

The Basics of
Open Meetings
And
Public Participation

The first section in what is commonly referred to as “The Montana Open Meeting Act” sums up the policy considerations upon which the open meeting and public participation requirements of both the Montana Constitution and Montana Statutes are based, saying:

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 this state do not wish to abdicate their sovereignty to the agencies which serve them. Toward these ends, the provisions of this part shall be liberally construed. (Section 2-3-201 MCA)

For those who think this is some sort of newfangled concept, it should be noted that this section was adopted in 1967 and has not been amended since. Similarly, the requirement set out in Section 7-5-2125 MCA that all meetings of the Board of County Commissioners be open to the public has been on the books unchanged since 1895.

The framers of the 1972 Constitution gave constitutional stature to the principles set out in Section 2-3-201 by including in Article II of the Constitution Sections 8 and 9, which require, respectively, that the public be given the opportunity to participate in agency actions prior to a decision (agency is defined as including local governments) and that all persons have the opportunity to examine documents and observe the deliberations of public bodies and agencies. It should be stressed that these provisions work together and that a failure to timely provide to the public documents under Section 9 may result in a violation of the public’s right to participate and also of the open meeting statute. (See, for example, *Bryan v. District*, 2002 MT 264, 60 P.3d 381 (Mont. 2002), where a failure to provide

documents under Article II, Sec. 9 was held to also result in a violation of the right to participate provisions of Article II, Sec. 8).

What is a Meeting? The basics are simple. Section 2-3-202 MCA defines a meeting in the following terms:

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 jurisdiction.

Section 2-3-203 MCA makes it clear that the requirements of the open meeting law apply to state agencies, to political subdivisions, and to “organizations or agencies supported in whole or in part by public funds or expending public funds.”

Some examples. The obvious: whenever the commission (or other public body) meets to discuss business, the meeting is a public meeting which must be open to the public. Less obvious: with a 3-member commission, whenever one commissioner calls another commissioner to discuss some item of county business, the telephone call is a public meeting because there is a quorum (2 out of 3 commissioners) convened electronically (the telephone) and a discussion of county business. Less obvious still: the commissioners appoint a citizen committee (or a committee consisting of elected officials) to consider and recommend to them the purchase of equipment or the development of policy. Meetings of the committee are public meetings. *Assoc. Press v. Crofts*, 2004 MT 120, 89 P.3d 971 (2004); but note the Open Meeting Law does not extend to a meeting between employees and a private contractor. See also *SLJ of Mont. v. Billings*, 263 Mont. 142, 867 P.2d 1084 (1993).

What does an Open Meeting require? First, it requires that the public be admitted. The only constitutional exception to this requirement is when closure of a meeting is required to protect individual privacy. A second exception, closure to discuss litigation strategy, is authorized by statute but, at least in my view, this exception is constitutionally suspect and should be used sparingly. Closure will be discussed in more detail below.

Second, an open meeting requires notice. While no specific notice requirements are set out in the Open Meeting Law, the Montana Supreme Court has been quite clear and specific on this point, holding that notice is an essential requirement for an open meeting. *Bd. of Trustees v. County Comm.'s*, 186 Mont. 148, 606 P.2d 1069 (1980). The specifics on Notice are further discussed below.

Third, an open meeting requires minutes (Section 2-3-212 MCA.) While these minutes do not need to be elaborate, they must include, at a minimum: (1) the date, time, and place of the meeting; (2) a list of the members present; (3) the substance of all matters proposed, discussed, or decided; and (4) at the request of any member, a record by individual members of any votes taken.

Fourth, an open meeting requires an agenda item that permits any member of the public to comment on any public matter that is not on the agenda and which is within the agency's jurisdiction. [See Section 2-3-103(1)(a)]. You may not, however, take action on an item which is not on an agenda. Public comment received under this section must be included in the minutes of the meeting. You do have the ability to limit the time allowed for comment under this section and to limit public comment to subjects over which you have jurisdiction.

What Notice is Required? Notice consists of two parts: first, notice that you will be meeting at a specified time and place; and second, notice of the matters to be discussed and/or decided.

For many actions, the Legislature has specifically required that notice be given in a specific manner and contain specific information. When you are dealing with a matter for which the Legislature has established specific notice requirements, obviously these requirements must be complied with; and if you do comply, you can be confident you have met the statutory and constitutional requirements for open meetings. If you wish, you may give additional notice. For example, some zoning decisions require only notice by posting at least 10 days prior to the action. If you think the property owners need or deserve more notice, you can supplement the required notice by publication or mailings to the affected property owners. Let me be very clear, however, that this additional notice is a supplement to and not a

substitute for the statutorily required notice. If you chose to give supplemental notice, you should do so in all like cases.

