

# 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 Montana Journalism Review and the Montana Freedom of Information Hotline offer this updated guide (revised March 2016) to educate journalists and citizens about public access to local, state and federal 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 Meloy Law Firm of Helena answers a full range of questions on government access at **406-442-8670**. The firm may be accessed through the FOI Hotline website ([www.montanafoi.org](http://www.montanafoi.org)) or by email to [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.

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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 of Montana Code Annotated (MCA) 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 says 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 may not be closed to discuss litigation in which the only parties are public bodies.

The public must also be provided the opportunity to comment on any item even if the item is not on the public meeting agenda. §2-3-103 MCA (1)(a).

***What is a “quorum” of a public body?***

A quorum of a public body is the minimal number of members of the body committee or organization, usually a majority, who must be present for valid transaction of business. For a three-member body, two members meeting for the purpose of discussing any public business is subject to the open-meeting/right-to-participate laws.

***Do open-meetings/right-to-participate requirements apply to informal gatherings of a quorum of the members?***

Yes. Two of three members of a body riding together in a motor vehicle to a meeting, going out for coffee or lunch to discuss any public business are activities that are covered by open-meetings/right-to-participate laws regardless of the formality of the setting.

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

Legally, a meeting holder starts with the notion that ALL meetings are presumed to be open and meetings can only be closed when the body discusses matters involving individual privacy and then only if the presiding officer determines that the demand of individual privacy ***clearly*** exceeds the merits of public disclosure. The burden is on the person seeking a closed meeting to overcome the presumption of openness.

Public bodies may also close a meeting to discuss litigation strategy, but only when: 1) litigation actually exists (not just threatened); 2) an open discussion will negatively affect the litigating position of the body; and 3) the litigant is a private-nongovernmental party. A body may not close a meeting when the parties in litigation are both governmental entities.

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

Meeting closures are at the discretion of the presiding officer. Before

closing a meeting, the presiding officer must explain in open session the reasons for closing the meeting and must also explain generally each item the body intends to discuss in private before closing the meeting.

The presiding officer must also determine that privacy interests clearly outweigh public disclosure before the meeting can be closed. The right of privacy encompasses delicate matters such as medical or family issues or matters in which an employee's performance will be criticized (excluding employees vested with public trust, as discussed *supra*). The Montana Supreme Court has made it clear that there is no blanket exemption from the right to know for discussion of personnel matters or records. *Missoula County Public Schools v. Bitterroot Star*, 378 Mont. 451, 345 P.3d 1035.

An entity 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. A public entity may assert the right of privacy on behalf of an individual, but it is always prudent to consult the individual in advance of the meeting to see whether he or she wishes to waive the right.

### ***Can a public body vote on issues during closed meetings?***

No. A board can discuss a private issue in a closed meeting, but the vote should be taken during an open session.

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

Yes, but they must allow the public some method of observing the meeting. §2-3-202 MCA 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 ... "

The state Supreme Court has ruled that a telephone conference with a quorum is subject to the Open Meeting Act. *Board of Trustees, Huntley Project School District No. 24 v. Board of County Commissioners*, 186 Mont. 148, 606 P.2d 1069 (1980).

Therefore, all laws governing public access to such meetings would apply, and meetings could be closed only for the exceptions noted. The

body may also communicate during a meeting by email or text message, but the email or message must be displayed to the audience while it is occurring. Otherwise, private emailing and texting about an issue being discussed during a meeting violates the open meetings laws.

### ***Must public agencies post their agendas?***

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

A sweeping 1998 Montana Attorney General's opinion held 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. And the agenda should be sufficiently detailed to alert the public as to the topic of discussion.

### ***Can the public body discuss matters that are not on the agenda?***

No. The right to observe decision-making activities of a public body is conditioned on the public having advanced notice of the topic of the discussion. That's the purpose of the agenda. When a body discusses matters which were not on the agenda, both the right to observe and the right to participate are violated.

### ***Can a public body meet without giving public notice?***

No. In *Board of Trustees Huntley Project, supra*, the Montana Supreme Court ruled that "(w)ithout public notice, an open meeting is open in theory only, not in practice." Further, the Public Participation Act requires agencies to develop procedures to "ensure adequate notice" before a final decision and to assist public participation in its decision-making before the decision is made (§2-3-103 MCA).

