

CITIES AND TOWNS - Public comment and participation;
LOCAL GOVERNMENT - Public comment and participation;
MUNICIPAL GOVERNMENT - Public comment and participation;
OPEN MEETINGS - Public comment and participation in municipal government;
STATUTORY CONSTRUCTION - Construing statutes incorporated by reference, construing plain meaning of statutes;
MONTANA CODE ANNOTATED - Title 2, chapter 3; sections 1-2-101, -102 to -108, 2-3-101 to -104, -101, -102, (1), -103, (1), (b), -108, -111 to -114, -111, -112, -201, -202, -203, (3), 7-1-4141 to 4143, -4141, -4142, -4143;
MONTANA CONSTITUTION - Article II, sections 8 and 9;
OPINIONS OF THE ATTORNEY GENERAL - 47 Op. Att'y Gen. No. 13 (1998), 42 Op. Att'y Gen. No. 51 (1988).

- HELD:
1. A city council must provide an agenda item for public comment on non-agenda matters only for issues that are of significant interest to the public. Public notice is required for any meeting of the council.
 2. A city council must provide an agenda item for public comment on non-agenda matters of significant interest to the public even when the council meets in informal work sessions where no action may be taken.
 3. The right of the public to comment at a meeting of a city council on non-agenda items extends to matters that may involve an interest in individual privacy. The presiding officer retains the power to close the meeting to other members of the public upon a determination that the right of individual privacy clearly outweighs the merits of public disclosure.
 4. Montana Code Annotated tit. 2, ch. 3 applies to all advisory boards, commissions and committees of the city council subject to the limitation that such entities need not permit public comment on matters that are not of significant interest to the public.

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5. Only an item that is not of significant public interest or is otherwise exempt from the public participation requirements of Mont. Code Ann. § 2-3-103 may be added to the city council agenda and acted upon at the same meeting.

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Dear Mr. Brooks:

You have requested my opinion on a number of questions relating to the public notice and comment provisions of Mont. Code Ann. § 2-3-103 as amended in 2003 by House Bill 94 ("HB 94"). Your particular questions relate to the application of the amended statute to city councils, committees and commissions of the same. Specifically you have asked:

1. Is public notice with public comment required only for city council decisions that are of significant interest to the public?
2. Is public comment required when the council meets in informal work sessions where no action is taken?
3. What are "public matters" upon which the public may comment?
4. Does House Bill 94 apply to all advisory boards and commissions of a city council?
5. Can an item be added to a city council agenda at the time of the meeting and acted upon at the same meeting?

The analysis of these questions requires an interpretation and understanding of the complex relationship between the "Right to Know" provision of our Constitution, article II, section 9; the section that defines a citizen's "Right of Participation", article II, section 8; and the statutes implementing these constitutional provisions. Both constitutional

provisions recognize and describe the public's right to be involved in the workings of state and local government. But the scope of the public's right is differently defined.

The constitutional language suggests the complexity of the relationship between these two rights. The "right to know" gives the public the right to "examine documents" and "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 (emphasis added). The constitutional "right of participation" is more limited. The public has a 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." Mont. Const. art. II, § 8 (emphasis added).

The use of the phrase "all public bodies or agencies of state government and its subdivisions" in section 9 and the narrower term "governmental agencies" in section 8 has significance for the determination of the answers to your questions. Section 9 gives the public a right to know that applies to every public body in the state. Subject to the individual privacy exception, the public has a right to observe the deliberations and examine the documents of every public body. In contrast, section 8 defines the constitutional right to participation that applies to a much narrower group of public entities. Under this section the public has a right to participation only in the operation of "agencies" and only "as may be provided by law."

The constitutional history of section 8 demonstrates that the drafters of our constitution intended that the term "governmental agencies" have a narrow meaning. Delegate Wade Dahood, chair of the Bill of Rights Committee, described the purpose of section 8 as follows: "What is intended by Section 8 is that any rules and regulations that shall be made and formulated and announced by any governmental agency . . . shall not be made until some notice is given so that the citizen will have a reasonable opportunity to participate" II 1972 Mont. Const. Conv. 1655 (1972). Additional questioning of delegate Dahood followed:

CHAIRMAN GRAYBILL: His question, Mr. Dahood, was, is the city council a governmental agency?

