

47 Op. Att'y Gen. No. 13

CONSTITUTIONS - Right of participation and right to know provisions as applied to county commissioners;
COUNTY COMMISSIONERS - Compliance with open meeting and public participation laws;
COUNTY COMMISSIONERS - Convening of quorum of county commissioners as meeting which must be open to public;
COUNTY COMMISSIONERS - Determining whether matter is of "significant public interest" to trigger notice and public participation requirements;
OPEN MEETINGS - Convening of quorum of county commissioners as meeting which must be open to public;
RIGHT TO KNOW - Determining whether matter is of "significant public interest" to trigger notice and public participation requirements;
MONTANA CODE ANNOTATED - Title 2, chapter 3; sections 2-3-103, -104, 2-3-111, -112, 2-3-201 to -203, 7-5-2122, -2125;
MONTANA CONSTITUTION - Article II, sections 8, 9;
OPINIONS OF THE ATTORNEY GENERAL - 42 Op. Att'y Gen. No. 51 (1988).

HELD:

1. A county commission which establishes the hours of 9:30 a.m. to 5 p.m., Monday through Friday, as its regular meeting date for public notice purposes is not in compliance with Montana's public participation constitutional provisions and statutes.
2. Public notice is required of any convening of a quorum of county commissioners at which any matter of significant public interest is to be discussed, deliberated or determined. Additionally, the public must be given the opportunity to participate in any decision of the commission, other than ministerial acts, if there is any question whether the decision is of "significant interest to the public."

April 6, 1998

Mr. Mark Harshman
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Dear Mr. Harshman:

You have requested my opinion on the following question:

Does a county commission comply with Montana's open meeting and public participation laws by establishing the hours of 9:30 a.m. to 5 p.m., Monday through Friday, as its regular meeting date for public notice purposes? If not, what are appropriate guidelines and procedures for counties to follow in determining which matters are of "significant public interest" so as to require public notice?

I.

Montana's open meeting and public participation laws are derived from two fundamental rights contained within the Montana Constitution: the Right to Know and the Right of Participation, Mont. Const. art. II, §§ 8, 9. I will discuss these provisions individually as they relate to your question.

Right to Know

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.

Mont. Const. art. II, § 9.

Statutory provisions regarding the public's right "to observe the deliberation of all public bodies or agencies of state government and its subdivisions" are found at title 2, chapter 3, part 2 of the Montana Code Annotated. Common Cause of Mont. v. Statutory Comm. to Nominate Candidates for Comm'r of Political Practices, 263 Mont. 324, 326, 329, 868 P.2d 604, 605, 607 (1994). The legislature's intent in adopting these statutes was to ensure that public agencies, which exist to "aid in the conduct of the peoples' [sic] business," conduct all "actions and deliberations" openly. Mont. Code Ann. §§ 2-3-201, -203(1), (2). It has long been recognized that county commissions are bound by Mont. Const. article II, section 9 and its associated statutes. Board of Trustees, Huntley Project Sch. Dist. No. 24 v. Board of County Comm'rs, 186 Mont. 148, 154, 606 P.2d 1069, 1072 (1980). Additionally, Mont. Code Ann. § 7-5-2125 provides that "[a]ll meetings of the board of county commissioners must be public." Under the constitution the right applies to any meeting "except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure." Mont. Const. art. II, § 9. For purposes of the discussion herein, I assume that your question has as a premise that this exception does not apply.

Montana's open meeting statutes define the term *meeting* very broadly. *Meetings* are "the convening of a quorum" of the subject public agency "to hear, discuss, or act upon a matter over which the agency has supervision, control, jurisdiction, or advisory power." Mont. Code Ann. § 2-3-202. See also Common Cause of Mont.

The statutory definition of *meeting* was previously analyzed by Attorney General Greely at 42 Op. Att'y Gen. No. 51 at 198 (Mont. 1988). A *quorum* was determined to be "a majority of the entire body" when members are acting as a group, "not merely the action of a particular number of members as individuals." 42 Op. Att'y Gen. No. 51 at 200-01. The terms *discuss*, *deliberations*, and *discussions* were found to contemplate "collective discussion and collective acquisition of information among the 'constituent membership' of the agency." Id.

