The Right to Participate and the Right to Know in Montana

Fritz Snyder
University of Montana School of Law, fritz.snyder@umontana.edu

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THE RIGHT TO PARTICIPATE AND THE RIGHT TO KNOW IN MONTANA

Fritz Snyder

I. INTRODUCTION

The right-of-participation and right-to-know sections of the Montana Constitution encourage open government and maximize citizen access to the decision-making institutions of state and local government. Both rights enhance the freedom of information which is the cornerstone of democracy. The right-of-participation section was a response to insider deal-making in state and local government. The right-to-know section was a response to the penchant for secrecy in government by state and local officials. Government is derived from the people and is intended for the benefit of the people. The people have a right to demand information about government activities and to obtain the information they request. Government in Montana is more open and accessible because of these two very important

1. Professor of Law and Associate Dean, University of Montana School of Law. I wish to thank the Honorable James Nelson, Associate Justice, Montana Supreme Court, for reading the draft of my article and offering valuable comments and suggestions.
3. Id.
sections. What follows is an analysis of how these two sections play out in specific situations, based on the relevant statutes and on the interpretations of the Montana Supreme Court and of the Montana Attorney General.

II. HISTORY OF MONTANA FUNDAMENTAL RIGHTS

Article II of the Constitution of the State of Montana is titled "Declaration of Rights." This Declaration of Rights has thirty-five sections, and the Montana Supreme Court has said that these thirty-five sections are "fundamental rights." A "fundamental right" is a right protected by the Declaration of Rights or "a right without which other constitutionally guaranteed rights have little meaning." Two of the particularly interesting and important sections or "rights" are Section 8, Right of Participation:

The public has the right to expect governmental agencies to afford such reasonable opportunity to citizen participation in the operation of the agencies prior to the final decision as may be provided by law.

and Section 9, Right to Know:

No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

These are both very unusual constitutional provisions. Only one other state has even a limited right-to-participate provision in its constitution. Only two other state constitutions have right-to-know provisions similar to Montana's, and two other state constitutions have limited right-to-know provisions.

5. Id.
7. Id. § 9.
8. N.C. CONST. art. I, § 37 (constitutional amendment approved at the 1996 general election) (giving crime victims basic right to participate in the justice system).
9. N.H. CONST. pt. 1, art. 8 ("Government . . . should be open, accessible, accountable and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted."); FLA. CONST. art. I, § 24 (designating all public information from all three branches of government as open unless the legislature by a two-thirds vote determines otherwise).
10. OKLA CONST. art. II, § 34 (dealing with rights of victims: "[A]ny victim or family member of a victim of a crime has the right to know the status of the investigation and prosecution of the criminal case [and] . . . the right to know the location of the defendant following an arrest [including] . . . when there is any release . . . of the
There is a fundamental link between the right to know and the right to participate in Montana. The right to know is a "companion" to the preceding right of participation. "Both arise out of the increasing concern of citizens and commentators alike that government's sheer bigness threatens the effective exercise of citizenship." The Montana Supreme Court will not analyze the two provisions in a vacuum, "separate and distinct." The Montana Constitutional Convention Bill of Rights Committee unanimously adopted Section 8 in response to the increased public concern and literature about citizen participation in the decision-making processes of government.

Delegate Foster commented: "Public awareness and access seem to be the only tools to remind the great mass of public servants that their job is to serve the needs of the public and no other; they are paid by tax dollars to benefit the public above all else." When trying to determine the meaning of a particular word or phase, or sometimes the absence of a word or phrase, in the Montana Constitution, it has become common for the Montana Supreme Court and lawyers generally to look at the convention's committee reports and at the specific comments of the delegates. In fact, in at least 117 cases between 1973 and 2004, the court referred to convention reports or transcripts to help determine intent. This is interesting. To help determine legislative or

defendant from confinement."); MICH. CONST. art. IX, § 23 (dealing with the public's right to know details of state finance).
12. Id. ¶ 31.
13. Id. (quoting 2 MONT. CONSTITUTIONAL CONVENTION COMM. REPORTS 631 (1972)).
14. Id.
15. Id. ¶ 40 (quoting 2 Mont. Constitutional Convention Comm. Reports 631 (1972)).
16. Id. (quoting 5 Mont. Constitutional Convention Transcripts 1655, 1657 (1972)).
17. Westlaw Search: "'constitutional convention' & date (after 1972 & before 2005)."
statutory intent, a lawyer or judge may look at the pertinent legislative history of a particular bill before it became law; in particular, at the written committee reports, at the hearing transcripts, and at the floor debate. For the federal Congress, all three types of history are available. For the Montana Legislature, all that is available are the minutes of legislative committee hearings, and the Montana Supreme Court sometimes checks these minutes to help determine legislative intent. The thinking is that when the Senate or the House, as a whole, votes in favor of a bill it incorporates the committee report, the hearing minutes (or transcript) or the relevant remarks during floor debate on the bill into its overall vote on the bill. That is, there is a direct link between the final vote on the part of the legislators and the legislative history.

It is both curious and interesting that this same notion has carried into discussions of constitutional history of Montana's 1972 Constitution. Certainly it is true that there is a well-indexed, very convenient eight-volume set of the Montana Constitutional Convention committee reports along with a complete transcript of all floor debate on the part of the 100 delegates. It is, then, possible to infer the presumed intent of the delegates when they voted in favor of a particular section of the proposed constitution. However, there is a significant difference here. It was the voters of Montana who had to approve the final constitution and all the sections within it, which they did. Thus it was the voters' understanding, surely, of what the constitutional sections intended that is, or should be, paramount. And there really is no way to attribute the intent from the written constitutional committee reports or from delegates' floor debate to the voters themselves. The only thing the voters had themselves was the voter education guide sent to all the voters: Proposed 1972 Constitution for the State of Montana: Official Text with Explanation, which was submitted by the Montana Constitutional Convention. It had a two-page "History and Highlights of Proposed Constitution," and then it gave the specific text of each section of each article, along with

18. There are at least fifteen such cases since 1973.
very short explanations after each section. These explanations or comments, if relevant, would be (and should be) the clearest indicators of intent for the voters themselves. There is one particularly useful example. Article II, Section 10, Right of Privacy says:

The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.

The explanation after this section says: "New provision prohibiting any invasion of privacy unless the good of the state makes it necessary" (emphasis added). However, the Montana Supreme Court, perhaps unaware of this explanation, said in *State v. Long* that this privacy section applies only to state action, and the fruits of an illegal search conducted by a private citizen without government participation are not subject to exclusion. This statement, which has never been overruled, flatly contradicts the explanation's word "any."

