

# Don't get left in the DARK

Montana's 1972 Constitution gives citizens the right to inspect public records and attend meetings of public agencies at all levels of state and local government. Read this brochure to make sure that you know your rights under the Constitution, state law and case law.



## Access in Montana

Frequently Asked Questions:  
A guide for journalists and citizens

**Montana Freedom of Information Hotline**  
(406) 442-8670 • [www.montanafoi.org](http://www.montanafoi.org)

# Access in Montana

## *Frequently Asked Questions: A guide for journalists and citizens*

Journalists and other citizens frequently run up against closed doors in their search for information and access, often because they're simply not aware of their rights. The University of Montana School of Journalism and the Montana Freedom of Information Hotline offer this guide to educate journalists and citizens about public access to state, federal and local government.

Questions and responses in this guide were culled from questions journalists have already asked the Montana FOI Hotline, operated by a coalition of news media to monitor, ensure and enforce the public's right to know. The Helena-based Meloy Law Firm answers a full range of questions on government access at 406-442-8670 or by email at [mike@meloylawfirm.com](mailto:mike@meloylawfirm.com).

This guide should in no way substitute for legal guidance from the FOI Hotline. The purpose of the FAQ is to serve as a guide that will answer basic access questions. It should also help journalists narrowly define inquiries they might make to the Hotline. Complex issues should always be referred to either the Hotline or the news organization's legal counsel.

The Montana sections of law governing right-to-know issues are referred to below without the citation from the Montana Code Annotated (MCA). All code sections are to that Code, e.g. §2-3-103.

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# OPEN MEETINGS

## *What laws govern access to meetings?*

Montana's 1972 Constitution has two key right-to-know sections that are the strongest in the nation in guaranteeing citizens' right to inspect public records and attend meetings of government agencies at all levels of state and local government:

Article II, Section 8. Right of Participation. The public has the right to expect government 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.

Article II, 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 the state government and its subdivisions, except in cases where the demand of individual privacy clearly exceeds the merits of public disclosure.

Title 2, Chapter 3 further defines access to meetings in Montana. §2-3-201 declares the Legislature's intent that "public boards, commissions, councils and other public agencies in this state exist to aid in the conduct of the peoples' business." It further declares that provisions of this part of the law "shall be liberally construed" in favor of openness. §2-3-202 defines a meeting as the convening of a quorum of a public agency to hear, discuss or act upon a matter over which the agency has control or advisory power.

§2-3-203 requires that all meetings of governmental bodies of the state, political subdivisions or organizations supported in whole or in part by public funds shall be open to the public, including committees and subcommittees. The presiding officer may close a meeting for discussion of a matter involving individual privacy, but only if the officer determines that the demand of individual privacy clearly exceeds the merits of public disclosure. The right to individual privacy may be waived by the individual about whom the discussion pertains.

Meetings may be closed to discuss litigation strategy when an open meeting would have a detrimental effect on the position of the public agency. Meetings in which the only parties are public bodies may not be closed to discuss litigation strategy.

## ***For what reasons can a meeting of a governmental body be closed to the public?***

As noted above, meetings can be closed should the body discuss matters involving individual privacy (e.g. personnel matters) if the presiding officer determines that the demand of individual privacy clearly exceeds the merits of public disclosure. Public bodies may not close meetings to discuss collective bargaining strategy. *Great Falls Tribune v. Great Falls Public Schools*, 255 Mont. 125, 841 P.2d 502 (1992) and §2-3-203.

Nor may public bodies close meetings to discuss litigation strategy in which the only parties are public bodies. *Associated Press v. State Board of Public Education*, 246 Mont. 386, 804 P.2d 376 (1991). The FOI Hotline believes that the exemption exception is unconstitutional and could be overturned if challenged.

## ***What must the officer do to close a meeting?***

Meeting closures are at the discretion of the meeting's presiding officer. Before closing a meeting, the presiding officer must explain in open session the reasons for closing the meeting and must also explain each item the body intends to discuss in private before closing the meeting.

For example, a school board may not close a meeting to discuss personnel matters, then move on to other business while in closed session. Individuals may waive their rights to privacy and allow meetings to remain open, even when personnel matters are being discussed.