For actions for which the Legislature has not established specific notice procedures, there is still a requirement for notice of the time, place, and subject matter of the meeting. Even though you are required by Section 7-5-2122 MCA to establish by resolution a regular meeting date (or dates), such a resolution in and of itself is not sufficient, since it will not include the detail of items to be discussed at those meetings which is required to make the public's right to know and to participate effective. The Attorney General has ruled (following a decision by District Court Judge Hegel) that merely establishing a regular meeting time and place does not fully comply with constitutional and statutory open meeting and public participation requirements.

In 47 Mont. Op. Atty. Gen. No 13, Attorney General Joe Mazurek offered the following guidance on notice:

Having anticipated my response to your first question, you have also asked for "appropriate guidelines and procedures for counties to follow in determining which matters are of 'significant public interest' so as to require public notice." As discussed above, the public participation statutes require that the public be allowed to participate in the resolution of matters of significant public interest. Thus, matters of significant public interest require notice, as well as an opportunity for the public to participate in the decision-making process prior to the final decision being made.

The term *significant public interest* is neither defined in the statutes regarding public participation nor discussed in the legislative minutes pertaining to those statutes. There is also no Montana Supreme Court decision which defines *significant public interest* in this context.

The 1997 legislature defined the term "significant interest to the public" for purposes of the Montana Administrative Procedure Act (Mont. Code Ann. §§ 2-4-101 to -711) as "agency actions under this chapter regarding matters that the agency knows to be of widespread citizen interest. These matters include issues involving a substantial fiscal impact to or controversy involving a particular class or group of individuals." Mont. Code Ann. § 2-4-102(12).

The legislature's stated intention that this definition be limited to

agency actions under the Montana Administrative Procedure Act precludes reliance on the definition to interpret the term *significant public interest* as it is used in the Public Participation in Governmental Operations Act. Mont. Code Ann. § 1-2-107; Department of Rev. of State of Mont. v. Gallatin Outpatient Clinic, Inc., 234 Mont. 425, 430, 763 P.2d 1128, 1130-31 (1988).

Additionally, the Montana Administrative Procedure Act uses the term *significant interest to the public* to describe subject matter for which a hearing is required before a rule can be adopted, amended or repealed. Public participation is nonetheless permitted through the opportunity to comment in writing, whether the subject matter is of *significant interest to the public* or not. Conversely, the term *significant public interest* is used in the Public Participation in Governmental Operations statutes to describe when public participation of any sort is required. Mont. Code Ann. § 2-3-111(1).

The term *significant public interest* as used in this opinion is limited at the very least by Mont. Code Ann. § 2-3-112(3), which excepts "a decision involving no more than a ministerial act" from the public participation mandates. A ministerial act is generally performed pursuant to legal authority, and requires no exercise of judgment.

[A] duty is to be regarded as ministerial when it . . . has been positively imposed by law, and its performance required at a time and in a manner or upon conditions which are specifically designated; the duty to perform under the conditions specified not being dependent upon the officer's judgment or discretion. State ex rel. Workers' Compensation Div. v. District Court, 246 Mont. 225, 229, 805 P.2d 1272, 1275 (1990).

At the other end of the spectrum, District Judge Dorothy McCarter found the extension of a school superintendent's contract to be of *significant public interest* in Citizens for Accountability in Education v. Board of Trustees, School District No. 9, No. ADV-92-450, slip op. at 6 (Mont. 1st Jud. Dist. Oct. 7, 1992). Similar conclusions were reached in Texas where the termination of a school superintendent and a police chief were found to be of "special public interest" requiring "full and adequate notice" to the public. Cox Enter., Inc. v. Board of Trustees of Austin Indep. Sch. Dist., 706 S.W.2d 956, 959 (Tex. 1986) (school superintendent); Mayes v. City of De Leon, 922 S.W.2d 200, 203 (Tex. 1996) (police chief).

Judge Hegel's decision in Seliski v. Rosebud County is also instructive. "Since the Public Participation in Government [Act] is implementing a constitutional mandate, in developing and applying such procedures, the Commissioners should resolve any doubts about whether a decision is 'of significant interest' or as to the adequacy of the notice in favor of increased citizen participation." Seliski, slip op. at 4.

"When interpreting statutes, it is fundamental that words and phrases are to be given their plain, ordinary and usual meaning." Common Cause of Mont., 263 Mont. at 330, 868 P.2d at 608 (citations omitted). Webster's *Third International Dictionary* defines *significant* as "having a meaning," "full of import," and "deserving to be considered." *Public* means "of or pertaining to the people," "relating to, belonging to or affecting a community at large," and is "opposed to private." The term *interest*, when used in this context, is defined as a "concern" or the "state of being concerned or affected." Thus, an action of *significant public interest* is an action which has meaning to and deserves to be considered by the people it affects.

Applying Judge Hegel's instructions to resolve any doubt in favor of increased public participation, any non-ministerial decision or action of a county commission which has meaning to or affects a portion of the community requires notice to the public and the opportunity for the public to participate in the decision-making process.