Privacy is important in this article because the Right of Privacy is balanced with, or against, the Right to Know. However, I bring this privacy example up now to emphasize the importance of the constitutional voters' guide with its explanations and to induce a note of caution to the idea of looking at the Montana Constitutional Convention committee reports and floor comments to determine, clearly and irrevocably, the intent behind a particular section. At best, these reports and comments indicate the delegates' intent, not the voters' intent, which is quite different from legislative intent where the legislators are the final voters. None the less, by custom and usage, it is important to pay attention to what the delegates seemed to have intended with respect to Sections 8 and 9. In addition, the explanations in the voter education guide had no helpful comments with respect to Sections 8 and 9. The explanation for Section 8 says: "New provision creating the right of the people to participate in the decision making process

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22. MONT. CONST. art II, § 10.
25. Id., 216 Mont. at 72, 700 P.2d at 158.
of state and local government.’’ The explanation for Section 9 says: “New provision that government documents and operations be open to public scrutiny except when the right to know is outweighed by the right to individual privacy.”

III. THE RIGHT TO PARTICIPATE

The final Constitutional Convention Bill of Rights Committee proposal for Section 8 was as follows: “The public shall have the right to expect governmental agencies to afford every feasible opportunity for citizen participation in the operation of the government prior to the final decision.” There was an attempt to make it more of a specific directive to government agencies with a proposed amendment saying: “Governmental agencies shall afford reasonable opportunity for citizens’ participation . . . .” However, Delegate Burkhardt argued against it by saying: “[W]e don’t want a precise, hidebound kind of inescapable statement that has to be put into the statutes. What we are looking for is the soul of a document, the living, growing reality.” The proposed amended language was defeated by a 58 - 30 vote.

The question also came up about the meaning of “governmental agencies” in Section 8. Delegate Dahood said, “I mean, by ‘government,’ [to] include those branches that are going to make rules and regulations that have the force and effect of law with respect to the average citizen. That does not include the Judiciary . . . .” However, Delegate Berg said: “I don’t think that it’s rational or reasonable to describe government and not include all branches of government . . . . [Although] I cannot conceive of what [the Judiciary’s] participation would be.”

Delegate McNeil then moved that the word “government” be deleted and that the word “agency” be added in its place:

I believe this will clear up the ambiguity that was concerning

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28. Id.
29. 2 MONT. CONSTITUTIONAL CONVENTION COMM. REPORTS 630 (1972).
30. 5 MONT. CONSTITUTIONAL CONVENTION TRANSCRIPTS 1655 (1972) (mot. by Del. Harbaugh).
31. Id. at 1665.
32. Id. at 1668.
33. Id. at 1663.
34. Id. at 1664.
Delegate Berg . . . . It will eliminate any question that the people are not going to participate by way of vote in terms of the Legislature or the Supreme Court or anything else and will clearly pinpoint the fact that it is the governmental agencies that are the target of this section designed to permit the citizens to participate therein.\textsuperscript{35}

His amendment was adopted via a voice vote.\textsuperscript{36}

Finally, near the end of the delegates' discussion of Section 8, Delegate Davis proposed a very important addition or amendment: the addition of "as provided by law" at the end of Section 8.\textsuperscript{37} He commented: "[W]e want the Legislature to establish some guidelines, rather than leaving it in doubt."\textsuperscript{38} Both Delegates Eck and Dahood commented that legislative implementation was inferred even without the specific words but did not oppose their addition.\textsuperscript{39} This leads to the distinction between self-executing and non-self-executing provisions. "A self-executing constitutional provision is one that is immediately effective without the necessity of ancillary legislation; that is, it supplies a sufficient rule by which a right given may be enjoyed or a duty imposed may be enforced."\textsuperscript{40} This distinction between Section 8 (Right of Participation) and Section 9 (Right to Know) is very important. Section 8 is not self-executing; Section 9 is. Section 8 spawned the Public Participation in Governmental Operations\textsuperscript{41} and Open Meetings\textsuperscript{42} statutory schemes. Section 9 spawned almost nothing and is completely open to court interpretation and enforcement.

Montana Code Annotated section 2-3-101, Legislative Intent, nearly tracks the language of Section 8: The right of the people to have " . . . reasonable opportunity to participate in the operation of governmental agencies prior to the final decision . . . ." Definitions are important. Montana Code Annotated section 2-3-102(1) defines "agency" as "any board, bureau, commission, department, authority, or officer of the state or local government authorized to make rules, determine contested cases, or enter

\textsuperscript{35} Id. at 1666.
\textsuperscript{36} 5 MONT. CONSTITUTIONAL CONVENTION TRANSCRIPTS 1667 (1972).
\textsuperscript{37} Id. at 1668.
\textsuperscript{38} Id.
\textsuperscript{39} Id.
\textsuperscript{40} Carl W. Tobias & Daniel N. McLean, Of Crabbed Interpretations and Frustrated Mandates: The Effect of the Environmental Policy Acts on Pre-existing Agency Authority, 41 MONT. L. REV. 177, 255 (1980).
\textsuperscript{41} MONT. CODE ANN. §§ 2-3-101 to -114 (2003).
\textsuperscript{42} MONT. CODE ANN. §§ 2-3-201 to -221.
into contracts except (a) the legislature . . . ; (b) the judicial branches . . . ; (c) the governor . . . .” A board of education advisory committee, such as a facilities committee, is “a public or governmental” body. The definition of agency does not include individual employees, and therefore a TV station did not have the right to have a reporter cover a meeting between the city engineer, the public works director, and representatives of a private construction company. However, a Montana Attorney General Opinion criticized this decision for its too limited definition of a “meeting” when, in fact, an agency, really two agencies, were involved in the meeting.

Montana Code Annotated section 2-3-103 deals with public participation, which has been refined by cases and Attorney General Opinions. Subsection 1 says: “Each agency shall develop procedures for permitting and encouraging the public to participate in agency decisions that are of significant interest to the public” (emphasis added). Meetings involving the consideration of matters of “significant public interest,” meaning decisions involving more than a ministerial act requiring no exercise of judgment, are subject to public participation mandates. However, Article II, section 8, Right of Participation, of the Montana Constitution contains no such limitation. In addition, what is and is not a “ministerial act” can be quite subjective. Governing authorities tend to have varying ideas about what is of “significant interest” to the public. If the law gives public officials a way around the right-to-participate and right-to-know requirements, public officials may embrace that loophole.

Montana Code Annotated section 2-3-103(1) also says there must be adequate notice of the meeting. Thus there must be two days posted notice of the time and place of a meeting of an agency. Where two of three county commissioners discussed by telephone the approval of a preliminary plat of a subdivision, a “meeting” took place. A gathering of county commissioners to discuss issues over which they have authority is an open

47. MONT. CODE ANN. § 7-5-2122(2) (2003).
meeting and subject to public participation. When three members of the four-member committee that recommends a list of persons from whom the Governor may select the Commissioner of Political Practices met to discuss candidates and the transmission of their names to the Governor and gave no public notice of the meeting, the committee violated the Open Meeting Law.

Montana Code Annotated section 2-3-104 lists the requirements for compliance with the notice provisions: (1) Environmental impact statement properly prepared and distributed; (2) A proceeding is held in accord with the Montana Administrative Procedure Act (Mont. Code Ann. § 2-4-302); (3) A public hearing has the appropriate notice; (4) A newspaper has carried a story concerning the decision sufficiently prior to the final decision to permit public comment. Notice can be by a means other than print. Montana Code Annotated section 2-3-105 provides for supplemental notice by radio or television.