DELEGATE DAHOOD: The city council, in my judgment, would not be the type of governmental agency that's contemplated by Section 8.

DELEGATE HELIKER: May I ask--inquire further? Then you--this applies only to appointive agencies?

DELEGATE DAHOOD: Basically, that's true, because a city council, for example, just like a Legislature, is not going to act without regard to the-citizen participation. They are not going to do it; but the governmental agencies that are not elected, that are appointed, that function to carry out the laws that are passed, are the ones, of course that will enact rules and regulations and make the decisions that affect people with the effect of law, without, sometimes, having any regard for citizen participation.

Id. at 1667.

It is my opinion that the constitutional right to participate found in article II, section 8 does not apply to local elected bodies such as a city council. However, it does not follow that the public has no right to participate in city council matters. Section 8 is not self-executing and the legislature has provided for these rights.

In 1975 the legislature passed House Bill 396, "An act to implement Article II, section 8 of the 1972 Constitution by providing guidelines for citizen participation in the operations of government agencies." This law, now codified at Mont. Code Ann. § 2-3-101 to -104, and -111 to -114, gave legislative substance to the public right of participation. The act, however, continued to define the right of public participation only with reference to state and local "agencies." Since the law was intended to implement article II, section 8, it is reasonable to assume that the legislature intended to use the term as it was used by the drafters of the Constitution.

The legislature brought the right of public participation to the city councils of the state in 1979 with the enactment of Senate Bill 503. This bill was a general municipal government act of thirty-one separate sections. Sections 17, 18 and 19 extended a statutory right to the public to participate in meetings of municipal governing bodies, boards, authorities, and committees. These sections are codified at Mont. Code Ann. § 7-1-4141 to -4143 and provide as follows:

7-1-4141. Public Meeting Required. (1) All meetings of municipal governing bodies, boards, authorities, committees, or other entities created by a municipality shall be open to the public except as provided in 2-3-203.

....

7-1-4142. Public Participation. Each municipal governing body, committee, board, authority or entity, in accordance with Article II, section

8 of the Montana Constitution and Title 2, chapter 3, shall develop procedures for permitting and encouraging the public to participate in decisions that are of significant interest to the public.

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

The above analysis leads to the conclusion that the framers of the constitution left to the legislature the crafting of any right of public participation in the activities of a city council. It addressed the issue in 1979 with the adoption of the provisions quoted in the preceding paragraph.

Before the passage of HB 94, the public right of participation before both the “agencies” described in title 2 and the “municipal entities” of title 7 was limited to those matters of “significant interest to the public.”

The passage of House Bill 94 in 2003 added a new dimension to the rights of public participation. The legislation set forth a right to comment on non-agenda issues that is applicable to “any public matter,” regardless of the level of interest to the public. Montana Code Annotated § 2-3-103 reads as follows:

(a) Each agency shall develop procedures for permitting and encouraging the public to participate in agency decisions that are of significant interest to the public. The procedures must ensure adequate notice and assist public participation before a final action is taken that is of significant interest to the public. The agenda for a meeting, as defined in 2-3-202, must include an item allowing public comment on any public matter that is not on the agenda of the meeting and that is within the jurisdiction of the agency conducting the meeting. However, the agency may not take action on any matter discussed unless specific notice of that matter is included on an agenda and public comment has been allowed on that matter. Public comment received at a meeting must be incorporated into the official minutes of the meeting, as provided in 2-3-212.

(b) For purposes of this section, “public matter” does not include contested case and other adjudicative proceeding.

(House Bill 94 amendments underscored.)