Public notice must be given even for meetings that legitimately

can be closed to the public. In *Seliski v. Rosebud County et. al.*, Rosebud County Case No. DV 94-13 (1995), District Judge Joe Hegel found that a county commission's practice of conducting meetings on regular business days from 8 a.m. to 5 p.m. without notice of when particular matters would be discussed, was "really no notice at all" and violated the Public Participation in Government Act, §2-3-101, et seq., MCA.

The public should be given an adequate agenda of subjects to be discussed by the governmental agency, sufficiently in advance to allow members of the public to decide to attend and/or give input on significant decisions.

### ***Can public agencies close meetings to discuss collective bargaining strategy?***

No. The Supreme Court threw out that exception to the Open Meetings Act in 1992. *Great Falls Tribune v. Great Falls Public Schools*, *supra*. In 1993, the Legislature amended §2-3-203 MCA to remove the exception.

### ***What types of "public agencies" fall under the Open Meeting Act?***

§2-3-203 MCA requires that 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 sub-committees of the whole, as well as to "work sessions" sometimes held by some entities not necessarily made up of members of the constituent body.

In 2002 a Supreme Court decision 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*, 312 Mont. 257, 60 P.3d 381 (2002). However, in *Boulder Monitor v. Jefferson High School District*, 373 Mont. 212, 316 P.3d 848 (2014) the Court held that attendance as an observer by one of the members of the public body did not convert the sub-committee into a quorum of the body for purposes of providing notice that would otherwise have been required of the body.

### ***What kind of meetings are subject to the open meetings laws?***

The Montana Supreme Court ruled in a suit brought by The Associated Press and 13 other news organizations in 2004, that the meetings of an informal committee of public university officials must be open to the public under the Montana Constitution and open meetings laws. Commissioner of Higher Education Richard Crofts held meetings with high-ranking university employees, including presidents and chancellors, to seek input on such policies as student tuition and fees. In 2002, one of these meetings was canceled by Crofts after an AP reporter came to cover the meeting and wouldn't leave.

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).

A 2002 decision found that a committee, or advisory board, made up of several school principals, a school board trustee, two teachers and four members of the public formed to discuss school-closure options was subject to open-meeting laws. *Bryan v. Yellowstone County Elementary School Dist. No. 2*, 312 Mont. 257, 60 P.3d 381 (2002). The meetings of associations composed of public or governmental bodies

that regulate the rights, duties or privileges of any individual must be open to the public.

***What type of personal information can be properly discussed in a closed meeting?***

This private, personal information is generally limited to family problems, health problems, drug and alcohol problems (see 42 Mont. AG. Op. 119 (1988), and information relating to marriage to procreation, contraception, family relationships, and child rearing. *Flesh v. Mineral and Missoula Counties*, 241 Mont. 158, 786. P.2d.2d 4 (1990).

Hiring interviews may also involve private information which justifies closing a meeting. Disciplinary matters may be closed depending upon the class of employee and the nature of the charges.

***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.2d. 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. Some government officials, including a city manager, have chosen to allow the public to view their job reviews. However, if the employee is a supervisory-level employee and the review concerns illegal or improper acts, the employee does not have an expectation of privacy in that discussion and the meeting may not be closed.

***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. *Missoulian 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.

If the candidates were not told beforehand that the proceedings were to be open, a governmental body could justifiably close a meeting. Nevertheless, 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. For example, if a local governmental body is considering an appointment to fill a vacant elective seat, the entire process should be open.

***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) MCA: “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 an employee grievance or disciplinary matter?***

Sometimes. If the grievance concerns a disciplinary action taken by a supervisor, the meeting may only be closed if 1) the employee asserts the right of privacy and the presiding officer determines the balance in favor of closure and 2) the employee is not “vested with the public trust.”

If the employee is a supervisory-level employee, handles public money or is otherwise in a position of public trust, and the allegations concern a violation of that trust, the meeting must be open.

If the grievance involves some matter unrelated to performance issues, such as a dispute over pay or benefits, there is no basis for closing the meeting.

***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 MCA) and a successful plaintiff can be awarded attorney fees (§2-3-221). Any person who asserts a claim that a governmental action has deprived them of statutory and constitutional rights to observe a meeting has standing to pursue a legal claim. *Schoof v. Nesbit*, 373 Mont. 226, 316 P.3d 831 (2014).