## ***Can governmental bodies meet by telephone or other electronic means?***

Yes, but they must allow the public to participate and listen in. §2-3-202 defines a meeting as "the convening of a quorum of the constituent membership of a public agency or association... whether corporal or by means of electronic equipment ... "

See also *Board of Trustees, Huntley Project School District No. 24 v. Board of County Commissioners*, 186 Mont. 148, 606 P.2d 1069 (1980) where the Court set aside a decision made in a private telephone conference with a quorum of commissioners. Therefore, all laws governing public

access to such meetings would apply, and meetings could be closed only for the exceptions noted (such as when an individual's right to privacy clearly exceeds the public's right to know).

***Do public agencies have to provide advanced notice of matters to be discussed at meetings?***

There is no specific notice provision in the open meetings statute. However §2-3-103 requires that a public body may not take action on a matter unless specific notice of that matter is included on an agenda. Moreover, several other laws pertaining to some local government bodies require advance public notice of meetings of those bodies. For example, under §7-5-2122, a county commission must give 48 hours notice of the time place and date of a regular meeting. School boards must also give 48 hours notice under §20-3-322(3).

In general, though, a public entity must give sufficient advance notice of the matters to be discussed so that members of the public who would be interested in the issue may attend and participate in the matter before it is acted upon. *Bryan v. Yellowstone County School District*, 312 Mont. 257, 60 P.3d 381 (2002).

Montana's Open Meetings law does not strictly require public agencies to post their agendas. However, recent rulings combined with other Montana statutes clearly indicate that agencies should post agendas.

In a sweeping 1998 opinion with implications for all public bodies, Attorney General Joe Mazurek ruled that county commissioners cannot comply with the state's open-meetings law by saying they may meet anytime during their regular work week. The ruling said commissions must specify particular meeting dates and times in advance to let citizens know when a quorum will meet to discuss or act on any issue of significant public interest.

That's so the public has an opportunity to participate in the decision making. 47 Mont. Atty. Gen. Op. 13 (1998). In *Board of Trustees, Huntley Project School District 24 v. Board of County Commissioners*, 186 Mont. 148, 606 P.2d 1069 (1980) the Montana Supreme Court ruled that "(w)ithout public notice, an open meeting is open in theory only, not in practice."

## ***Does the Open Meetings Act apply to sub-committees of the whole body?***

§2-3-203 says the meetings of public agencies and certain associations of public agencies must be open to the public. These include 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.

Further, any committee or subcommittee appointed by a public body... for the purpose of conducting business which is within the jurisdiction of that agency is subject to the requirements of the Open Meetings Act. This would apply to committees of the whole, as well as to "work sessions" sometimes held by ad hoc committees of school boards.

## ***Does the open meetings law apply to all meetings of state or local officials?***

In general, the open meetings provisions of the Constitution and statutes apply to constituent bodies. However, the Court ruled in 2004, that the meetings of an informal committee of public university officials must be open to the public. In that case, the Commissioner of Higher Education held meetings with high-ranking university employees, including presidents and chancellors, to seek input on such policies as student tuition and fees.

The Supreme Court said the policy committee was a public body and its deliberations should have been open, even if it did not produce a result or action, take votes or keep minutes. "In this case, while the Policy Committee was not formally created by a government entity to accomplish a specific purpose, it was organized to serve a public purpose."

The court said that factors to be considered in determining whether such a committee is subject to open meeting laws include, but are not limited to whether the meetings are paid for with public funds, whether committee members are public employees acting in their official capacity, frequency of meetings, whether the committee deliberates or just gathers facts, whether the meetings concern policy matters rather than ministerial or administrative functions, whether the committee

members have executive authority, and the result of the meetings. *Associated Press v. Crofts*, 321 Mont., 89 P.3d 971(2004)

The Court has also found that a committee, or advisory board, made up of several school principals, a school board trustee, two teachers and four member of the public formed to discuss school-closure options was subject to open meeting laws. *Bryan v. Yellowstone County Elementary School Dist. No. 2*, supra. However, the Court has also found that meetings between a contractor and a city public works administrator were not subject to open meetings laws. *SJL of Mont. v. City of Billings*, 263 Mont. 142, 867 P.2d 1084 (1993).