Montana Code Annotated section 2-3-111 provides for the "reasonable opportunity" to submit views at public hearings: (1) "Procedures for assisting public participation must include a method of affording interested persons reasonable opportunity to submit data, views, or arguments, orally or in written form, prior to making a final decision that is of significant interest to the public"; (2) The facility where the hearing is held must be "accessible." "Reasonable opportunity" demands compliance with the constitutional right to know. Montana Code Annotated section 2-3-301 notes that comments may also be submitted via email. Simply noting that the regular meeting time, for public notice purposes, is 9:30 a.m. - 5:00 p.m., Monday through Friday, is not sufficient. Also, posting a notice of a school board meeting 48 hours prior to the meeting in three locations did not meet the constitutional requirement for adequate notice.

53. Bryan, ¶ 44.
Montana Code Annotated section 2-3-112 provides the following exceptions to Public Participation (section 2-3-103) and to the Opportunity to Submit Views at Public Hearings (section 2-3-111): (1) Agency decisions dealing with emergency situations affecting the public health, welfare, or safety; (2) An agency decision that must be made to protect the interests of the agency; (3) A decision involving no more than a ministerial act. In fact, these exceptions seem to have little importance. An emergency situation would justify quick action on the part of an agency. Of course, it would have to be a true emergency. An agency decision that must be made to protect the interests of the agency would presumably be a lawsuit of some kind where litigation strategy is discussed. There are no cases or Attorney General opinions discussing these two exceptions. Meetings involving the consideration of matters of significant public interest, meaning decisions involving more than a ministerial act requiring no exercise of judgment, are subject to public participation mandates. Clearly, “no exercise of judgment” is a very low threshold.

The second part of the statutory scheme deals with open meetings. Montana Code Annotated section 2-3-201 declares that it is the legislative intent that these open meetings statutory sections be given a liberal construction. Public boards, commissions, councils, and other public agencies exist to aid in the conduct of the peoples’ business: “It is the intent of this part that actions and deliberations of all public agencies shall be conducted openly . . . . [T]he provisions of the part shall be liberally construed.” Executive meetings of public bodies are subject to the Open Meeting Law even if no decisions are reached at the meetings. A statutory committee required to provide the Governor with a list of names of possible candidates for the position of Commissioner of Political Practices was a “public or governmental body” subject to requirements of the Open Meeting Law. Human Rights Commission deliberations must be open to the public unless the demands of individual privacy clearly exceed the merits of public disclosure. A public body (e.g., the Daly Mansion Preservation Trust) performing a

57. MONT. CODE ANN. § 2-3-201 (2003).
59. Common Cause of Mont., 263 Mont. at 330, 868 P.2d at 608.
public function is subject to the Open Meeting Law.61 A member of the public may record the deliberations of open school board meetings.62 School boards are not permitted to discuss bargaining strategy privately,63 local governments may not discuss litigation strategy privately,64 and legislative caucuses may not discuss partisan strategy privately.65 The Montana Supreme Court has opened to the public its weekly administrative meetings in which it deals with such matters as revising rules governing attorneys and judges, court procedures, appointments to judicial boards and commissions, and court administrator reports.66 However, this will not affect its weekly closed-door conferences at which the members discuss and vote on cases.67

According to Montana Code Annotated section 2-3-202, a “meeting” means “[t]he convening of a quorum of the constituent membership of a public agency or association,” even if done by a conference call “to hear, discuss, or act upon a matter” over which the agency has supervisory power. Where two of three county commissioners discussed by telephone the approval of a preliminary plat of a subdivision, a meeting took place.68 Deliberations of a county tax appeal board regarding property evaluations must be open to the public unless the presiding officer determines that the demands of individual privacy clearly exceed the merits of public disclosure.69 However, discussions between the Director of Fish, Wildlife and Parks and an Indian tribe were not subject to the Open Meeting Law because there was not a quorum of the constituent membership but only the individual Director involved; a “quorum” consists of a majority of the entire body.70

67. Id.
68. Bd. of Trs., 186 Mont. at 154-55, 606 P.2d at 1072-73.
Montana Code Annotated section 2-3-203 further elaborates on what meetings of associations or public agencies are and which, therefore, must be open to the public: (1) All meetings of public or governmental bodies, boards, bureaus, commissions, or agencies supported in whole or in part by public funds or expending public funds. (2) All such meetings of associations that are composed of public or governmental bodies which regulate the rights, duties, or privileges of any individual. The phrase "public or governmental bodies" means a group of individuals organized for a governmental or public purpose. Factors to consider when determining if a committee's meetings are required to be open to the public:

(1) Whether the committee's members are public employees acting in their official capacity; (2) whether the meetings are paid for with public funds; (3) the frequency of the meetings; (4) whether the committee deliberates rather than simply gathering facts and reports; (5) whether the deliberations concern matters of policy rather than merely ministerial or administrative functions; (6) whether the committee's members have executive authority and experience; and (7) the result of the meetings.

However, section 2-3-203 states that the presiding officer of any meeting may close the meeting if the discussion relates to a matter of individual privacy and the demands of individual privacy clearly exceed the merits of public disclosure, although the right of individual privacy may be waived. Also, according to section 2-3-203, a meeting may be closed to discuss strategy to be followed with respect to litigation when an open meeting would have a detrimental effect on the litigating position of the public agency. The definition of "agency" does not include individual employees; therefore, a TV station did not have the right to cover a meeting between the city engineer, the public works director, and representatives of a private construction company.

A committee is a "public or governmental body" if it has a clear public and governmental purpose and was created for a specific governmental purpose; e.g., a committee to recommend a list of persons from whom the Governor may select the Commissioner of Political Practices. A Board of Education

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71. Common Cause of Mont., 263 Mont. at 330, 868 P.2d at 608.
73. SJL of Mont. Assocs., 263 Mont. at 147-49, 867 P.2d at 1087-88.
74. Common Cause of Mont., 263 Mont. at 330, 868 P.2d at 608.
advisory committee, the Facilities Committee, is "a public or governmental body."\textsuperscript{75} Quasi-judicial boards are public bodies and subject to Montana's open-meeting and public-notice laws.\textsuperscript{76} The Attorney General found that the Montana Life and Health Insurance Guaranty Association is a public body statutorily organized to protect insured members of the public from insurance company insolvency, and, as such, the Association's board of directors is subject to the Open Meeting Law.\textsuperscript{77} By accepting public funds and deciding how those funds are to be spent, a convention and visitors bureau became subject to the Open Meeting Law.\textsuperscript{78} Meetings of private corporations under state contract are to be open to the public.\textsuperscript{79} Deliberations of the Human Rights Commission are subject to the Open Meeting Law unless demands of individual privacy clearly exceed the merits of public disclosure.\textsuperscript{80} Without public notice, though, a meeting is open to the public in theory only, not in practice.\textsuperscript{81}

However, in personnel matters involving grievances, the right to privacy exceeds the public's right to know.\textsuperscript{82} Flesh developed a two-part test to determine whether a privacy interest is protected by the state constitution: (1) whether the person involved has a subjective or actual expectation of privacy, and (2) whether society recognizes that expectation as reasonable.\textsuperscript{83} A trial court committed error when it incorrectly held that the city council could go into executive session to discuss charges against the police chief, who was not present, without first notifying him and asking whether he would waive his privacy rights.\textsuperscript{84} In a 1984 opinion, the Montana Supreme Court said that the demands of individual privacy of university

\textsuperscript{75} Bryan, ¶ 26.


