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Legal Opinion 2012-010

TO: John Engen, Mayor; City Council; Bruce Bender, Marty Rehbein, Ginny Merriam, City Boards and Commissions, City Department and Division Heads

CC: Legal Staff

FROM: Jim Nugent, City Attorney

DATE: August 29, 2012

RE: Montana Law requires that deliberations of public bodies and public agencies be conducted openly pursuant to the public's right to observe deliberations of public bodies and public agencies.

FACTS:

The purpose of this legal opinion is to remind everyone that pursuant to Montana law the public has a right to observe the deliberations of public bodies and public agencies.

ISSUE:

Does Montana law specifically address the public's right to observe the deliberations of public bodies and public agencies?

CONCLUSION:

Yes, Montana Constitutional provision Article II, section 9, provides that no person shall be deprived of the right to observe the deliberations of public bodies. Further, section 2-3-201 MCA provides that the actions and deliberations of all public agencies shall be conducted openly.

LEGAL DISCUSSION:

Montana law clearly provides that the deliberations of public bodies and public agencies are required to be open to the public; so that the public may observe the deliberations of the public body or public agency. Further, the Montana Supreme Court in *Associated Press v. Crofts*, 2004 MT 120, 321 Mont. 193, 89 P 3d 971, 2004 Mont. LEXIS 195 (2004) in paragraph 22, stated that Montana's Constitution and statutes must be liberally interpreted in favor of openness.

Article II, section 9 of the Montana Constitution entitled “Right to know” provides as follows:

“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)

Montana state open meeting law also requires that deliberations of all public bodies and public agencies be conducted openly. Section 2-3-201 MCA of Montana’s open meetings law 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 people’s 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)

Subsections 2-3-203(1)(2) and (6) MCA identify what entities must have open meetings as follows:

“2-3-303. 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, bureau, commissions, agencies of the state, or any political subdivision of the state 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.

. . . .

(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)

Pursuant to the Associated Press v. Crofts decision, supra, the Montana Supreme Court liberally construed the meaning of public body and public agency to include policy meetings that the commissioner of higher education had with other university system senior employees, stating in paragraph 17 that:

“We have previously determined that IN THE CONTEXT OF SECTION 2-3-203(1), MCA (2001), THE PHRASE ‘PUBLIC OR GOVERNMENTAL BODIES’ MEANS A GROUP OF INDIVIDUALS ORGANIZED FOR A GOVERNMENTAL OR PUBLIC PURPOSE. . . . (citations omitted). .. THEREFORE, PURSUANT TO SECTION 2-3-203(1) MCA (2001), ANY GROUP OF INDIVIDUALS ORGANIZED FOR A GOVERNMENTAL OR PUBLIC PURPOSE MUST ALLOW THEIR MEETINGS TO BE OPEN TO THE PUBLIC.” (emphasis added)

The Montana Supreme Court later in *Associated Press v., Crofts* in paragraph 22 stated in pertinent part that:

“Consideration of Montana’s particular constitutional and statutory schemes leads us to the conclusion that Crofts interpretation of what constitutes a public body is too narrow. WE CONCLUDE THAT UNDER MONTANA’S CONSTITUTION AND STATUES, WHICH MUST BE LIBERALLY CONSTRUED, 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. . . .” (emphasis added)

It is also important in this context to note that pursuant to Article II, section 8 of the Montana Constitution the public also has a Constitutional as well as a statutory state law right to a reasonable opportunity to participate in public government decision making prior to a final decision being made. Article II, section 8 of the Montana Constitution provides that:

“RIGHT OF PARTICIPATION. THE PUBLIC HAS A RIGHT TO EXPECT GOVENMENTAL 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)

Also, see sections 2-3-101, 2-3-103, 7-1-4142 and 7-1-4143 MCA setting forth provisions of Montana state law pertaining to the public’s right to a reasonable opportunity to participate in government operations prior to final decisions being made.

Finally it should also be noted that the Montana Supreme Court in *Associated Press v. Crofts*, supra, in paragraph 31 stated that: “OUR CONSTITUION 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.” (emphasis added).

CONCLUSION:

Yes, Montana Constitutional provision Article II, section 9, provides that no person shall be deprived of the right to observe the deliberations of public bodies. Further, section 2-3-201 MCA provides that the actions and deliberations of all public agencies shall be conducted openly.

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/s/

Jim Nugent, City Attorney
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