### ***What type of personal information can a meeting be closed for?***

The right of privacy includes intimate personal information such as family problems, health problems, medical records, drug and alcohol problems (see 42 Mont. Atty. Gen. Op. 119 (1988), as well as information relating to marriage, to procreation, contraception, family relationships, and child rearing. *Flesh v. Mineral and Missoula Counties*, 241 Mont.158, 786. P.2d 4 (1990).

### ***Can meetings of public agencies and public bodies be closed to discuss job reviews?***

The Court has ruled that the public's right to know is not absolute; an individual's right to privacy must be weighed against it. In *Missoulian v. Board of Regents*, 207 Mont. 513, 675 P.2nd. 962 (1984), the court ruled that closure of university presidents' job-performance evaluation meetings was necessary to protect individual privacy of university presidents and other university personnel.

However, some government officials, may wish to allow the public to view their job reviews. It is always prudent to contact the employee before the meeting and obtain a waiver of the right of privacy so the meeting can be open.

***Can a governmental body close proceedings during a hiring process?***

Governmental bodies, such as school boards hiring superintendents, can close proceedings to the public in order to protect the privacy of the candidates if those candidates have a reasonable expectation of privacy. *Missouliau v. Board of Regents*, supra. Governmental bodies have chosen to keep candidate searches open by asking candidates whether they mind public interviews, thereby eliminating the expectation of privacy.

Moreover, even if the employee does not waive the right of privacy, an argument can be made that the hiring process should be open if the body is looking to fill a position that is important to the community. This is particularly true if the discussion pertains to the appointment of a vacant elective seat on the body.

***Should a meeting to discuss the discipline/termination of a city employee be closed for privacy if the employee wants it open?***

No. According to §2-3-203(3): “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.”

***Can a meeting be closed to discuss the discipline of a public employee who is charged with a violation of law?***

The Court in a number of cases has found that when a public employee vested with the public trust (police officer, elected employee, school teacher, person in charge of public funds, etc.) is charged with a criminal offense or sexual harassment, the employee does not enjoy an expectation of privacy over the disciplinary proceedings. *Great Falls Tribune v. Cascade County Sheriff*, 238 Mont. 310, 777 P.2d 345 (1989). *Bozeman Daily Chronicle v. City of Bozeman*, 260 Mont. 218, 859 P.2d 435 (1993). *Citizens to Recall Mayor Whitlock*, 255 Mont. 517, 844 P.2d 74 (1992) and *Billings Gazette v. City of Billings*. 2011 MT 293.



### ***What are the remedies if a meeting was illegally closed?***

A decision made in an improperly closed meeting may be voided by an action brought in district court within 30 days of the decision (§2-3-213) and a successful plaintiff can be awarded attorney fees (§2-3-221).

### ***Can pictures or recordings be taken in open meetings?***

Under §2-3-211, “accredited press representatives may not be excluded from any open meeting ... and may not be prohibited from taking photographs, televising, or recording such meetings.” The attorney general has also ruled that the legislative intent of the law would be furthered by allowing the public to mechanically record open meetings. 38 Op. Att’y Gen. No. 8 (1979).

### ***Are agencies required to keep and provide access to minutes of their proceedings?***

Yes. According to §2-3-212, appropriate minutes of all open meetings shall be kept and shall be available for inspection by the public. Minutes must include the date, time and place of the meeting; a list of the individual members of the public body, agency or organization in attendance; the substance of all matters proposed, discussed or decided; and, at the request of any member, a record by individual members of any votes taken.

County commission minutes should be published within 21 days after adjournment of the session, or within 30 days for certain financial information (§7-5-2123(2)). Nevertheless, minutes should be available upon request, even if they are in draft form and have not been approved by the governmental body. The Public Records Act, §2-6-101, et seq MCA, and Article II, Section 9 of the Montana Constitution do not make a distinction between draft minutes and final minutes. Both must be provided to the public. County commissions are required to keep a “minute book” (§7-5-2129).

***Do passing notes, emailing, texting or whispering among members of governmental bodies violate the Open Meetings Act?***

There are no court cases or sections of statute that support these attempts at secrecy. However, if the “deliberations” consist in part of passing notes, emailing, texting or the exchange of whispered comments, the public is being deprived of its constitutional right to observe the deliberations of the public body and to have access to public documents. This is little different than if the board met behind closed doors.

