

OFFICE OF THE CITY ATTORNEY

435 Ryman • Missoula MT 59802
(406) 552-6020 • Fax: (406) 327-2105
attorney@ci.missoula.mt.us

Legal Opinion 2009-021

TO: John Engen, Mayor; City Council; Bruce Bender, CAO; Dept. City Clerk; Ellen Buchanan; Anne Guest; Donna Gaukler; Steve King; Mark Muir; Mike Brady; Doug Waters; Roger Millar; Mike Barton; Denise Alexander; Mary McCrea

CC: Dept. Atty.

FROM: Jim Nugent

DATE: December 10, 2009

RE: Public Right to Observe Public Body Deliberations unless Chair Determines an Individual Privacy Right Outweighs Public Right to Know

FACTS:

There has been some public official misunderstanding or confusion about the public's constitutional and statutory rights to observe the deliberations of any Montana municipal government public body.

ISSUE(S):

Does the public have the right to observe the deliberations of any municipal government public body?

CONCLUSION(S):

Both Montana's Constitution and Montana statutes explicitly provide that the public has a right to observe the deliberations of all public bodies of government, except when the demands of individual privacy clearly exceeds the merits of public disclosure.

LEGAL DISCUSSION:

Montana law expressly provides that deliberations of public bodies shall be conducted openly. Article II, Section 9 of Montana's Constitution entitled "Right to Know" provides:

Section 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. (Emphasis added.)

Article II, Section 10 of Montana's Constitution entitled "Right of Privacy" provides:

Section 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.

Title 2, Chapter 3, Part 2 MCA is entitled "Open Meetings". Section 2-3-201 MCA of this part provides:

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 abdicate their sovereignty to the agencies which serve them. Toward these ends, the provisions of the part shall be liberally construed. (Emphasis added.)

Section 7-1-4141 MCA of Montana Municipal government statutes provides that "All meetings of municipal governing bodies, boards, authorities, committees or other entities created by a municipality shall be open to the public except as provided in §2-3-203." (Emphasis added.)

A meeting is defined in §2-3-202 MCA as meaning:

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.

Section 2-3-203 MCA which is cross referenced to in Montana Municipal government statutes §7-1-4141 MCA quoted above states:

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. (Emphasis added.)

The Montana Supreme Court has indicated that in the context of §2-3-203(1) MCA the phrase "public or governmental bodies" means a group of individuals organized for a governmental or public purpose. (Emphasis added.) See Associated Press v. Crofts, 2004 MT 120, 321 Mont 193, 89 P.3d 971, 2004 Mont. LEXIS 195, paragraph 17; Common Cause v. Statutory Committee (1994) 263 Mont 324, at 330; 868 P.2d 604, at 608. Bryan v. District, 2002 MT 264, p.25, 312 Mont. 257, p.25, 60 P.3d 381, p.25.

The Montana Supreme Court in Associated Press v. Crofts, supra, at paragraphs 3-32 indicated that Montana's Constitution protects the public's right to observe the deliberations of public bodies stating:

".... Moreover, our constitution mandates that the deliberations of public bodies be open, which is more than a simple requirement that only the final voting be done in public. Therefore, we hold that the meetings of the Policy Committee were meetings within the meaning of §2-3-202 MCA."

"Article II, Section 9, of the Montana Constitution provides that no person shall be deprived of the right to observe the deliberations of public bodies. Government operates most effectively, most reliable, and is most accountable when it is subject to public scrutiny. ... The Policy Committee is a public body which deliberates on substantive issues that are the public's business. ..." (Emphasis added.)

CONCLUSION(S):

Both Montana's Constitution and Montana statutes explicitly provide that the public has a right to observe the deliberations of all public bodies of government, except when the demands of individual privacy clearly exceeds the merits of public disclosure.

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Jim Nugent, City Attorney

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