The public participation procedures for city councils must be “developed” “in accordance with Title 2, chapter 3.” Mont. Code Ann. § 7-1-4142. When reference is made in a statute to another part of the Montana Code, it is presumed to refer to that part of the code “as it may be amended or changed from time to time.” Such “presumption may be overcome only by a clear showing that a subsequent amendment or change . . . is inconsistent with the continued purpose or meaning of the section referring to it.” Mont. Code Ann. § 1-2-108. To the extent possible, these related statutes must be harmonized to give effect to each. Gregg v Whitefish City Council, 2004 MT 262, ¶ 38, 323 Mont. 109, 99 P3d 151.

With this framework in mind, I turn to your questions.

I.

As a public body, the city council must open its meetings to the public to meet the requirements of article II, section 9 of the Constitution and Mont. Code Ann. §§ 2-3-201 and 7-1-4141. A meeting is not effectively open without public notice of the meeting. “Montana law requires that public notice be given of meetings subject to the requirements of the open meeting statutes. Without public notice, an ‘open’ meeting is open in theory only, not in practice.” Common Cause of Montana v. Statutory Comm. to Nominate Candidates for Comm’r of Political Practices, 263 Mont. 324, 331, 868 P.2d 604, 609 (1994) (citation omitted). These constitutionally mandated open meeting requirements are imposed on all public bodies irrespective of whether the business being conducted by the body is “of significant interest to the public.” Public notice of any meeting of the city council or its committees is therefore a requirement of the law of Montana.

Under the Supreme Court’s decision in Common Cause, the right to notice that a meeting will be held is an element of the constitutional right to know under article II, section 9. As discussed in Part V, infra, it does not follow, however, that the public has a right to advance notice of matters that will be considered during a meeting that are not of significant interest to the public.

The public’s right to participate in city council requires only that procedures be developed to permit public participation in issues that are of “significant public interest.” Mont. Code Ann. § 7-1-4142. It does not require those procedures to include a right to participate on issues that are not of “significant public interest.” The statute provides that these procedures shall be developed in accordance with title 2, chapter 3. That reference is presumed to incorporate any amendments. But the presumption is defeated when the

referenced code is amended so that it is “inconsistent with the continued purpose or meaning of” the statute. Mont. Code Ann. § 1-2-108. Only those requirements of HB 94 that are consistent with Mont. Code Ann. § 7-1-4142 may be incorporated by reference.

I conclude that when HB 94 requires an agenda item for public comment on non-agenda matters, this mandate is imposed upon a city council only to the extent that the comments are directed to matters of significant interest to the public. The express purpose of Mont. Code Ann. § 7-1-4142 is to permit and encourage “the public to participate in decisions that are of significant interest to the public.” House Bill 94 is inconsistent with the purpose of Mont. Code Ann. § 7-1-4142 to the extent that it would require the council to allow public comment on matters that are not of significant interest to the public. However, related statutes must be harmonized to the extent possible, as enunciated by the Montana Supreme Court in Gregg. Therefore the city council must provide an agenda item for public comment on non-agenda, public matters. But it is not required to take public comment on matters that are not of significant interest to the public.

II.

Your second question deals with the application of HB 94 to “informal meetings.” This also requires consideration of the meaning of Mont. Code Ann. § 7-1-4142 after the amendment of Mont. Code Ann. § 2-3-103 by House Bill 94.

The answer to your question turns on the definition of “meeting” in Mont. Code Ann. § 2-3-103. This section defines “meeting” with reference to Mont. Code Ann. § 2-3-202. Section 202 states that a “meeting” is “the convening of a quorum of the constituent membership of a public agency or association . . . to hear, discuss, or act upon a matter over which the agency has supervision, control, jurisdiction, or advisory power.” (Emphasis added.) Our open meeting law does not require action or the possibility of action before the deliberations of a public body must be open to the public. It is sufficient that the body will “hear” or “discuss” a public issue. Common Cause of Montana, 263 Mont. at 331. When the council meets in informal work sessions where no action is taken, it is nevertheless a “meeting” within the definition of the statute. See 47 Op. Att’y. Gen. No. 13 (1998) (“Informal governmental action, which includes discussions and information-gathering, must be considered a meeting open to the public . . .”); cf. 42 Op. Att’y Gen. No 51 (1988) (“Use of ‘deliberations’ and ‘discussions’ in the context of open meeting laws connotes collective discussion and collective acquisition of information among the ‘constituent membership’ of the agency.”) (Emphasis added.)