***Are committee meetings of the Montana Legislature open to the public and the press?***

Yes. Article V, Section 10, subsection 3 of the state Constitution requires, “(t)he sessions of the Legislature and of the committee of the whole, all committee meetings, and all hearings shall be open to the public.” This includes when committees are taking votes.

***Are political caucuses of the Montana Legislature open to the news media and public?***

Yes. The Associated Press and other news organizations in Montana sued to end the practice of closed-door caucuses, arguing that they are part of the legislative process where important public-policy issues are discussed by legislators. A state district judge ruled that organizational party caucuses, held before the start of the legislative session, should be subject to the state open meetings law. The court also ruled, however, that the news media had no legal basis for suing to get access to party caucuses during legislative sessions.

The news media appealed this decision to the Montana Supreme Court, which ordered the district court to reconsider the issue. Upon remand, the district court ruled that caucuses held during legislative sessions to discuss public business, so they too are subject to the open meetings law. The Legislature did not appeal and the caucuses have been open since the 1999 session.

# **PUBLIC RECORDS**

## ***What are the laws governing access to public documents in Montana?***

In addition to Article II, Section 9 of the Montana Constitution, sections §2-6-102, 104 and 110 govern access to public documents. §2-6-102 gives citizens the right to inspect and copy any “public writings” of the state, except as prohibited by statute. The law makes no distinction between “draft” documents and completed documents.

§2-6-104 says public records are available for inspection at all times during office hours. §2-6-110 provides that each person is entitled to a copy of public information in electronic form, upon payment of a fee for the time and materials used to transfer the data.

Electronic records include, but are not limited to, videotapes, photographs, microfilm, film and computer disks. If requested, information provided to the public must reflect the condition of the original.

## ***What is defined as a public record?***

§2-6-101 defines public records as “the written acts or records of the acts of... public officers, legislative, judicial and executive,” or as “public records kept in this state of private writings” (with exceptions). In short, any record concerning matters within the jurisdiction of the governmental entity are “public records.”

## ***Are jury lists public documents?***

Yes. Two sections of Montana law require that both grand jury and regular jury lists should be open to the public. §3-15-503 addresses regular juries and §3-15-601 addresses grand juries. Under both of these laws, jury lists must be open to public inspection during regular business hours.

## ***Does the right of individual privacy extend to corporations?***

No, after repeatedly upholding this notion, the Montana Supreme Court abandoned this position, ruling that the Montana Constitution

never intended to give a privacy right to “non-human entities.” The ruling came in a lawsuit filed by news groups seeking access to power-purchase deals that a former utility had filed with the Montana Public Service Commission.

The court, however, said that nothing in the state Constitution requires disclosure of trade secrets and other confidential proprietary information where the data is protected by statute. *Great Falls Tribune v. Montana Public Service Commission*, 2003 MT 359, 319 Mont. 38, 82 P.3d 876.

### ***Are tax records public?***

It depends on the record, and this is an area of the law that is still being litigated. The Montana Supreme Court struck down a state Revenue Department policy that held confidential some coal tax records that formerly were public, saying the practice violated citizens’ constitutional right to know. *Associated Press et al. v. Montana Department of Revenue* 300 Mont. 233, 4P3d5 (2000).

However, the Court in *Elliott v. Montana Department of Revenue*, 2006 MT 267, 334 Mont. 195, 146 P.3d 741, found that the state making confidential tax records of “C” corporations prevented disclosure of those records. The decision preserved the right to challenge the constitutionality of the section.

### ***Can a request for electronic records be refused if they are public?***

§2-6-110 provides that each person is entitled to a copy of public information in electronic format, including emails, upon payment of a fee for the time and materials used to transfer the data. The term “public record” also includes electronic mail sent or received in connection with official business. §2-6-202.

In 2002, more than 3,000 emails from the governor’s office were turned over to media requestors after they had been screened to determine whether the right of individual privacy clearly exceeded the public’s right to know. The governor’s office said that screening the mail for privacy cost more than \$28,000, not including some technology expenses.

### ***Are 911 tapes kept by law enforcement public records?***

Yes. A 911 call is clearly an “initial offense report” and therefore “public criminal justice information.” There is nothing in the law granting greater protection to 911 tapes versus other public records. Like other public documents, they may be withheld only when the demand for individual privacy clearly exceeds the merit of public disclosure. For example, if the 911 call is for a health-related emergency for a private citizen it may not be available for inspection.