Likewise, the Wisconsin Supreme Court, in interpreting open meeting laws similar to Montana's, held that a convening of members open to the public occurs when a group of members "gather to engage in formal or informal governmental business." State ex rel. Newspapers v. Showers, 398 N.W.2d 154, 166 (Wis. 1987). Informal governmental action, which includes discussions and information-gathering, must be considered a meeting open to the public as "[l]istening and exposing itself to facts, arguments and statements constitutes a crucial part of a governmental body's decision making. 'The possibility that a decision could be influenced dictates that compliance with the law be met.'" State ex rel. Badke v. Village Bd., 494 N.W.2d 408, 415 (Wis. 1993), citing Lynch v. Conta, 239 N.W.2d 313 (Wis. 1976), and State ex rel. Newspapers v. Showers, 398 N.W.2d 154 (Wis. 1987).

Thus, as your county has already recognized, the gathering of at least two of Blaine County's three commissioners to discuss either between themselves or with members of the public issues over which the commission has authority is a *meeting* subject to the open meeting laws of Montana. Commissioners are trusted with the responsibility of ensuring they do not "hear, discuss, or act upon a matter over which the agency has supervision, control, jurisdiction, or advisory power" unless the gathering is treated as a meeting open to the public. Clearly, if a member of the public enters the commissioners' work area while such a meeting is occurring, that person must be permitted to remain and observe the discussion, absent an overriding privacy right of another individual.

The importance attached to the open meeting requirement is underscored by Mont. Code Ann. § 2-3-212, which requires that minutes of all open meetings be kept and made available for public inspection. I bring this statute to your attention for informational purposes only as you have posed no question pertaining to the keeping of minutes by county commissions.

Right of Participation

Article II, section 8 of the Montana Constitution provides:

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

Statutory provisions regarding the public's right to participate are found at Mont. Code Ann. title 2, chapter 3, part 1, entitled "Notice and Opportunity to Be Heard." Each public agency must adopt policies which permit and encourage public participation in agency decisions and which "assure adequate notice and assist public participation before a final agency action is taken that is of significant interest to the public." Mont. Code Ann. § 2-3-103(1). Thus, consideration of matters of "significant public interest" triggers the notice requirements associated with the constitutional right of participation.

The required policies and procedures "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." Mont. Code Ann. § 2-3-111(1). Public participation may be waived when the agency decision: (1) concerns "an emergency situation affecting the public health, welfare or safety"; (2) maintains or protects the interests of the agency itself; or (3) is nothing more than a ministerial act. Mont. Code Ann. § 2-3-112.

Beyond Mont. Code Ann. § 2-3-103, notice of meetings conducted by county commissioners is mandated by Mont. Code Ann. § 7-5-2122. That statute provides:

7-5-2122. Meetings of board of county commissioners. (1) The governing body of the county shall establish by resolution a regular meeting date and notify the public of that date.

(2) The governing body of the county, except as may be otherwise required of them, may meet at the county seat of their respective counties at any time for the purpose of attending to county business. Commissioners may, by resolution and prior 2 days' posted public notice, designate another meeting time and place.

The Blaine County Commission has established and notified the public of a regular meeting date--9:30 a.m. to 5 p.m., Monday through Friday. You have asked whether this method of providing notice of meetings complies with Montana's open meeting and public participation laws. The open meeting laws contain no explicit notice requirements. Rather, notice requirements originate in Montana's public participation laws and attach only when an issue is of significant public interest. Montana Supreme Court decisions which engraft notice requirements to open meeting provisions have been limited to situations where a matter of significant public interest was being determined. See Board of Trustees, Huntley Project Sch. Dist. No. 24, supra, involving a final commission decision on a subdivision; and Common Cause of Mont., supra, involving the adoption of recommendations to the governor on the appointment of an important government official.

In my opinion, article II, section 9 requires that any meeting of the commissioners be open to the public, whether the matter being considered involves large issues of policy or the smallest ministerial act. However, the obligation to afford the public prior notice and opportunity to participate attaches under article II, section 8, only to meetings which consider matters of significant interest to the public. I further conclude Blaine County's practice does not satisfy Montana's constitutional requirements.