The Court in *Schoof* reversed a prior decision restricting right-to-know suits only to plaintiffs who could show an actual injury caused by the closed meeting. A claimant need not be a resident of the particular jurisdiction to bring a lawsuit. Claimants only need to show their rights to observe a meeting or examine a document were violated by the agency. *Shockley v. Cascade County*, 376 Mont. 493, 336 P.3d 375 (2014).

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

Yes. Under §2-3-211 MCA, “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 Montana 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).

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

Yes. Although there are no court cases or sections of statute that support these attempts at secrecy, the constitutional right is to observe deliberations. If the deliberations consist in part of the passing of notes or the exchanging of emails, text messages or 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.

### ***Can a person bringing suit for violation of the right to participate under Article II, Section 8 of the Constitution recover attorney fees?***

Yes. *Citizens for Balanced Use v. Department of Fish Wildlife and Parks*, 376 Mont. 202, 331 P.3d 844 (2014).

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

Yes. According to §2-3-212 MCA, 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 statutory provisions governing access to documents include “public information” which is “prepared, owned, used or retained by any public agency relating to the transaction of official business, regardless of form.” §2-6-1002(11), and Article II, Section 9 of the Montana Constitution do not make a distinction between draft documents and approved or “official” documents. Both must be provided to the public. County commissions are required to keep a “minute book” (§7-5-2129).

Finally, under §2-3-212(4), a public body is required to keep minutes of closed meetings. These minutes are to be kept confidential, but may be disclosed upon court order.

***Do emails communicated to a quorum of a public body constitute a “meeting” and, therefore, subject to notice and observation by the public?***

Yes. In *Allen v. Lakeside Neighborhood Planning Committee*, 371 Mont. 310, 308 P.3d 916 (2013) the Supreme Court warned: “(w)e therefore caution public officers that conducting official business via email can potentially expose them to claims of violation of open meetings laws.”

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

Yes. According to Article V, Section 10, subsection 3 of the state Constitution, “The 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. In 1995, The Associated Press and 21 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. State District Judge Thomas Honzel ruled later that year that organizational party caucuses, held before the start of the legislative session, should be subject to the state open meetings law.

Honzel 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 Honzel to reconsider the issue. Honzel ruled in 1998 that the caucuses during legislative sessions are 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 is defined as a public record?***

The newly enacted §2-6-1002(13) MCA defines public records as “public information” that is “fixed in any medium and is retrievable in usable form for future reference” **and** has been “designated for retention by the state (or local) records committee...” It is unclear whether the conjunction “and” is a necessary prerequisite to defining a public record.

The old law, repealed by §2-6-1002(13), defined a public record to be “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). Under the old law, any record concerning matters within the jurisdiction of the governmental entity were “public records.” This new statute is ambiguous and probably will need judicial construction.

The term “public information” as used in the new law is defined as “information prepared, owned, used, or retained by any public agency...” §2-6-1002(11).

Note, that “public information” is not confined to “documents.” Technically, then, a public employee could be compelled to provide “information” of which he or she was aware, regardless of whether it is reflected in some document.

***What is the most effective way to request copies of public records?***

When possible, those requesting public records should go in person to the county courthouse or other governmental entity and ask to examine the records they need, making their request as narrow and specific as possible. Then, after looking through the records, a request can be made for copies of just those documents that are needed. Doing so will minimize the risk of the agency delaying access to the records with excuses like “too many records to look through to find yours” or “it will be far too expensive for us to do the search.” Remember, your constitutional right is to *examine* a document.

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

Yes. §2-6-1006 permits an agency to charge for its costs in “gathering” and “copying” requested documents. The agency must give the requestor an estimate of the agency charges and is not obliged to gather or copy the document. In a 1996 memo to state agencies, Gov. Mark Racicot suggested a charge of .10 per copy as a “reasonable” charge. In no event, however can the costs exceed the actual costs incident to fulfilling the request. (§2-6-1006(3)).

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

Yes. According to §2-6-1006(3) MCA, agencies may charge expenses for accessing the document and making copies. Prior to this change, only a state agency could charge for access to electronically stored information. Under the new law both state and local agencies can charge for identifying and gathering requested records. The agency is limited to charging the actual cost “directly incident to filling the request in the most cost-efficient and timely manner possible.” But, the new law permits the agency to charge for the time spent in accessing the information and may require the requestor to pay up front.