### ***Can a state agency charge for access to electronic documents?***

Yes. According to §2-6-110, agencies may charge expenses for accessing the mainframe and any other out-of-pocket expenses associated with the request for information. It also sets the allowable labor charge at the hourly rate for an employee classified as grade 10, market salary, if the copying takes more than a half-hour. This statute has given agencies more leeway in charging for access to electronic records.

§2-17-1101, allows the state Department of Administration as well as local governmental agencies to charge “convenience fees” for electronic services, and these fees exceed the costs of actually making copies. If challenged, these laws will probably not meet constitutionality scrutiny, because they violate Montanans’ right to know.

It should be remembered that the constitutional right regarding access to documents is the right to “examine” the document (not to take copies, thereof). While the Legislature has required entities to make copies and charge for those copies, there should be no charge for the “examination” of the record.

### ***Are letters written to a public agency by a private individual public documents?***

Yes. Once in possession of the government, letters are public documents unless there is a sufficiently strong right of privacy that overrides the public’s right to know. In most cases, those who write letters to a government agency or body, especially to complain, do not have an expectation of privacy.

***Can a state agency demand that the public make requests for documents in writing so they may be screened?***

§2-6-104 requires governmental entities to make records available for inspection at all times during office hours. It is not necessary for the request to be in writing.

***Can a public agency withhold reports alleging gross negligence or official misconduct by public employees?***

As cited above, there are a number of Supreme Court rulings that public employees occupying positions of public trust have no expectation of privacy over records of alleged misconduct. For example, in *Bozeman Chronicle v. City of Bozeman*, supra, a Bozeman police officer was accused of raping a cadet at the state Law Enforcement Academy. No criminal charges were brought, and the officer resigned before any disciplinary action was taken.

The city and the county denied the newspaper access because, they argued, the investigative files were confidential under the Criminal Justice Information Act. The Supreme Court disagreed, ruling that the police officer's right to privacy was exceeded by the public's right to know. The court ordered in camera inspection of the documents at issue, to protect the privacy right of the victims and the witnesses.

In *Citizens to Recall Mayor v. Whitlock*, supra, the mayor of Hamilton was accused of sexually harassing the city judge. No criminal charges were brought, but the city hired an investigator to investigate the accusations and to prepare a report for the city. The city subsequently refused to release the report to the public. The court ruled that the mayor's expectation of privacy was unreasonable as a matter of law: "Society will not permit complete privacy and unaccountability when an elected official is accused of sexually harassing public employees or of other official misconduct related to the performance of his official duties."

In *Billings High School District No. 2 v. Billings Gazette*, 2006 MT 329, 335 Mont. 94, 149 P.3d 565, the *Bozeman Chronicle* decision was used as support for ordering release of documents relating to the suspension of two high school teachers found in a "compromising position" by a student.

***Are “draft” copies of public documents open for viewing by the public?***

Yes. §2-6-102 makes no distinction between “draft documents” and completed documents. The courts have also ruled that draft documents are public documents.

***Are initial offense reports and initial arrest records kept by law enforcement considered public records?***

Yes. Under the law, telephone logs are considered either “initial offense reports” or “initial arrest records,” or both. These are public under §44-5-103(13)(e)(i). In 42 Att’y Gen. Op. 119, the attorney general defined “initial arrest records” as “the first record made by a criminal justice agency indicating the fact of a particular person’s arrest, including the initial facts associated with that arrest,” and “initial offense reports” as “the first report recorded by a criminal justice agency which indicates that a criminal offense may have been committed, including a description of the initial facts surrounding the reported offense.”

The opinion said confidential information may be blacked out, but the edited report should be public. §44-5-311 also protects the identity of a crime victim. This section says police cannot release the address, telephone number or place of employment of a victim who requests confidentiality. The law also forbids police from releasing the names of sex crime victims except in certain situations.

In 50 Att’y Gen. Op. 6, the attorney general softened this law, saying police may disclose a crime scene location, even if such disclosure may suggest the identity of the victim, even the victim of a sex crime. The opinion further said that confidentiality attempts by victims need to be subjected to a balancing act between public disclosure and privacy under the Montana Constitution.