District Judge Joe L. Hegel addressed a similar situation in Rosebud County. The Rosebud County Commission passed a resolution notifying the public that it conducts meetings from 8 a.m. to 5 p.m. on regular business days. Judge Hegel ruled that the resolution did not "satisfy the provisions of the Public Participation in Government Act [Mont. Code Ann. §§ 2-3-101 to -114] or of Article II, section 8 of the Montana Constitution." Seliski v. Rosebud County, No. DV 94-13, slip op. at 5 (Mont. 16th Jud. Dist. Apr. 12, 1995).

A notice that business will be conducted from 8:00 a.m. to 5:00 p.m. on all regular business days is really no notice at all. Such a policy would require interested citizens to examine the commissioner's desk calendars on a daily basis to find out if a discussion or decision of significant interest was going to be held

anytime soon. This is impractical for most people and can hardly be said to encourage or assist public participation in such decisions as required by the Montana Constitution and by statute.

Seliski, slip op. at 4. I agree with Judge Hegel that a notice stating that unspecified business will be conducted some time between 9:30 a.m. and 5 p.m. on specified days of the week does not, by itself, satisfy the requirements of article II, section 8 and its implementing statutes.

II.

Having anticipated my response to your first question, you have also asked for "appropriate guidelines and procedures for counties to follow in determining which matters are of 'significant public interest' so as to require public notice." As discussed above, the public participation statutes require that the public be allowed to participate in the resolution of matters of significant public interest. Thus, matters of significant public interest require notice, as well as an opportunity for the public to participate in the decision-making process prior to the final decision being made.

The term *significant public interest* is neither defined in the statutes regarding public participation nor discussed in the legislative minutes pertaining to those statutes. There is also no Montana Supreme Court decision which defines *significant public interest* in this context.

The 1997 legislature defined the term "significant interest to the public" for purposes of the Montana Administrative Procedure Act (Mont. Code Ann. §§ 2-4-101 to -711) as "agency actions under this chapter regarding matters that the agency knows to be of widespread citizen interest. These matters include issues involving a substantial fiscal impact to or controversy involving a particular class or group of individuals." Mont. Code Ann. § 2-4-102(12).

The legislature's stated intention that this definition be limited to agency actions under the Montana Administrative Procedure Act precludes reliance on the definition to interpret the term *significant public interest* as it is used in the Public Participation in Governmental Operations Act. Mont. Code Ann. § 1-2-107; Department of Rev. of State of Mont. v. Gallatin Outpatient Clinic, Inc., 234 Mont. 425, 430, 763 P.2d 1128, 1130-31 (1988).

Additionally, the Montana Administrative Procedure Act uses the term *significant interest to the public* to describe subject matter for which a hearing is required before a rule can be adopted, amended or repealed. Public participation is nonetheless permitted through the opportunity to comment in writing, whether the subject matter is of *significant interest to the public* or not. Conversely, the term *significant public interest* is used in the Public Participation in Governmental Operations statutes to describe when public participation of any sort is required. Mont. Code Ann. § 2-3-111(1).

The term *significant public interest* as used in this opinion is limited at the very least by Mont. Code Ann. § 2-3-112(3), which excepts "a decision involving no more than a ministerial act" from the public participation mandates. A ministerial act is generally performed pursuant to legal authority, and requires no exercise of judgment.

[A] duty is to be regarded as ministerial when it . . . has been positively imposed by law, and its performance required at a time and in a manner or upon conditions which are specifically designated; the duty to perform under the conditions specified not being dependent upon the officer's judgment or discretion.

State ex rel. Workers' Compensation Div. v. District Court, 246 Mont. 225, 229, 805 P.2d 1272, 1275 (1990).

At the other end of the spectrum, District Judge Dorothy McCarter found the extension of a school superintendent's contract to be of *significant public interest* in Citizens for Accountability in Education v. Board of Trustees, School District No. 9, No. ADV-92-450, slip op. at 6 (Mont. 1st Jud. Dist. Oct. 7, 1992). Similar conclusions were reached in Texas where the termination of a school superintendent and a police chief were found to be of "special public interest" requiring "full and adequate notice" to the public. Cox

Enter., Inc. v. Board of Trustees of Austin Indep. Sch. Dist., 706 S.W.2d 956, 959 (Tex. 1986) (school superintendent); Mayes v. City of De Leon, 922 S.W.2d 200, 203 (Tex. 1996) (police chief).

