

OFFICE OF THE CITY ATTORNEY

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

Legal Opinion 2010-009

TO: John Engen, Mayor; City Council; Bruce Bender; Ginny Merriam, Communications Director; Marty Rehbein, City Clerk; Nikki Rogers, Senior Deputy City Clerk; Kelly Elam, City Clerk's Office; Erin Scott, Neighborhood Liaison; Ellen Buchanan, MRA Director; Chris Behan, MRA; Donna Gaukler, Parks & Recreation Director; Anne Guest, Parking Commission Director; Steve King, Public Works Director; Kevin Slovarp, City Engineer; Doug Waters, Cemetery Director; Brentt Ramharter, Finance Director; Phil Smith, Bike-Ped Coordinator; Don Verrue, Building Division Superintendent; Mark Muir, Assistant Chief of Police; Mike Brady, Assistant Chief of Police

CC: Legal Staff

FROM: Jim Nugent, City Attorney

DATE June 7, 2010

RE: All city government boards, committees and commissions as well as any subcommittees must abide by Montana's right to know and public participation open meeting constitutional provisions and state statutes

FACTS:

Recently it was discovered a committee had been created by a public body city commission that was being utilized to make suggestions to the city commission but was not operating in full compliance with Montana's public meeting, participation and record keeping laws.

ISSUE:

Are committees of public body commissions required to comply with Montana's public meeting, participation and record keeping laws?

CONCLUSION:

Yes, generally all meetings of government bodies including municipal boards, committees, subcommittees and commissions must be conducted in public pursuant to Montana's right to know and public participation open meeting and public record keeping laws.

LEGAL DISCUSSION:

Mont. Code Ann. § 2-3-203(6) of Montana's open meeting laws expressly provides that "[a]ny committee or subcommittee appointed by a public body . . . for the purpose of conducting business that is within the jurisdiction of that agency is subject to the requirements of this section."

Further, Mont. Code Ann. § 2-3-212 provides that appropriate minutes of all public meetings must be kept and made available for public discussion. This statute also sets forth minimum requirements for what must be included in the minutes.

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.

Montana's constitutional right of participation and right to know provisions expressly establish rights of citizens to participate in as well as to observe the deliberations of all public bodies including boards, committees and commissions as well as their committees and subcommittees. Mont. Const. art. II, §§ 8 and 9 provide:

Section 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. (Emphasis added.)

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.)

Local governments are political subdivisions of state government and all boards, committees and commissions are a public body of local municipal government. Further, any committee or subcommittee is subject to Montana's public participation, meeting and record keeping laws.

Montana's open meeting law, pursuant to Mont. Code Ann. § 2-3-201 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.)

Mont. Code Ann. § 2-3-203 of Montana's public participation open meeting law provides:

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.)

Also, pursuant to Mont. Code Ann. § 2-3-103, public participation also includes at each public meeting allowing public comment on any public matter that is not on the agenda of the meeting and that is within the jurisdiction of the public entity conducting the meeting.

2-3-103. Public participation -- governor to ensure guidelines adopted.

(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. The agenda for a meeting, as defined in [2-3-202](#), must include an item allowing public comment on any public matter that is not on the agenda of the meeting and that is within the jurisdiction of the agency conducting the meeting. However, the 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, as provided in [2-3-212](#).

(b) For purposes of this section, "public matter" does not include contested case and other adjudicative proceedings.

(2) The governor shall ensure that each board, bureau, commission, department, authority, agency, or officer of the executive branch of the state adopts coordinated rules for its programs. The guidelines must provide policies and procedures to facilitate public participation in those programs, consistent with subsection (1). These guidelines must be adopted as rules and published in a manner so that the rules may be provided to a member of the public upon request.

CONCLUSION:

Yes, generally all meetings of government bodies including municipal boards, committees, subcommittees and commissions must be conducted in public pursuant to Montana's right to know and public participation open meeting and public record keeping laws.

OFFICE OF THE CITY ATTORNEY

/s/

Jim Nugent
City Attorney

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