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 or to access it.

### ***Can an agency deny access to "public information"?***

§2-6-1003 MCA guarantees public access to all "public information" except information related to "individual or public safety or the security of public facilities, including public schools, jails, correctional facilities, private correctional facilities, and prisons, if release of the information jeopardizes the safety of facility personnel, the public, students in a public school, or inmates of a facility."

§2-6-1003(3) permits the Montana Historical Society to "honor" restrictions imposed by "private" record donors "as long as the restrictions do not apply to public information."

### ***Can an agency deny access to "information" which is maintained by the agency, but is not "public information"?***

Maybe. Pursuant to §2-6-1002(1) MCA, "confidential information" may be withheld from public examination. "Confidential information" includes information containing "privacy interests" (which) clearly exceed the merits of public disclosure, is related to judicial deliberations in adversarial cases, is necessary to maintain the security and integrity of secure facilities or information systems owned by or serving the state, and any other information designated as confidential by statute or court decisions. However, there is no operative provision in the law expressly using the definition of "confidential information." In other words, there is no prohibition against disclosure of "confidential information." It probably will take a court decision to tie the definition to an operational bar on disclosure.

### ***Can a request for electronic records be denied if the records are public?***

The old law, §2-6-110 MCA, provided 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. Under the new law, §2-6-1006(3), the agency can insist on payment of the estimated costs of retrieval before permitting access. This provision is particularly troublesome for electronically stored records because it will be difficult to impeach the agency estimate of the time necessary to identify or retrieve the record.

***What should the public do when a government official denies a request for a public record?***

The first step is to make sure that the request has been made to the official who has the authority to grant or deny access. If the request was made to someone who does not have the final say, then the request should be taken up the chain of command to the official who has the final authority on the matter. Then, if that person again denies access to the records, the requestor should contact the FOI Hotline for assistance.

***In the event an agency denies access to a record, must it indicate why access is denied?***

Yes. Under §2-6-1009 MCA a public agency must provide a written explanation for denial of an information request.

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

The old law (§2-6-104 MCA) required that public records be open to inspection by any person during office hours. The new law does not have a specific provision setting forth when records may be inspected. §2-6-1006(2) requires that an agency respond to a request “in a timely manner.”

***How quickly must the agency respond to a document request?***

§2-6-1006(2) MCA requires the agency to “respond in a timely manner.” The agency must make the record available for examination and copying or provide the requestor with an estimate of the time and charges for accessing the information if it cannot be “readily identified and gathered.”

### ***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 MCA 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 has now 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. All other corporate information in the possession of a governmental agency is presumed to be open and may not be withheld based on a right of privacy. *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 in flux. 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 federal statute making confidential tax records of “C” corporations prevented disclosure of those records. The decision preserved the right to challenge the constitutionality of the section under state law.

Property tax records and assessments are both public information, but individual state income tax records (as well as corporate income tax records) are confidential because they are implicitly confidential under

federal law.

***If public officials are conducting public business via private email or private cell phones (texts), does the public have access to that information?***

Yes. 2-6-1002(11) MCA defines accessible information to include information prepared by government relating to the transaction of official business. The medium used (whether public or private email) makes no difference. If the information related to official business, it is accessible.

***Are 9-1-1 tapes and dispatch recordings kept by law enforcement public records?***

Yes. A 9-1-1 call and its accompanying recorded dispatch record is clearly an "initial offense report" and therefore "public criminal justice information." See, 42 Op. Att'y Gen. No. 119 (2004). There is nothing in the law granting greater protection to 9-1-1 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 9-1-1 call is for a health-related emergency for a private citizen, it may not be available for inspection.

***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?***

§2-6-1003 MCA is the operative requirement that agencies make records available for inspection and copying. There is no condition precedent in the law requiring that the request be in writing. However, it is always good practice to put the request in writing so there is a record

of the request, the date it was made and the specific records requested in the event court action is later commenced. In addition to requiring the request be made in writing, some agencies will also ask for the reasons for requesting the documents. Neither of these requirements is necessary, however, and an oral request without rationale must be honored.

***Can the custodian of a record require the public to use a specific form to submit a records request?***

No. There is no requirement in Montana state law for the use of a specific form. (For a sample FOI request letter, please see the “Resources” tab on the montanafoi.org home page.)