***Are driving records and drivers’ license information, including photos, public?***

§61-11-503 limits disclosure of information from drivers’ licenses, vehicle titles, vehicle registration and vehicle insurance status. Information that is not available to the public includes a driver’s photo, Social Security number, medical or disability information and address.

***Are motor vehicle accident records public?***

No. §61-7-114, provides these reports are for the “confidential” use of government agencies. The reports may be examined and copied by persons named in the reports or involved in the accident.

***Are birth and death certificates public?***

§50-15-121 makes death certificates public. However, the federal Health Insurance Portability and Accountability Act of 2003 forbids the release of the cause of death until two years after the death. Birth certificates are not available to the public until 30 years after date of birth.

***Are applications for marriage public record?***

No. The attorney general ruled in 2000 that this information is not available to the public. His opinion carries the force of law until it is overruled by the courts. Marriage licenses themselves are public documents.

***Are votes cast by legislators on the issue of calling a special session of the Legislature available to the public before all votes are received?***

Yes. §5-3-106 requires legislative poll results secret until all votes are received but subject to disclosure after the close of voting.

***Are election canvassing records open to the public?***

Yes. §13-15 says the canvass of all votes is open to the public. This applies to any general, regular, special or primary election held by a county, municipality, school board or special district. §§13-1-101(7), 13-1-101(19) and 20-20-102.

***May the public inspect competitive bids on government projects before a contract is awarded?***

Yes. §18-4-304 requires public inspection of bids after they are opened, subject to some restrictions.



***Is the public entitled to examine settlements of lawsuits if they involve government agencies?***

Yes. In *Pengra v. State*, 302 Mont. 276, 14 P.3d 499 (2000), the Montana Supreme Court ruled that the family of a murdered Helena woman had no right to privacy in the amount of money government paid to settle the family's lawsuit against the state. Following the decision, the Legislature enacted §2-9-303, which says court settlements involving state agencies are public, and §2-9-304, extends this to the state's political subdivisions.

***Are jail occupancy records public?***

Yes. §44-5-102(13)(e)(iv) MCA, provides that initial arrest records, initial offense reports and jail occupancy rosters are all public criminal justice information.

***Are salaries of government employees public information?***

Yes, under 43 Att'y Gen.Op. 119 (1988)

***When are public records open to inspection?***

§2-6-104 requires that public records be open to inspection by any person during office hours. §2-16-117 sets office hours from 8 a.m. to 5 p.m., Monday through Friday, unless otherwise provided by law.

***Can a state agency charge for copies of public documents?***

Yes. §2-6-102(2) requires an agency to provide a "certified copy" of a document "on payment of legal fees therefor." The language, according to a 1996 memo written by then Gov. Marc Racicot, is arcane and was written at a time when a clerk actually copied by hand a document and certified its authenticity.

This statute may still, however, be used as authority for charging a reasonable fee to cover the costs of the agency (usually the cost of labor and other resources associated with finding and copying the document) when copies of public documents are made. Racicot's memo suggested as a guideline a charge of 10 cents per page.

## **FEDERAL AGENCIES**

The federal Freedom of Information Act applies to every agency, department, regulatory commission, government-controlled corporation and "other establishment" in the federal government's executive branch. FOIA does not apply to Congress, state agencies that receive federal funds or federal courts.

FOIA covers all records in the possession or control of a federal agency. If you ask for records and are refused, you may formally request them by writing a letter to an agency. Every federal agency covered under the act has to designate a FOIA officer to handle these requests.

Members of the news media may ask to be exempt from search fees and will not be charged for 100 pages of copies. Others requesting documents under FOIA get two hours of free search time and 100 pages of copies without charge.

The government may refuse FOIA requests for nine reasons: national security, internal personnel rules, information exempted by other federal laws, trade secrets, internal agency memorandums, personal privacy, investigations by law enforcement, banks regulated by the federal government and oil and gas well information.

A rather complete booklet on how to use FOIA is available from the Reporters Committee for Freedom of the Press in Arlington, Va. See also [www.rcfp.org](http://www.rcfp.org).