\textsuperscript{82} Flesh v. Bd. of Tr., 241 Mont. 158, 166, 786 P.2d 4, 9-10 (1990).

\textsuperscript{83} Id., 241 Mont. at 165, 786 P.2d at 8.

\textsuperscript{84} Goyen, 276 Mont. at 218-219, 915 P.2d at 828.
presidents and other university personnel in confidential job performance evaluations of the Board of Regents clearly exceed the merits of disclosure. It is questionable, however, whether this personnel matters exception should be "an all-protecting shield for all discussions relating to personnel . . . ." Perhaps only those "cases in which there is a significant threat to an employee's reputational interests" should be exempt from public scrutiny. The presidents of Montana's public universities are very important people. Their decisions are important to the people of Montana, and the people should have the right to read the Board of Regents evaluations of them. This should be true of all state and public university employees whose decisions have a very significant impact on public policy.

Montana Code Annotated section 2-3-213 states that any decision made in violation of section 2-3-203 may be declared void by a district court and that a suit to void a decision must be commenced within thirty days of the decision. Although, money damages are not available for holding an illegally closed meeting, according to Montana Code Annotated section 45-7-401, a public servant commits the offense of official misconduct when in his official capacity he knowingly conducts a meeting in violation of section 2-3-203. Exhausting administrative remedies is not required before appealing an agency's decision to close a meeting.

Under Montana Code Annotated section 2-3-211, media representatives may not be excluded from any open meeting and may not be prohibited from taking photos, televising, or recording such meetings. Under Montana Code Annotated section 2-3-212, appropriate minutes of all meetings required to be open shall be kept and shall be available to the public, and these minutes shall include:

(a) Date, time and place of meeting;
(b) A list of the members of the public body, agency, or organization in attendance;
(c) The substance of all matters proposed, discussed or decided; and

87. Id.
At the request of any member, a record by individual members of any votes taken.

IV. THE RIGHT TO KNOW

Article II, section 9, the Right to Know, "is premised on the idea that government should be open and subject to public scrutiny." A reporter, Daniel J. Foley, brought up the need for the right-to-know provision in a statement before the Montana Constitutional Convention's Bill or Rights Committee: "In a survey by the Montana Press Association several months ago, one paper reported that it could not obtain city ordinances. Another said one of its reporters was not allowed to look at marriage licenses." Delegate Dorothy Eck said that Article II, section 8, the Right of Participation, would give citizens the right to know the proceedings of all public transactions; e.g., those involving city councils, school boards, town meetings, and the legislature. She felt that people were beginning to associate the right to know with the Constitutional Convention, which had been very open and receptive to citizen suggestions.

Justice Nelson has noted that the Montana Supreme Court "has been particularly vigilant and uncompromising in protecting Montanans' constitutional 'right to know' and in rejecting other governmental bodies' attempts to limit or subvert this right." Justice Trieweiler noted:

The delegates to the Constitutional Convention made a clear and unequivocal decision that government operates most effectively, most reliably, and is most accountable when it is subject to public scrutiny . . . . While on any given occasion there may be legitimate arguments for handling government operations privately, the delegates to our Constitutional Convention concluded that in the long term those fleeting considerations are outweighed by the dangers of a government beyond public scrutiny.

Governmental meetings should be open, and bureaucrats should not exclude the public even to discuss litigation or collective

90. ELISON & SNYDER, supra note 2, at 47.
91. 5 MONT. CONSTITUTIONAL CONVENTION BILL OF RIGHTS COMM. MINUTES 1-2 (Jan 27, 1972).
92. 5 MONT. CONSTITUTIONAL CONVENTION BILL OF RIGHTS COMM. MINUTES 3 (Feb. 12, 1972).
93. Id.
bargaining strategy. 96 "[P]ublic officials gain undue power by their rarified access to information. And because average citizens are denied that same information, bureaucrats have another advantage: they escape full accountability to the people they serve." 97 The Montana Constitution provides the media, along with the public, the right to know. 98

There is in section 9 the question of the balance between the right to know and the right of privacy. However, here the word "clearly" comes into play: "No person shall be deprived of the right to [know] . . . except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure" (emphasis added). 99 Delegate Eck noted: "We added the word 'clearly' with the intention of tipping the balance in favor of the right to know . . . . By creating an atmosphere of openness in government, the [Bill of Rights] committee believe[d] that confidence in government will increase . . . ." 100

As far as deciding who would decide when the right to privacy should prevail, the legislature was deliberately left out, with deference instead to the courts. 101 There was also the thought about making the right to know absolute by deleting the section " . . . except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure," but the delegates by a vote of 76-14 rejected this idea. 102 Some had feared the privacy exception would swallow the entire rule. Delegates did, however, unanimously approve adding the word "individual" so that it would read "the right of individual privacy." 103 Moreover, "individual" does not mean a "corporation." Delegate Wade Dahood said: "A person can . . . be defined to include a corporation under the law [but] . . . an individual . . . would not be a corporation . . . ." 104 Justice James Nelson later commented on this in a special concurrence:

[The framers never intended that corporations and entities other
than individuals—i.e., human beings—would be guaranteed privacy rights.

The protection from disclosure under Article II, Section 9, is not available to corporations or any other non-human entity.\textsuperscript{105}

In \textit{Great Falls Tribune v. Montana}, the court's majority opinion incorporated Justice Nelson's special concurrence that "individual privacy" is limited to natural human individuals only.\textsuperscript{106}

Two factors determine whether a person has a constitutionally-protected privacy interest: (1) Whether the person involved had a subjective or actual expectation of privacy, and (2) Whether society is willing to recognize that expectation as reasonable.\textsuperscript{107} Former Montana Administrative Rule 42.2.701 (2000) presumed that all taxpayers have a constitutionally-protected right to privacy in the information they provide to the Department of Revenue which prevails over the right to know. However, to determine whether the demands of individual privacy clearly exceed the merits of public disclosure, the facts of each case must be examined.\textsuperscript{108} It requires a balancing of "the competing constitutional interests in the context of the facts of each case to determine whether the demands of individual privacy clearly exceed the merits of public disclosure."\textsuperscript{109} To determine whether the right of privacy warrants the closure of a meeting, the presiding officers should apply a three-part test:

a) Determine whether a matter of individual privacy is involved;

b) Determine the demands of that privacy and the merits of publicly disclosing the information at issue;

c) Decide whether the demands of individual privacy clearly outweigh the demands of public disclosure.\textsuperscript{110}

A report explored allegations of a mayor's misconduct in office and did not disclose information related to his private activities, general performance evaluation, or proceedings in which his character, integrity, honesty, or personality were discussed.\textsuperscript{111}

\textsuperscript{105} Associated Press, Inc. v. Mont. Dep't. of Revenue, 2000 MT 160, ¶¶ 109, 111, 300 Mont. 233, ¶¶ 109, 111. 4 P.3d 5, ¶¶ 109, 111 (Nelson, J., concurring).