Judge Hegel's decision in Seliski v. Rosebud County is also instructive. "Since the Public Participation in Government [Act] is implementing a constitutional mandate, in developing and applying such procedures, the Commissioners should resolve any doubts about whether a decision is 'of significant interest' or as to the adequacy of the notice in favor of increased citizen participation." Seliski, slip op. at 4.

"When interpreting statutes, it is fundamental that words and phrases are to be given their plain, ordinary and usual meaning." Common Cause of Mont., 263 Mont. at 330, 868 P.2d at 608 (citations omitted). Webster's *Third International Dictionary* defines *significant* as "having a meaning," "full of import," and "deserving to be considered." *Public* means "of or pertaining to the people," "relating to, belonging to or affecting a community at large," and is "opposed to private." The term *interest*, when used in this context, is defined as a "concern" or the "state of being concerned or affected." Thus, an action of *significant public interest* is an action which has meaning to and deserves to be considered by the people it affects.

Applying Judge Hegel's instructions to resolve any doubt in favor of increased public participation, any non-ministerial decision or action of a county commission which has meaning to or affects a portion of the community requires notice to the public and the opportunity for the public to participate in the decision-making process.

I recognize the challenges these requirements may create for county commissions. I surveyed Montana's counties seeking to identify an existing procedure for providing notice which complies with Montana's public participation laws while not unduly impeding county commissions. The results ranged from less compliance than in Blaine County to very detailed procedural mandates.

Several of the responding counties have developed a process which appears to balance the public's rights with its commission's need to conduct business and serve the public. Those counties set regular meetings at a recurring time each week or month, for example 9 a.m. the first and third Mondays of each month. An agenda is prepared and posted sufficiently in advance to give notice to the public of the topics to be discussed and actions to be considered by the commission. Forty-eight hours is generally considered sufficient to notify the public of contemplated action. Citizens for Accountability, slip op. at 6.

Often the notice and agenda are published by the local press. New items are not added to the agenda but carried over to the next regularly scheduled meeting. Matters of significant public interest are reserved for those regularly scheduled meetings. Commissions may also schedule additional or special meetings to discuss matters of significant public interest by issuing a resolution and providing two days' posted public notice. Mont. Code Ann. § 7-5-2122(2).

These commissions keep the public apprised of their day-to-day activity and action on routine matters in various ways. A common, and informative, process is to post and distribute the commission's weekly calendar and to post or make available each commissioner's daily calendar. Commissioners are encouraged to avoid discussing issues of significant public interest when part of a quorum and to inform the public that issues of significant public interest will not be resolved outside the regularly scheduled meeting.

Judge Hegel endorsed similar processes in Seliski:

The [Public Participation in Government] Act requires the commissioners to develop policies and procedures to determine whether a particular decision is of "significant interest to the public," or whether it is merely a daily housekeeping function. The Act also requires the commissioners to adopt procedures to provide adequate notice to the public of all such significant decisions as they arise. This may very well mean placing such items on an agenda for a meeting to be held on a regular day each month, or at a special meeting date, with posted notice of the meeting date and agenda, and/or publication of notice. The amount of notice given should increase with the relative significance of the decision to be made. The procedures must be designed to encourage and assist citizen participation and must provide adequate notice.

Id., slip op. at 5.

THEREFORE, IT IS MY OPINION:

1. A county commission which establishes the hours of 9:30 a.m. to 5 p.m., Monday through Friday, as its regular meeting date for public notice purposes is not in compliance with Montana's public participation constitutional provisions and statutes.
2. Public notice is required of any convening of a quorum of county commissioners at which any matter of significant public interest is to be discussed, deliberated or determined. Additionally, the public must be given the opportunity to participate in any decision of the commission, other than ministerial acts, if there is any question whether the decision is of "significant interest to the public."

Sincerely,

JOSEPH P. MAZUREK

Attorney General

jpm/mas/dm