# COURTS

## *What laws govern access to court proceedings?*

In *State v. Mont. Judicial Dist. Court*, 281 Mont. 285, 933 P.2d 829 (1997) the Court created a new standard in Montana (versus the balance under the U.S. Constitution) finding that the media's access to proceedings and documents is founded in the right-to-know provision of the Montana Constitution, rather than in the First Amendment. The standard involves consideration of the following:

Where the defendant asserts the rights of the accused to a fair trial, a gag order may be issued only when each of the following conditions are met:

- 1) The media and general public must be given the opportunity to be heard on the question.
- 2) The court must describe what reasonable alternatives have been considered and why those alternatives cannot adequately protect the defendant's rights to a fair trial.
- 3) The order must be narrowly tailored to serve the interest of protecting the defendant's fair trial rights.
- 4) The court has made specific findings that there is a **substantial probability** (emphasis the Court's) that the defendant's right to a fair trial will be prejudiced by publicity that the gag order would otherwise prevent.

## *What laws govern access to court records?*

Court records are public documents under Art. II, Sec. 9, regardless of how those records came into public hands. *State v. Mont. Judicial Dist. Court* 281 Mont. 285, 933 P.2d 829 (1997). The right-to-know provision of the Montana Constitution grants the public a broader right to know than mere access to official court documents and court proceedings. *State v. Mont. Judicial Dist. Court*, supra.

The Supreme Court has issued a general order regarding what information contained in a court document can be redacted by a Clerk of Court before release to the public. Information such as social security numbers, drivers license numbers, dates of birth and medical records

may be redacted before inspection is permitted. All other court records must be open unless they are sealed by court order. The sealing of any court record may be attacked by asserting rights under Article II, Section 9 of the Constitution.

### ***What laws govern access to police records?***

Most of the law governing law enforcement records can be found in the Montana Criminal Justice Information Act, Title 44, Chapter 5 MCA. This act spells out what can and cannot be released. Laws regarding the release of information about juvenile criminal proceedings are found in Part 6 of the Youth Court Act, Title 41, Chapter 5, MCA.

Generally, juvenile offense records are open for public inspection until the youth has reached 21 or is no longer under state supervision and then the records are sealed. Generally, law enforcement investigatory records are confidential until the prosecution has been completed. At that point a district judge can open such records after making the balancing test in Article II, Section 9. Mug shots are confidential information unless the law enforcement agency publicizes the photograph to aid in apprehension of a suspect.

### ***When are court documents officially public?***

Once a document is filed in court, any member of the public can have access to it unless the judge has ordered otherwise in certain special and rare situations. That means, for instance, that information cannot be withheld because the parties involved have not been served.

### ***Are youth court records afforded any special protection under Montana law?***

These records are generally accessible, but some records are still restricted by the law. Specifically, §41-5-212 reads: "Reports of preliminary inquiries, petitions, motions, other filed pleadings, court findings, verdicts, and orders and decrees on file with the clerk of court are public records and are open to public inspection until the records are sealed under §41-5-216."

Youth court records and law enforcement records pertaining to a youth covered under this law are sealed three years after supervision

for an offense ends, but may be unsealed if a new offense is committed. Certain records remain private under the court's discretion. Under §41-5-215, for example, private information concerning a youth include "(s)ocial, medical, and psychological records, youth assessment materials, predispositional studies, and supervision records of probationers."

***Are presentence investigation reports public record?***

Not without a court order. According to §46-18-113 (1), "(a)ll presentence investigation reports must be a part of the court record but may not be opened for public inspection." Further, such confidential criminal justice information is restricted to criminal justice agencies, those authorized by law to receive it and those authorized to receive it by court order. However, both of these statutes have provisions that allow a district judge to authorize release of the information.

§46-18-113(2) specifically states that the court can allow access to others as it considers necessary. §44-5-303 allows a judge to enter a court order allowing others to have access to confidential criminal justice information upon finding that the demands of individual privacy do not exceed the merits of the public's right to know.

As discussed above, if the criminal offender is a public employee or official there is no expectation of privacy over the records and Montana courts have released otherwise confidential criminal justice information. For example, in a case brought by the Great Falls Tribune, the names of police officers accused of using excess force were released. *Great Falls Tribune v. Cascade County Sheriff, supra*.