\textsuperscript{106} Great Falls Tribune, ¶ 33.

\textsuperscript{107} Missoulian, 207 Mont. at 522, 675 P.2d at 967.

\textsuperscript{108} Mont. Dep't. of Revenue, ¶ 26.

\textsuperscript{109} Missoulian, 207 Mont. at 529, 675 P.2d at 971.


The district court properly found that the right of the public to know should be accorded greater weight than the mayor's unreasonable claim of privacy. The question of self-executing versus non self-executing also came up in the constitutional convention. Section 8, Right to Participate, is not self-executing and called on the legislature for help with legislation. Section 9 takes the opposite tack. It was proposed that "as may be provided by law" should be added to and thus make it also not self-executing. However, this proposal was voted down, 56-30. The Montana Supreme Court has also specifically recognized that section 9 is self-executing with legislation not required to give it effect.

A key definitional question when analyzing section 9 is what is a "public body." Section 9 says: "No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies . . . ." (emphasis added). Thus a committee, which was not appointed pursuant to a statute or regulation, that the director of the Department of Corrections appointed to advise him was found to be a public body. A school district is a public body for the purposes of the right-to-know provisions. After the disciplinary arm of the Montana Supreme Court, the Commission on Practice, filed findings, conclusions, and recommendations for sanctions of two attorneys, the attorneys filed arguments attacking the constitutionality and function of the Commission. The court held that the Rules on Lawyer Disciplinary Enforcement establishing investigatory and adjudicatory functions of the Commission on Practice and requiring that pre-formal complaint investigations and evidence be kept confidential did not violate the attorneys' constitutional rights. Chief Justice Turnage, writing for the majority in the four-three decision, said that because the Commission on Practice sat only in an advisory role.

112. Id., 255 Mont. at 524, 844 P.2d at 78.
114. 5 MONT. CONSTITUTIONAL CONVENTION TRANSCRIPTS 1679 (1972).
119. Id. ¶ 51.
capacity to the court, no prejudice was shown to the sanctioned attorneys as a result of their exclusion from the Commission's deliberation meetings.\textsuperscript{120} Justice Nelson in his dissent argued that even the Montana Supreme Court, along with its Commission on Practice, is a public body: "There can be no doubt, this Court is a group of individuals organized by and under the Montana Constitution for a governmental purpose . . . ."\textsuperscript{121} The committee that recommended a list of persons from whom the Governor may select the Commissioner of Political Practices was a "public or governmental body" because it had a clear public and governmental purpose and was created for a specific governmental task and was thus subject to the open meeting law.\textsuperscript{122} The Attorney General found the Montana Life and Health Insurance Guaranty Association to be a public body statutorily organized to protect insured members of the public from the extraordinary event of insurance company insolvency.\textsuperscript{123} However, when a father of a high school student sought a writ of mandate to obtain names and rankings of teachers who evaluated his student son and whose low ranking prevented him from being admitted into the National Honor Society, the court said the teachers acted voluntarily and the school did not keep records related to Honor Society membership, and therefore the documents sought were not "documents of a public body."\textsuperscript{124}

The party requesting information under the Right-to-Know provision must make a showing that it is entitled to receive such information.\textsuperscript{125} In a 2004 case, newspapers brought an action against the Montana Commissioner of Higher Education, seeking a declaration that the meetings (14 meetings over a 30-month period) between the Commissioner and the state university policy committee, made up of senior university officials (Senior Management Group), were subject to the state's open meeting laws.\textsuperscript{126} In his majority opinion, Justice Warner, in this five-two decision, noted that the Senior Management Group was organized to serve a public purpose because it

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{120} Id. ¶ 49.
\item \textsuperscript{121} Id. ¶ 106 (Nelson, J., dissenting).
\item \textsuperscript{122} \textit{Common Cause of Mont.}, 263 Mont. at 330-31, 868 P.2d at 608.
\item \textsuperscript{124} \textit{Becky}, 274 Mont. 218 at 138, 906 P.2d at 197.
\item \textsuperscript{125} \textit{Bozeman Daily Chronicle v. Bozeman Police Dep't}, 260 Mont. 218, 224, 859 P.2d 435, 439 (1993).
\item \textsuperscript{126} \textit{Associated Press v. Crofts}, 2004 MT 120, 321 Mont. 193, 89 P.3d 971.
\end{itemize}
\end{footnotesize}
discussed matters directly related to the governance of the university system, such as policy changes, tuition and fee changes, budgeting issues, contractual issues, employee salaries, and legislative initiatives.\textsuperscript{127} He said:

Devices such as not fixing a specific membership of a body, not adopting formal rules, not keeping minutes in violation of § 2-3-212, MCA, and not requiring formal votes, must not be allowed to defeat the constitutional and statutory provisions which require that the public's business be openly conducted.\textsuperscript{128}

The presumption is that all documents of public officials are amenable to inspection, even over other competing constitutional interests, such as due process.\textsuperscript{129} New York's Committee on Public Access to Court Records determined that "whatever is public in paper should be public electronically;" that attorneys should delete certain information such as account numbers and social security numbers, but all family records are closed.\textsuperscript{130} In Minnesota, "if a court administrator cannot identify a statute, court rule, court order or case law that precludes public access to a particular record, then the record is presumed to be accessible to the public . . ."\textsuperscript{131}

Information determined to be private includes: (a) family problems; (b) health problems; (c) drug and alcohol problems; (d) interpersonal relations.\textsuperscript{132} Fifth, it is also "unlawful to disclose data in the vital statistics records" of the Department of Public Health and Human Services, local registrars, or county clerks and recorders, unless disclosure is authorized by law.\textsuperscript{133} A sixth
type of private information is employment evaluations, even though the information is voluntarily conveyed and is "general knowledge." With respect to the in camera inspection of private employment records, court discretion in suppressing discovery is proper. On the other hand, a public official who was arrested for driving under the influence and with an expired driver's license had no expectation to a constitutional right to privacy regarding the initial investigation report and video tapes taken at the time of her arrest because she chose to violate the law while holding public office. In a similar case, several police officers were disciplined as a result of their actions during the chase and apprehension of a suspect. Law enforcement officials refused to release the names of the officers to the newspaper on the basis that to do so would violate the officers' privacy rights. The Montana Supreme Court upheld the lower court's order to disclose the names on the basis that officers who have been disciplined have only a minimal right of privacy that is easily outweighed by the peoples' right to know.