***Are all personnel records maintained by a public agency confidential?***

The Supreme Court has ruled that there is no blanket exemption for personnel records. Disciplinary records of public employees vested with the public trust are publically accessible. *Missoula County Pub. Schools v. Bitterroot Star*. 378 Mont. 451, 345 P.3d 1035.

***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 Daily Chronicle v. City of Bozeman Police Dept.* 260 Mont. 218, 225, 859 P.2d 435, 439 (1993), 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 determining whether the right of individual privacy protects certain records from disclosure, the Supreme Court has devised a two-part test: (1) whether the person asserting the right has a subjective or actual expectation of privacy and (2) whether society is willing to recognize that exception as reasonable. The Court has applied this test in a series of cases involving records of agency investigations of alleged wrongdoing by public employees and officials. The Court in *Bozeman Daily Chronicle* relied on its prior ruling in *Great Falls Tribune v. Cascade County Sheriff*, 238 Mont. 103, 775 P.2d 1267, (1989), in which the Court first recognized that when balancing the right to know with the right of privacy of governmental employees who occupy positions of public trust, the right to know must always prevail. This is so, because “it is not good public policy to recognize an expectation of privacy in protecting the identity of a law enforcement officer whose conduct is sufficiently reprehensible to merit discipline.” 238 Mont. 107.

Since the Court’s ruling in *Great Falls Tribune*, the Court has applied this doctrine to order the release of records of a mayor’s alleged harassment of a city employee, *Citizens to Recall Whitlock v. Whitlock*, 255 Mont. 517, 844 P.2d 74 (1992); a police officer accused of rape, *Bozeman Chronicle v. City of Bozeman*, 260 Mont. 218, 869 P.2d 435 (1993); a DUI arrest of a county commissioner, *Jefferson County v. Montana Standard*, 2003 MT 384, 318 Mont. 173, 79 P.3d 805; a school teacher’s abuse of students, *Svaldi v. Anaconda Deer Lodge*, 2005 MT 17, 325 Mont. 365, 106 P.3d 548; a sex discrimination case involving county public defender’s office, *Yellowstone County v. Billings Gazette*, 2006 MT 218, 333 Mont. 390, 143 P.3d 135; and, a police department clerk accused of misusing city funds, *Billings Gazette v. City of Billings*, 2011 MT 293, 362 Mont. 522, 267 P.3d 11.

A recent iteration of this doctrine is the 2011 *Billings Gazette* ruling. There, the Court determined that because the clerk was being investigated for allegations that she misappropriated public funds, “which is the very aspect of her job that renders it a ‘position of trust,’ the public documents generated as a result of the investigation should be subject to public disclosure.” ¶23. The Court relied on its 2006 *Yellowstone County* case recognizing “society is not willing to recognize as reasonable the privacy interest of individuals who hold positions of public trust when the information sought bears on that individual’s

ability to perform public duties." *Yellowstone County*, *supra* at ¶21.

However in *Billings Gazette v. City of Billings*, 372 Mont. 409, 313 P.3d 128 (2013), the Supreme Court declined to apply the public trust/diminished right of privacy doctrine to non-managerial employees.

### ***Are school records of students open to public inspection?***

The school probably will refuse to provide public access to student records based on a federal law, FERPA. The Supreme Court, in *Cut Bank Pioneer Press v. Cut Bank School District*, 2007 MT 115, ¶24, 337 Mont. 229, 160 P.3d 482, applied the Montana right-to-know law in holding that the federal law is inapplicable so long as the names of the students are redacted. So, if you ask for redacted student records they should be provided. However, this issue is being re-litigated in *Krakauer v. Commissioner of Higher Education*. There, the district court ruled that FERPA did not prohibit access to student records of disciplinary matters, so long as the school did not permit access on a systematic basis. The case is on appeal and scheduled for oral argument before the Supreme Court.

### ***Are "draft" copies of public documents open for viewing by the public?***

Yes. The definition of public information in §2-6-1002(11) MCA makes no distinction between "draft documents" and completed documents: "Public information means information prepared ... by any public agency ... regardless of form ..." The courts have also ruled that draft documents are public documents. The most commonly occurring issue is whether minutes of meetings of governmental entities in "draft" form are publicly accessible. The answer, of course, is yes.