In another case, *Bozeman Chronicle, supra*, the investigation materials concerning an alleged rape at the police academy were ordered released. In a case brought by the Allstate Insurance Company, the criminal investigation records of a person who allegedly committed suicide were ordered released. *Allstate Insurance Co. v. Billings*, 239 Mont. 321, 780 P.2d. 186 (1989).

### ***Can a judge restrict access to television cameras in the courtroom?***

§3-1-111 allows the district court judge to control the “orderly conduct of proceedings.” However, Canon 35 of the Canons of Judicial Ethics allows closure only when the judge finds that broadcasting would “substantially and materially interfere with the primary function of the court.” The judge also must put into the record the reasons for restricting media access. It also sets forth a specific procedure for the reporter to follow, i.e., make a direct request to the judge.

### ***Are pretrial hearings and suppression hearings open to the public?***

Generally, yes. Under §46-11-701, pretrial proceedings in criminal cases are generally open to the public. If it appears to the judge that pretrial publicity may threaten the right of the defendant to a fair trial, the judge is first supposed to seek the voluntary cooperation of the news media in delaying dissemination of the potentially prejudicial information until the impaneling of the jury or earlier at the discretion of the judge.

If such voluntary cooperation cannot be agreed to, the judge is then supposed to hold a hearing on whether the hearing on the proceeding should be closed. The judge may close suppression hearings and seal the record only if the dissemination of information would create a clear and present danger to the fairness of the trial and the prejudicial effect cannot be avoided by any reasonable alternative means.

### ***May judges close selection of juror (voir dire) proceedings to the public?***

No. In the murder trial of Gene Austad in Great Falls, a district judge closed the questioning of possible jurors. The Great Falls Tribune appealed to the Montana Supreme Court, which said the proceedings should be open and would not impair the defendant’s right to a speedy trial. *Great Falls Tribune v. District Court*, 186 Mont. 433, 608 P2d116 (1980).

***Do citizens receive their attorney fees if they successfully sue to gain access to public documents and government meetings?***

A plaintiff who prevails in an action in district court to enforce his rights under Article II, Section 9 of the Montana Constitution may be awarded his costs and reasonable attorneys' fees at the discretion of the judge. §2-3-221.

However, recently, government custodians of "private" records have filed court actions and argued that the requesting party cannot recover his fees because he was not the plaintiff. Most courts have not followed this precept and have permitted recovery of fees when the requesting party prevails.

***Should hearings on whether a defendant is competent to stand trial be closed?***

Probably not. Again, Montana's laws (and subsequent court rulings) carry the presumption that any criminal proceeding will be open, unless a compelling argument is made that the defendant's right to a fair trial is threatened.

***Should the Montana Supreme Court's closed-door meetings be open to the public?***

Probably. It appears the Montana Constitution says that these gatherings should be open. But while some candidates for the high court and members of the court favor opening the sessions, a majority of the court has declined to do so. If sued, the court might have to decide if its own conferences should be public.

***Are coroner's inquests open to the public?***

Yes. §46-4-201 establishes that a coroner's inquest must be run like a court and all court proceedings in Montana are open to the public, with almost no exceptions. The purpose to an inquest is to clear the air in the case of a controversial death. To close the inquest would defeat that purpose.

***What should reporters do if they think a court proceeding is being improperly closed?***

Montana FOI wallet cards (available from the FOI Hotline) include a statement, to be entered into the court record as soon as there is a motion to close a criminal proceeding in a Montana court:

Your Honor, may I address the court? My name is \_\_\_\_\_. I'm a reporter for \_\_\_\_\_. I respectfully object to closing this proceeding to the public and the news media. The Montana Supreme Court has ruled that the "right-to-know" provision of the Montana Constitution and the First and the Fourteenth Amendments to the U.S. Constitution guarantee the public the right to attend criminal proceedings except in the most extreme cases.

These decisions hold that the closure must be a last resort, taken only after (1) a showing of the compelling interests that demand it, and (2) that less restrictive alternatives are not available. Before you rule on this motion to close these proceedings, I request a recess to let me consult with my employer and my lawyer. Thank you.

**CAVEAT:** A reporter may not interrupt the proceedings after they have been closed. This can lead to a valid contempt citation, because the judge has the right to control the activities in the courtroom. *Great Falls Tribune v. District Court*, 238 Mont. 310, 777 P.2d 345 (1989).