In 2003, a survey in Montana showed an 81 percent success rate in obtaining public information from public agencies. However, nearly half of Montana's county sheriffs violated the state's Open Records Law by refusing to release their jail rosters. The sheriffs or their employees claimed the inmate lists were confidential. The Daniels County sheriff said he did not care what the law said: "He wasn't about to let anyone see

134. Missoulian, 207 Mont. at 527-528, 675 P.2d at 970. The demands of individual privacy of the university presidents and other university personnel in confidential job performance evaluations sessions by the Board of Regents clearly exceeded the merits of public disclosure. Id., 207 Mont. at 533, 675 P.2d at 973.
139. Id., 238 Mont. at 104, 775 P.2d at 1268.
140. Id., 238 Mont. at 107, 775 P.2d at 1269.
141. Bob Anez, Records Audit Reveals Barriers, MISSOULIAN, Oct. 22, 2003, at A1. Requested was a copy of each sheriff's report of the incident calls handled in the previous 24-hour period. Id. at A6.
142. Kim Skornogoski, Sheriff's Offices Most Likely to Fail Open Records Test, MISSOULIAN, Oct. 22, 2003, at A1. This included Liberty County, where the sheriff's office said "it had lost its roster," and four others who said they "did not keep such lists." Id. at A4.
his list of recent crime calls without a court order.”143 “A District Court clerk in Chinook took it upon herself to censor the roster of court cases by removing ones ‘the public doesn’t need to know about.’”144 In six counties, officials said it would take a court order to get the information.145 “In all, just 11 counties provided the reports at the first request from the citizens making the checks.”146 Judith Basin County Sheriff Robert Jacobi said that his office “has a responsibility not to disclose the misfortunes of people in the community to anyone who walks in off the street.”147 In fact, the laws of most states “require that arrest reports, jail logs and criminal incident information be treated as open records, with exceptions that apply when public release would create particular dangers.”148

Montana Code Annotated section 44-5-103(13) says: “Public Criminal Justice Information” means:

- (a) information made public by law;
- (b) information of court records and proceedings;
- (c) information of convictions, deferred sentences, and deferred prosecutions;
- (d) information of postconviction proceedings and status;
- (e) information originated by a criminal justice agency, including:
  - (i) initial offense reports;
  - (ii) initial arrest records;
  - (iii) bail records, and
  - (iv) daily jail occupancy records;
- (f) information considered necessary by a criminal justice agency to secure public assistance in the apprehension of a suspect; or
- (g) statistical information.

Montana Code Annotated section 301(1) says: “There are no restrictions on the dissemination of public criminal justice information.” The Montana Legislature amended this section in 1999, deleting the exceptions to section 301(1).149 Montana Code

144. Id.
146. Id. at A12.
149. 1999 Mont. Laws 1628. Senator Steve Doherty said: “Once a document goes to
Annotated section 44-5-301 says: "These documents must be open . . . during the normal business hours of the agency." However, during the survey in question and contrary to these statutes, "46 of the sheriff's offices demanded to know the name of the person seeking the information and 29 wanted to know the reason for the request."\textsuperscript{150} Under the right-to-know provision, any person is authorized by law to receive criminal justice information.\textsuperscript{151} "Law enforcement must be under the view of the public to deter false arrests or possible discriminatory action."\textsuperscript{152} "Most state laws require that arrest reports, jail logs and criminal incident information be treated as open records, with exceptions that apply when public release would create particular dangers."\textsuperscript{153}

According to the 2004 edition of the \textit{Montana Freedom of Information Deskbook}, which serves as an important resource for members of the media in Montana, various kinds of information must (emphasis in \textit{Deskbook}) be included in the initial incident report and shown to the public by any officer or employee.\textsuperscript{154} The \textit{Deskbook} cites 42 Montana Attorney General Opinion No. 119 (1988) in support of this proposition. This Opinion, which has not been superceded, says that a custodian of the information sought "must make the determination concerning whether public disclosure is merited on a case-by-case basis"\textsuperscript{155} guided by the ABA \textit{Standards for Criminal Justice: Fair Trial and Free Press}, approved by the American Bar Association of Delegates February 11, 1991 (3d ed. 1992). The ABA Criminal Justice Standards Committee appointed a task force in 1988 to draft the third edition of the \textit{Standards}. Prosecutors, criminal defense lawyers, and the media advised the task force.\textsuperscript{156} The third edition of the \textit{Standards} restored an

\textsuperscript{150} Skornogoski, \textit{supra} note 142, at A4.


\textsuperscript{152} Engrav v. Cragun, 236 Mont. 260, 267, 769 P.2d 1224, 1228 (1989).

\textsuperscript{153} \textit{NAT'L CONFERENCE OF LAWYERS AND REPRESENTATIVES OF THE MEDIA, supra} note 148, at 14.

\textsuperscript{154} \textit{MONTANA FREEDOM OF INFORMATION DESKBOOK 10-4} (Lucas Tanglen ed. 2004).


\textsuperscript{156} \textit{NATIONAL CONFERENCE OF LAWYERS AND REPRESENTATIVES OF THE MEDIA, supra} note 137, at 1.
emphasis on measures designed to avoid publicity that may be prejudicial to a fair trial, but the new standards also recognized the right of public access to information concerning criminal proceedings.\textsuperscript{157} The 1988 Attorney General Opinion cited the ABA Standards published in 1978, although in fact they were originally approved in 1968, with the second edition approved in 1980. The Attorney General Opinion said that the ABA standard "encourages the public dissemination of information by law enforcement agencies" (emphasis in original).\textsuperscript{158} The pertinent ABA standard cited is 8-2.1, "Release of information by law enforcement agencies,"\textsuperscript{159} but this standard was revised in 1991 "to correlate the standards for law enforcement speech directly to the standards for attorney speech in Standard [8]1.1."\textsuperscript{160} The history of this standard notes: "The previous edition separately itemized the standards for law enforcement speech and treated it somewhat more restrictively than attorney speech."\textsuperscript{161} The \textit{Fair Trial and Free Press} Standards provide that "speech by law enforcement officers presents precisely the same fair trial-free speech issues as does speech by attorney."\textsuperscript{162} The Standards offer a model for state bar associations and provide a restatement of the pertinent case law.\textsuperscript{163}

Standard 8-1.1(c) says that statements relating to the following matters may be made:

(1) the general nature of the charges against the accused, provided that there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty;

(2) the general nature of the defense to the charges or to other public accusations against the accused, including that the accused has no prior criminal record;

(3) the name, age, residence, occupation and family status of the accused;

(4) information necessary to aid in the apprehension of the accused or to warn the public of any dangers that may exist;

\begin{itemize}
  \item \textsuperscript{157} \textit{National Conference of Lawyers and Representatives of the Media}, \textit{supra} note 137, at 1.
  \item \textsuperscript{159} \textit{Id}.
  \item \textsuperscript{160} \textit{ABA Standards for Criminal Justice: Fair Trial and Free Press} 13 (3d ed. 1992).
  \item \textsuperscript{161} \textit{Id}.
  \item \textsuperscript{162} \textit{Id} at 14, cmt. 8-2.1.
  \item \textsuperscript{163} \textit{National Conference of Lawyers and Representatives of the Media}, \textit{supra} note 148, at 2.
\end{itemize}
(5) a request for assistance in obtaining evidence;
(6) the existence of an investigation in progress, including the general length and scope of the investigation, the charge or defense involved, and the identity of the investigating officer or agency;
(7) the facts and circumstances of an arrest, including the time and place, and the identity of the arresting officer or agency;
(8) the identity of the victim, where the release of that information is not otherwise prohibited by law or would not be harmful to the victim;
(9) information contained within a public record, without further comment; and
(10) the scheduling or result of any stage in the judicial process.\textsuperscript{164}

