

# OFFICE OF THE CITY ATTORNEY

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

## Legal Opinion 2012-024

**TO:** Mayor John Engen, City Council, Bruce Bender, Marty Rehbein, Brentt Ramharter, City Department Heads

**CC:** Legal Department Staff

**FROM:** Jim Nugent, City Attorney

**DATE** December 20, 2012

**RE:** Pursuant to the Montana Constitution and State Law, deliberations of public bodies must be conducted openly and the public must be provided the ability to observe the deliberations of a public body.

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## FACTS:

A December 19, 2012, Missoulian newspaper article at pages B-1 and B-2 pertaining to potential future city council meeting seating arrangements also included comments from at least one citizen to the effect that the best thing the city council could do “is probably go out and have a beer together before or after and get some work done that way as well”, plus a management consultant reportedly indicates that “dinner and drinks aren’t a bad idea.”. While there might be some ambiguity as to what type of work getting done was being referenced in the Missoulian article, it is imperative and important for city elected officials to understand that deliberations of a public body, such as a city council or any of its committees or subcommittees, must be conducted with opportunity for public participation and the governing body’s deliberations shall be open and observable by the public citizenry. Any dinner and/or drink gathering of a quorum of a city council subcommittee, committee or the city council general assembly itself, at which substantive city council work of significant interest to the public is discussed must be publicly noticed as well as publicly observable with reasonable opportunity for public participation.

## ISSUE(S):

What public openness requirements exist pursuant to Montana law with respect to the deliberations of a public body?

## CONCLUSION(S):

Article II, section 9 of Montana’s Constitution establishes a public right to know that includes a public Constitutional right to observe the deliberations of a public body. Further, pursuant to Montana’s open meeting laws, section 2-3-201 MCA requires that “deliberations of all public

agencies be conducted openly”. Also, Montana municipal law, section 7-1-4141 MCA requires that all meetings of any municipal governing bodies and committees, etc.; “shall be open to the public”.

### **LEGAL DISCUSSION:**

There are two imperative important Constitutional and statutory public citizen rights that exist in Montana with respect to meetings of public bodies or their committees or subcommittees. These two public citizen rights are (1) the “right of participation” in public body decision making prior to any final decisions being made and (2) the right to observe deliberations of all public bodies or agencies. Montana Constitutional provisions in Article II, section 8 “RIGHT TO PARTICIPATE” and section 9 “RIGHT TO KNOW” provide as follows:

“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 FINAL DECISION as may be provided by law. (emphasis added)

The Montana Code Annotated Annotations, volume 1, page 174 states that Article II, section 8 of the 1972 Montana Constitution was a new provision creating a right of the people to participate in the decision making process of state and local government. 51 Attorney General Opinion 12 (2005) held that any municipal entity, including an advisory board, commission and committee of the city council, is subject to the citizen right of public participation in any action of significant interest to the public.

Pursuant to 47 Attorney general Opinion 13 (1998) it was held that the gathering of a quorum of county commissioners of a county to discuss, either among themselves or with members of the public, issues over which the county commissioners have authority is a meeting subject to Montana’s open meeting laws. It was further indicated that meetings involving consideration of matters of significant public interest are subject to public participation mandates including notice and public participation requirements. A meeting involving consideration of matters of significant interest to the public was deemed to mean decisions involving more than a ministerial act requiring the exercise of no judgment. Also, see 42 Attorney General Opinion 51 (1988).

“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)

The Montana Code Annotated Annotations, volume 1, page 179 states that Article II, section 9 of the 1972 Montana Constitution was a new provision as well. Associated Press v. Crofts, 2004 MT 120, 321 M 193, 89 P 2d 971 (2004) is a Montana Supreme Court case that discusses the required liberal construction of Montana’s open meeting laws. The facts involved the Commissioner of Higher Education conducting policy meetings with senior employees of members of the university system; but not conducting them openly. The Montana Supreme

Court held that the meetings had to be open to the public indicating that the state legislature created open meeting laws with the intent that deliberations of state agencies be conducted openly and to that end that the open meeting laws be liberally construed. The university system policy group met to deliberate on matters of substance that were the public's business and were therefore considered to be a public body whose meetings were required to be open to the public.. The Montana Supreme Court indicated that Montana's Constitution protects the public's right to observe the deliberations of public bodies and the policy committee meetings were required to be open to the public.

The Montana State Legislature has also adopted Montana state laws implementing both the Montana Constitutional citizen right to participate prior to a public body making a final decision as well as the right to observe deliberations of all public bodies which public body meetings are required to conduct their deliberations openly. Title 2, chapter 3 Montana Code Annotated is entitled "PUBLIC PARTICIPATION IN GOVERNMENTAL OPERATIONS". With respect to the public citizen right to participate in meetings of public bodies, Part 1 of this chapter is entitled "NOTICE AND OPPORTUNITY TO BE HEARD. Section 2-3-101 MCA of this part provides:

"2-3-101. LEGISLATIVE INTENT. The legislature finds and declares pursuant to the mandate of Article II, section 8, of the 1972 Montana constitution that legislative guidelines should be established to secure to the people of Montana their CONSTITUTIONAL RIGHT TO BE AFFORDED REASONABLE OPPORTUNITY TO PARTICIPATE IN THE OPERATION OF GOVERNMENTAL AGENCIES PRIOR TO THE FINAL DECISIONS OF THE AGENCY. (emphasis added)

Section 2-3-103 MCA pertaining to public participation provides as follows:

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.

With respect to the citizen right to observe the deliberations of public bodies, part 2 of title 2, chapter 3 MCA is entitled “OPEN MEETINGS”. Section 2-3-201 MCA 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)

Section 2-3-203 MCA pertaining to meetings of public bodies being open to the public provides as follows:

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.

It is also important to note that subsection 2-3-203(6) MCA quoted above requires that committee and subcommittee meetings of a public body be open to the public for public participation as well as for the public to be able to observe the deliberations of the committee or subcommittee of the public body.

It should also be noted that Montana municipal government law pursuant to sections 7-1-4141, 7-1-4142 and 7-1-4143 MCA also requires that all meetings of municipal public bodies “shall be open to the public” and that the municipality shall develop procedures for permitting and encouraging public participation in public body public meetings with respect to items of significant interest to the public. Sections 7-1-4141, 7-1-4142 and 7-1-4143 MCA provide as follows:

7-1-4141. Public meeting required. (1) 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.

(2) Appropriate minutes shall be kept of all public meetings and shall be made available upon request to the public for inspection and copying. (emphasis added)

7-1-4142. Public participation. Each municipal governing body, committee, board, authority, or entity, in accordance with Article II, section 8, of the Montana constitution and Title 2, chapter 3, shall develop procedures for permitting and encouraging the public to participate in decisions that are of significant interest to the public.

7-1-4143. Participation. In any meeting required to be open to the public, the governing body, committee, board, authority, or entity shall adopt rules for conducting the meeting, affording citizens a reasonable opportunity to participate prior to the final decision.

**CONCLUSION(S):**

Article II, section 9 of Montana’s Constitution establishes a public right to know that includes a public Constitutional right to observe the deliberations of a public body. Further, pursuant to Montana’s open meeting laws, section 2-3-201 MCA requires that “deliberations of all public agencies be conducted openly”. Also, Montana municipal law, section 7-1-4141 MCA requires that all meetings of any municipal governing bodies and committees, etc.; “shall be open to the public”.

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Jim Nugent, City Attorney

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