advisory committees, even though they

are subject to the open meeting law, because their actions are not final agency decisions. *Citizens for a Better Flathead v. Board of County Commissioners of Flathead County*, 381 P.3d 555, 385 Mont. 156 (2016) (holding that "county planning board was not an agency . . . board's duty was to recommend that county adopt, reject, or take some other action with regard to the proposed revisions to county's growth policy, and board's recommendations were not binding on county."); *Allen v. Lakeside Neighborhood Planning Committee*, 308 P.3d 956, 371 Mont. 310 (2013); *Common Cause of Montana v. Statutory Committee to Nominate Candidates for Com'r of Political Practices*, 263 Mont. 324, 868 P.2d 604 (1994).

- Form of action should be "take form of simple petition to void an action or petition for declaratory judgment" under MCA §§ 2-3-114, 2-3-213. *Worden v. Board of County Com'rs of Yellowstone County*, 186 Mont. 148, 606 P.2d 1069 (1980) (discouraging use of writ of mandate).

- A subsequent valid open meeting that cured a previous illegal meeting renders the cause of action for an open meeting violation moot. *Zunski v. Frenchtown Rural Fire Dept. Bd. of Trustees*, 309 P.3d 21, 371 Mont. 552 (2013).

RESOURCES

- The Montana FOIA Hotline (406)529-6494 (Contact: Ian Marquand, Chairman) + http://www.montanafoi.org/

- National Freedom of Information Coalition: http://www.nfoic.org/montana-foi-resources

- Montana Attorney General: https://doj.mt.gov/agooffice/right-to-know-and-right-of-privacy-laws/

- The Open Government Guide by Mike Meloy (Reporter's Committee for Freedom of the Press): https://www.rcfp.org/open-government-guide/montana/

- Snyder, Fritz. *The Right to Participate and the Right to Know in Montana*, 66 MONT. L. REV. 297 (2005).

- UM School of Journalism, *Access in Montana—Frequently Asked Questions: A Guide for Journalists and Citizens* (2005, Clem P. Work ed.).

- UM Law Library
  KF5753 Open Meetings; Access to Public Records
  KFM9458-9462 Montana Freedom of Information; CLE Materials