I recognize the challenges these requirements may create for county commissions. I surveyed Montana's counties seeking to identify an existing procedure for providing notice which complies with Montana's public participation laws while not unduly impeding county commissions. The results ranged from less compliance than in Blaine County to very detailed procedural mandates.

Several of the responding counties have developed a process which appears to balance the public's rights with its commission's need to conduct business and serve the public. Those counties set regular meetings at a recurring time each week or month, for example 9 a.m. the first and third Mondays of each month. An agenda is prepared and posted sufficiently in advance to give notice to the public of the topics to be discussed and actions to be considered by the commission. Forty-eight hours is generally considered sufficient to notify the public of contemplated action. Citizens for Accountability, slip op. at 6.

Often the notice and agenda are published by the local press. New items are not added to the agenda but carried over to the next regularly scheduled meeting. Matters of significant public interest are reserved for those regularly scheduled meetings. Commissions may also schedule additional or special meetings to discuss matters of significant public interest by issuing a resolution and providing two days' posted public notice. Mont. Code Ann. § 7-5-2122(2).

These commissions keep the public apprised of their day-to-day activity and action on routine matters in various ways. A common, and informative, process is to post and distribute the commission's weekly calendar and to post or make available each commissioner's daily calendar. Commissioners are encouraged to avoid discussing issues of significant public interest when part of a quorum and to inform the public that issues of significant public interest will not be resolved outside the regularly scheduled meeting.

Judge Hegel endorsed similar processes in Seliski:

The [Public Participation in Government] Act requires the commissioners to develop policies and procedures to determine whether a particular decision is of "significant interest to the public," or whether it is merely a daily housekeeping function. The Act also requires the commissioners to adopt procedures to provide adequate notice to the public of all such significant decisions as they arise. This may very well mean placing such items on an agenda for a meeting to be held on a regular day each month, or at a special meeting date, with posted notice of the meeting date and agenda, and/or publication of notice. The amount of notice given should increase with the relative significance of the decision to be made. The procedures must be designed to encourage and assist citizen participation and must provide adequate notice.

Id., slip op. at 5.

My thoughts on an appropriate policy that meets the requirements of the Montana Statutes and Constitution are set out below.

First, establish a general framework for meeting as required by Section 7-5-2122 MCA which will establish the commissioners' regular meeting day or, for full-time commissioners, a general weekly schedule.

For each meeting shown on the schedule, establish a method for developing an agenda and establish a time when the agenda for a particular meeting closes. Typically, any commissioner should have the power to put an item on any agenda. In addition, it would probably be wise to allow other elected officials or staff to add items to the agenda. Some staff person or officer (perhaps the Clerk and Recorder or the Commissioners' secretary) should be responsible for collecting agenda items from those authorized to add items to the agenda and for compiling the agenda.

On the date when the agenda closes, the person responsible for collecting the agenda items should prepare an agenda which should then, at a minimum, be posted at an established location. Generally, this posting should occur at least two full days prior to the meeting (this suggestion is based on the legislatively established notice requirement for special school board meeting) and should be considered a minimum for items of significant public interest.

Special meetings should be noticed in the same way that the agendas for established meetings are noticed. If it is not perfectly clear from the announcement of the special meeting what is to be discussed, then provide a brief explanation so the public will know what is to be discussed.

For any items that have minimal public interest, such as signing contracts and dealing with administrative matters which are internal to the county or preliminary to any action by the commission (such as directing staff to gather information or requesting information from other officials or agencies), it is permissible to give less notice – perhaps 24 hours – but care should be taken to limit this to what are truly administrative matters. The shorter notice is justified only for items which are not of substantial public interest. If you have any reason to believe there may be public interest in a particular discussion or action, then give at least two days' notice.

It is important to remember there is no such thing as too much notice. No one has ever been found in violation of the law by giving more notice or opportunity to be heard than is required. You do, however, run the risk of being second-guessed on

what is a matter of significant public interest if you give too little notice. In addition to posting the agendas, I would recommend e-mailing copies to the local media and to anyone else who has expressed an interest in being informed about commission business in general or about specific issues. If you have a County web site, posting the agenda on the web site is also a good idea. On major issues, you may wish to publish notice of the meeting even if you are not required to do so.

It is absolutely critical that you follow your established procedures and that you make the procedures known to the public. If you have issues with whether adequate notice was given, you should consider whether to continue the hearing or postpone the decision to make sure that everyone who has an interest in the matter has an opportunity to participate.

When can a Meeting be Closed? The most common basis for closure of a meeting that would otherwise be open to the public is closure to protect an individual's right to privacy. [See Section 2-3-203(3) MCA].