### ***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) MCA.

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 "mug shots" public?***

Yes. A recent state district court ruling likens a "mug shot" to be akin to a jail occupancy roster which is public criminal justice information. Based on this court decision, the attorney general has declined to address the issue, re-affirming the statewide application of the district court ruling.

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

§61-11-503 MCA 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 MCA 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 MCA makes death certificates public. However, the federal Health Insurance Portability and Accountability Act (HIPPA) 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 MCA requires legislative poll results to be 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 MCA 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 MCA requires public inspection of bids after they are opened, subject to some restrictions.

***Is the public entitled to examine settlements of lawsuits when 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 the government paid

to settle the family's lawsuit against the state. Following the decision, the Legislature enacted §2-9-303 MCA, 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).

**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 an 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 government agency must respond within 20 days of receiving a

request, even if it is to inform that an extension is needed to respond to the request.

A complete booklet on how to use FOIA is available from the Reporters Committee for Freedom of the Press in Arlington, Virginia. The RCFP also provides samples of FOIA requests and has a fill-in-the-blank request generator at [www.rcfp.org](http://www.rcfp.org).

## **COURTS**

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

Most of the law governing law enforcement records can be found in the Montana Criminal Justice Information Act, Title 44, Chapter 5 of Montana Code Annotated. 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.

Further, certain landmark cases in Montana courts, the “Right to Know” provision in the Montana Constitution and the First and Fourteenth Amendments to the U.S. Constitution guarantee the public the right to attend criminal proceedings except in the most extreme cases. As a general rule, 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 unavailable.

### ***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 all court records open for public inspection?***

§2-6-1002(1)(b) MCA exempts from disclosure information “related to judicial deliberations in adversarial proceedings.” This is a new exemption which awaits judicial construction. It presumably is restricted to judge’s

notes, as well as law clerk memos to judges. It could also be construed to include court reporter “raw” notes and trial transcripts.

***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 MCA 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 the end of supervision for an offense, but may be unsealed if a new offense is committed.

Certain records remain private under the court’s discretion. Under §41-5-215, these include “Social, medical, and psychological records, youth assessment materials, predispositional studies, and supervision records of probationers.” Under the old law, these types of records were only opened to the public if the juvenile were charged with an offense that would be a felony if the juvenile were an adult. Only then were court proceedings to be open to the public. This rule also applied to law-enforcement records.

***Can a newspaper or broadcaster be punished for printing the name of a youth as long as the information was lawfully obtained?***

No. Laws prohibiting the dissemination of lawfully obtained information would amount to an illegal prior restraint and are expressly forbidden under a number of U.S. Supreme Court cases, including the landmark *Florida Star v. B.J.F.*, 491 U.S. 524, 16 Media L. Rep. 1801 (1989). In that case, the court reversed a ruling against the *Florida Star*, a Jacksonville weekly, for publishing the full name of a rape victim in violation of a state statute. Also, in *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 5 Media L. Rep. 1305 (1979) the Supreme Court ruled that the government may constitutionally punish a newspaper for

publishing lawfully obtained, truthful information about a matter of public significance only if the government can show that punishment is “narrowly tailored to a state interest of the highest order.”

### ***Are presentence investigation reports public records?***

Not without a court order. According to §46-18-113 (1) MCA, “All 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.

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

§3-1-111 MCA 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. 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 MCA, 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 is supposed to 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.

In the notorious case of accused child-killer Nathaniel Bar-Jonah, who prosecutors said butchered his victim and fed body parts in meals to unsuspecting neighbors, a state district judge in 2001 refused broad defense motions to seal court documents, close pretrial hearings and issue a gag order. Ruling after the news media intervened to keep the case open to the public, Judge Kenneth Neill of Great Falls found, "While the media coverage of this case and the defendant has been intense, the defendant has failed to demonstrate a clear and present danger to the right of a fair trial ..."

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

Usually not. 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)

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

Yes. §46-4-201 MCA establishes that a coroner's inquest must be run like a court. §3-1-312 says that 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 when they think a court proceeding is being closed improperly?***

Montana FOI wallet cards (available as a downloadable .pdf on [www.montanafoi.org](http://www.montanafoi.org)) 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 in *Tribune v. District Court*, and *Smith v. District Court*, 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 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.*