Item (2), not in the \textit{Montana Freedom of Information Deskbook}, is new in the third edition of the \textit{ABA Standards}. "It is intended to provide clear authority for the defense to make statements that respond to accusations or prejudice that do not arise directly from the actual charges."\textsuperscript{165} Item (9) is not new and appeared in the first edition of the \textit{ABA Standards} (approved by the ABA House of Delegates in 1968) but was, for some reason, left out of Attorney General Opinion Number 119 in 1988. Note that all ten items could relate to the initial incident report or to the initial arrest report, except for (7) which deals specifically with an arrest.

Note also that item (8) is restricted by Montana Code Annotated section 44-5-311(1), which says:

If a victim of an offense requests confidentiality, a criminal justice agency may not disseminate, except to another criminal justice agency, the address, telephone number, or place of employment of the victim or a member of the victim's family unless disclosure is of the location of the crime scene, is required by law, is necessary for law enforcement purposes, or is authorized by a district court upon a showing of good cause.

50 Montana Attorney General Opinion No. 6 (2004) dealt specifically with the disclosure of crime victim information. It noted the purpose of the Montana Criminal Justice Information Act of 1979:\textsuperscript{166}

The purpose \ldots is to require the photographing and fingerprinting of persons under certain circumstances, to ensure the accuracy and completeness of criminal history information, and to establish

\begin{footnotesize}
\begin{enumerate}
\item[164.] ABA \textit{STANDARDS FOR CRIMINAL JUSTICE}, \textit{supra} note 160, at 1-2.
\item[165.] \textit{Id.} at 6.
\item[166.] Montana Criminal Justice Information Act of 1979, ch. 525, 1979 Mont. Laws 1277.
\end{enumerate}
\end{footnotesize}
effective protection of individual privacy in confidential and nonconfidential criminal justice information collection, storage and dissemination.\textsuperscript{167}

Confusion can result if information thought to be confidential appears within one of the documents listed in Montana Code Annotated section 44-5-103(13), which defines public criminal justice information. If an initial offense report or initial arrest record contained information defined as confidential,\textsuperscript{168} that information may have to be redacted prior to public dissemination.\textsuperscript{169} Montana Code Annotated section 44-5-311 "specifically removes victim information from the realm of public criminal justice information by mandating that it not be disseminated under certain circumstances."\textsuperscript{170} The Montana Attorney General, in an official Opinion, said that "... victim information may be redacted from public criminal justice information document prior to dissemination under the conditions described in Montana Code Annotated section 44-5-311(1), (3) if the victim requests confidentiality or is the victim of a sex crime."\textsuperscript{171} The Opinion goes on to say that "disclosure of

\begin{footnotes}
\item[168] MONT. CODE ANN. §44-5-103(3) (2003): "Confidential criminal justice information" means:
\begin{itemize}
\item[(a)] criminal investigative information;
\item[(b)] criminal intelligence information;
\item[(c)] fingerprints and photographs;
\item[(d)] criminal justice information of records made confidential by law; and
\item[(e)] any other criminal justice information not clearly defined as public criminal justice information.
\end{itemize}
\begin{enumerate}
\item If a victim of an offense requests confidentiality, a criminal justice agency may not disseminate, except to another criminal justice agency, the address, telephone number, or place of employment of the victim or a member of the victim's family unless disclosure is of the location of the crime scene, is required by law, is necessary for law enforcement purposes, or is authorized by a district court upon a showing of good cause.
\item The court may not compel a victim or a member of the victim's family who testifies in a criminal justice proceeding to disclose on the record in open court a residence address or place of employment unless the court determines that disclosure of the information is necessary.
\item A criminal justice agency may not disseminate to the public any information directly or indirectly identifying the victim of an offense committed under 45-5-502, 45-5-503, 45-5-504, or 45-5-507 unless disclosure is of the location of the crime scene, is required by law, is necessary for law enforcement purposes, or is authorized by a district court upon a showing of good cause.
\end{enumerate}
\end{footnotes}
crime scene information generally is required even if the victim of the crime has requested confidentiality or is the victim of a sex crime and such disclosure may inadvertently" identify the victim. "Disclosure alerts the public that a particular crime has occurred and serves to warn the community about any danger involved. An alerted public can provide law enforcement with valuable investigative information." The Opinion notes, though, that in doubtful cases the agency may turn to the court for determination under the Uniform Declaratory Judgment Act.

ABA Standard 8-1.1(b) also notes which facts should not be released to the public because such "matters ordinarily are likely to have a substantial likelihood of prejudicing a criminal proceeding":

1. the prior criminal record (including arrests, indictments, or another charges of crime) of a suspect or defendant;
2. the character or reputation of a suspect or defendant;
3. the opinion of the lawyer on the guilt of the defendant, the merits of the case or the merits of the evidence in the case;
4. the existence or contents of any confession, admission, or statement given by the accused, or the refusal or failure of the accused to make a statement;
5. the performance of any examinations or tests, or the accused's refusal or failure to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;
6. the identity, expected testimony, criminal record or credibility of prospective witnesses;
7. the possibility of a plea of guilty to the offense charges, or other disposition; and
8. information which the lawyer knows or has reason to know would be inadmissible as evidence in a trial.

Neither items (7) or (8) were in the ABA Standards as approved in 1968, which Attorney General Opinion Number 119 (1998) copied from. Of course, item (8) would be problematical for news organizations. Montana Code Annotated section 44-5-103(3) says that "Confidential criminal justice information" means:

a. criminal investigative information;

b. criminal intelligence information;

172.  Id. at 6.
173.  Id. at 5-6.
174.  Id. at 6.
175.  ABA STANDARDS FOR CRIMINAL JUSTICE, supra note 160, at 1.
(c) fingerprints and photographs;
(d) criminal justice information or records made confidential by law; and
(e) any other criminal justice information not clearly defined as public criminal justice information.\textsuperscript{176}

Thus Powell City Sheriff Scott Howard has said that "he will answer questions when he can, but cannot disclose information about ongoing investigations, some juvenile cases or other data not subject to public review."\textsuperscript{177}

With respect to court cases generally, "in nine out of 10 cases, court officials provided the public documents and . . . in 44 counties or 78 percent, citizens received the records on their first request."\textsuperscript{178} Wills, divorces, and property taxes are all public records. Article II, sections 8 and 9, of the Montana Constitution "impose an 'affirmative' duty on government officials to make all of their records and proceedings available to public scrutiny."\textsuperscript{179} "Access to court records permits people to examine the information considered by courts making decisions affecting the public at large."\textsuperscript{180}