When the matters being discussed in a meeting relate to matters of individual privacy, the presiding officer may make a determination that the demands of individual privacy outweigh the merits of public disclosure and, unless the right of privacy is waived by the individual whose privacy is being protected, close the meeting.

To determine whether individual privacy justifies closure of a meeting, the Montana courts employ a balancing test. The first part of the test is whether the person has a subjective expectation of privacy in the matters being discussed. The second part of the test is whether that subjective expectation is one which society is willing to recognize. If the determination is that there is a privacy interest that society is willing to recognize, the question then becomes whether protection of that interest outweighs the merits of public disclosure.

If you think the test is rather indefinite, you are right; but it does at least give you a way to organize your thinking on whether to close the meeting.

As you apply the test, the first thing to bear in mind is that the protection is of

individual privacy, which may include such matters as health information, personal family matters, educational records, employment-related disciplinary information, payroll deductions, or allegations of misconduct. Typically, an individual will feel these are private matters and will have an expectation of privacy in them. Generally, these are matters that society is willing to recognize as areas where the individual's expectation of privacy is objectively reasonable.

Individual privacy does not extend to the salary or compensation paid a public employee, to a decision on the award of a contract, or to any other expenditure of public funds or mistakes made in the course of performing official duties. For example, if the Treasurer's office makes a mistake that costs the County money, there is no individual privacy interest which would justify closure of the meeting. The employee who made the mistake may have a privacy interest in the personnel file that reflects the disciplinary action taken as a result of the mistake; but the mistake itself is public.

One of the most common errors is closing a meeting on the grounds of individual privacy when the individual being discussed isn't present and perhaps doesn't even know they are being discussed. Typically, this happens when someone shows up, perhaps at a meeting or just at the office, and wants to talk about some wrongdoing by some county employee. If you were paying attention to the discussion above, you know there is a problem, in that the matter wasn't on an agenda and there was no notice, so there is no way you can take any action. An even bigger problem with closing the meeting is that the right of privacy does not belong to the county – it belongs to the individual being discussed; and that individual must be given the right to waive his or her right before you close the meeting. My recommendation in these cases is to note that the individual being discussed isn't there, that the comments may involve individual privacy issues, and to move that the matter be discussed at some later time when notice can be given and everyone can be present.

I want to be very clear that this limitation should not be used to avoid consideration and resolution of allegations. If there is an allegation of wrongdoing, it is your duty to get to the bottom of the matter. If the allegations are not well-founded, you can clear the individual's name; and if the allegations are well-founded, you most

assuredly don't want to be associated with what will look like a cover-up. There is an old saying that even paranoids have enemies, and it does not hurt to remember that even someone you conceive to be a trouble-maker or a wing-nut may have the facts on their side from time to time.

The only other grounds for closure of a meeting are discussions of litigation strategy, however, this basis for closure is not available for litigation between public entities. Accordingly, if you find yourself in a lawsuit with another public agency; for example, the State or a school district, you are going to have to discuss your strategy in public. For litigation with private parties, I would use the closure sparingly and only with the advice of counsel. You should also remember that the exemption is to discuss litigation strategy, which means that there must be actual pending litigation. You cannot close a meeting just because you think that you might be sued.

There are some strong policy reasons (mandatory settlement conferences, for example) that should make the courts reluctant to bar closure on this basis; but it is not explicitly recognized as a basis for closure in the Constitution and, hence, is subject to challenge. The best way to keep this exemption is not to abuse it.

Emergencies. All this 'notice' nonsense – what about how to deal with an emergency? If you have a true emergency – a fire, flood, earthquake, or major storm event, then you can meet on short or even no notice and take action. Make sure the minutes specify the nature of the emergency and limit the meeting to those actions which have to be taken immediately to address the specific emergency. I want to stress that poor planning on your part does not constitute an emergency. For example, a school district that thought to accomplish a construction project with its own forces did not have an emergency when it failed to complete the project before school was to reopen in the fall (the issue was whether the school could hire a contractor to complete the project without going through the bidding process because the reopening of school as scheduled constituted an emergency). Similarly, the meeting must be limited to what is immediately necessary. Thus, if the County Jail burns down, you may have to act immediately to house the prisoners; but you don't need to provide for a new jail long term at the emergency meeting.

Conclusion. We're all public servants, which means we serve the public, even the really annoying parts of the public. Giving notice and letting the public have its say before you act avoids controversy and problems in the long run. All of us have had our differences with the press, but giving the press everything it is entitled to on the front end of the process will also build trust and avoid unnecessary controversy. If you act like a burglar, people may think that you are.

In any event, open meetings and proper public notice are more than just good ideas – they are the law. If you violate these standards, you are opening up your county to liability, which means that not only will you spend more time in court than you ever wanted to; you will also have your decision voided and have the obligation to pay the complainants' attorney fees for your trouble. Depending on the action taken, you may also have additional liability as a result.