Although Article II, section 9, is self-executing, it has come to rely on Montana Code Annotated section 2-6-101(2), which defines a "public writing" and, therefore, is within the public's right to know: "The written acts or records of the acts of the sovereign authority, of official bodies and tribunals, legislative, judicial, and executive . . . except records that are constitutionally protected from disclosure." However, the Montana Supreme Court interprets this section of the code much more broadly than the strict definition.\textsuperscript{181} Thus a spreadsheet is a document of a public body.\textsuperscript{182} The court has also said that documents of public bodies are "documents generated or maintained by a public body which are somehow related to the function and duties of that body."\textsuperscript{183}

\begin{itemize}
\item \textsuperscript{176} MONT. CODE ANN. § 44-5-103(3) (2003).
\item \textsuperscript{177} Thackeray, supra note 145.
\item \textsuperscript{178} Ron Tschida, Most Counties Willing to Provide Court Records, MISSOULIAN, October 23, 2003, at A5.
\item \textsuperscript{179} Great Falls Tribune v. Mont. Pub. Serv. Comm'n., 2003 MT 359, ¶ 54, 319 Mont. 38, ¶ 54, 82 P.3d 876, ¶ 54.
\item \textsuperscript{181} Bryan, ¶ 35.
\item \textsuperscript{182} Id. ¶ 36.
\item \textsuperscript{183} Becky, 274 Mont. at 136, 906 P.2d at 196.
\end{itemize}
Nelson, in a special concurrence, said: "If the public is to have any ability to know and understand how its government is exercising . . . control over the utilities, then individuals and organizations must have information that is filed by these utilities with government agencies . . . ." Justice Nelson also said: "Applying the definition of 'public writing' . . ., it is clear that most, if not all, of the documents which this Court generates and maintains are 'public writings' and, therefore, are documents of a public body." Evidentiary materials filed with a court also fall within the public's constitutional right to know. Inmate parole files are subject to the public right to know unless specifically limited by privacy concerns or legitimate penological interest as determined by the Board of Pardons and Parole or a reviewing court. However, documents relating to the denial of a high school student's membership in the honor society did not fit into the category of a public writing or document. On the other hand, "public writings" include all documents filed with the Montana Public Service Commission. Coal producers do not have an actual or subjective expectation of privacy in revenue information submitted to the Department of Revenue. Economic advantage is neither a privacy interest nor a sufficient reason for denying the public the opportunity to observe deliberations of public bodies or to examine public documents, including proposals submitted to the public body by a vendor, unless the proposal concerns a privacy interest involving legitimate trade secrets or individual safety. County time records that show an employee's name, the department for which the employee works, and the hours worked, including claims for vacation, holiday, and sick leave pay, are subject to public disclosure. The Board of Real Estate, when requested, must disclose the status of any real estate licensee, whether any disciplinary

188. *Becky*, 274 Mont. at 136, 906 P.2d at 197.
190. *Dep't of Revenue*, ¶ 42.
action has been taken against that individual, and, if so, the reason.\textsuperscript{193} A newspaper had the constitutional right to observe the deliberations of a committee established by the Department of Corrections to screen proposals for construction of a private prison, including the proposals which had been submitted to it, with the exception for information in which there was a privacy interest.\textsuperscript{194} Payroll record information reported to the Department of Transportation, including the names, addresses, and wages of private employees working on a publicly funded project, is subject to public disclosure, although social security numbers of those employees are not subject to public disclosure.\textsuperscript{195} Emails sent or received by a public agency are also public records in Montana.\textsuperscript{196}

A plaintiff who prevails in an action brought to enforce his or her rights to know may be awarded costs and reasonable attorney fees.\textsuperscript{197} The award of costs and attorney fees is discretionary.\textsuperscript{198} Plaintiffs who successfully contested the constitutional validity of a Department of Revenue rule regarding the confidentiality of corporate tax information were awarded their costs and reasonable attorney fees.\textsuperscript{199} Where the Bozeman City Chronicle successfully sued Bozeman’s police department to obtain the name of an officer who had resigned after being investigated for sexual misconduct, the district court had discretion to award attorney fees to the newspaper.\textsuperscript{200} The district court could award attorney fees even if the Board of Public Education acted in good faith and under the presumption that its action in closing its meeting was constitutional.\textsuperscript{201} However, the Montana Law Week Publishing Company, which intervened in a husband's negligence action against the state to oppose the husband's motion that the settlement between him and the state be sealed, was not entitled to attorney fees even though it prevailed because the state never opposed its position

\textsuperscript{194} Day, ¶ 33.
\textsuperscript{197} MONT. CODE ANN. § 2-3-221 (2003).
\textsuperscript{199} Dep’t. of Revenue, ¶ 43.
although a private individual did.\textsuperscript{202} Also, a trial court’s decision to update a water rights decree without notifying affected parties did not prevent water rights owners from examining documents or observing deliberations of public bodies and thus did not warrant the award of attorney fees.\textsuperscript{203} However, monetary damages are not available for holding an illegally closed meeting.\textsuperscript{204} The remedy should take the form of a simple petition to void an action decided in a meeting which has violated the right-to-know provision.\textsuperscript{205}

V. CONCLUSION

The Montana Supreme Court, by and large, has paid great deference to the right-to-participate and the right-to-know provisions of the Montana Constitution. Indeed, “a cantankerous press, an obstinate press, a ubiquitous press must be suffered by those in authority in order to preserve the even greater values of freedom of expression and the right of the people to know.”\textsuperscript{206} However, implicit in some of the Montana Supreme Court cases is the “notion that citizens should be satisfied with a certain level of blind trust in government leaders.”\textsuperscript{207} Citizens, in fact, have to be proactive in enforcing their rights to participate in government and their rights to know what their government is doing. “[R]eporters and editors must take it upon themselves to educate an uninformed board chairman, to sue an obstinate bureaucrat, and hire the lawyers who can plead the case for the right to know as articulately and vigorously as possible, before the courts in Montana.”\textsuperscript{208} The right to participate in governmental decision making and the right to know what government is doing lead to openness in government which, in recent years, has come to be known as “transparency.” However, in addition to this, we also need honesty and accountability. “Transparency” can imply that the public has no claim on what government does, “as long as it is

\textsuperscript{204} Irving, 248 Mont. at 465, 813 P.2d at 420.
\textsuperscript{205} Bd. of Trs., 186 Mont. at 156, 606 P.2d at 1073; Goyen, 276 Mont. at 219-20, 915 P.2d at 828-29.
\textsuperscript{207} Howell, supra note 86, at 89.
\textsuperscript{208} Howell, supra note 86, at 95-96.
done openly — or brazenly.”\textsuperscript{209} Public officials often dislike operating in a fish bowl and will avoid that if possible. Often “transparency” becomes “translucency.”

\textsuperscript{209} Christopher Caldwell, 7.25.04 The Way We Live Now: Characters: 'Integrity' Is What We Want in Our Leaders—Even If the Word Doesn’t Mean Much Anymore, NEW YORK TIMES MAGAZINE, July 25, 2004, at 11.