Therefore, the informal work sessions of the council must be considered “meetings” to which the public participation provisions apply. Consistent with Part I, the council must include on the agenda for its informal meetings a period for public comment on non-agenda items of significant interest to the public that are within the jurisdiction of the council. The sessions need not permit public comment on non-agenda matters that are not of significant interest to the public.

In addition you have asked whether public notice and comment on agenda items at the informal working sessions is required. Nothing in Mont. Code Ann. §§ 2-3-103, 7-1-4142, -4143 or any other statute of which I am aware, requires public comment on agenda items in these sessions. The language of Mont. Code Ann. § 2-3-103 only requires procedures to “ensure adequate notice and assist public participation before a final agency action.” (Emphasis added.) Furthermore, Mont. Code Ann. § 7-1-4143 requires the council to adopt procedures “affording citizens a reasonable opportunity to participate prior to the final decision.” The Billings ordinance specifying the rules of procedure for work sessions, BMCC § 2-222, states that “no motions will be entertained nor votes taken.” No action, let alone final action can be taken at the work sessions. If the council affords a reasonable opportunity for public participation at a later date, but before final action, the mandate of the statute has been met.

III.

House Bill 94 contains two limitations on the types of “public matters” subject to comment. A public matter “does not include contested case and other adjudicative proceedings.” Mont. Code Ann. § 2-3-103(b). In addition, the public participation rights do not extend to the exceptions listed in Mont. Code Ann. § 2-3-112 (emergency situations, ministerial acts or decisions required to protect the interest of the agency). You have suggested that there should be an additional limitation for matters involving individual privacy.

You correctly note that article II, section 9 of our Constitution limits the right to know and observe governmental proceedings where “the demand of individual privacy clearly exceeds the merits of public disclosure.” You suggest that the legislative history supports the conclusion that public comment should be limited by this privacy right. The minutes of the Senate Committee on Local Government, February 6, 2003, record the following exchange between Senator Mangan and the sponsor, Rep. Lawson:

Senator Mangan asked about the cases they had in Great Falls where a student is facing disciplinary action. Are there rules or guidelines in place for this type of privacy interest?

Representative Lawson replied that was why the word public was inserted in committee. Originally it was left open with any matter and that is why the word public was inserted to take care of issues just like that.

The consideration of your question starts with the application of traditional rules of statutory interpretation. “Where the language is clear and unambiguous, no further interpretation is required.” State v. Burkhart, 2004 MT 372, ¶ 47, 325 Mont. 27, 103 P.3d 1037. (Emphasis added.) In such cases, resort to “any other means of interpretation” is improper. Softich v. Baker, 171 Mont. 135, 136-37, 556 P.2d 902 (1976). For purposes of implementing Mont. Code Ann. § 2-3-103, House Bill 94 specifically excluded from the definition of “public matter” any “contested case or other adjudicative proceeding.” Mont. Code Ann. § 2-3-103(1)(b). The bill included no other exceptions. In construing a statute one may not “insert what has been omitted or omit what has been inserted.” Mont. Code Ann. § 1-2-101. Therefore, recognition of a broad exception for any matter involving an individual privacy right is inappropriate.

However, in 47 Op. Att’y Gen. No. 13 (1998), Attorney General Mazurek addressed the question of the meaning of the phrase “significant interest to the public” in a manner that provides some guidance here. In that opinion, after noting the absence of any helpful authority, General Mazurek opined that “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 opportunity for the public to participate in the decision making process.” This definition may in fact address the issue with which Senator Mangan had concern.

Although there might be some exceptional cases to the contrary, disciplining a student would generally not be a subject that has meaning to or affects a portion of the community. Rather, such a decision is generally a matter of interest only to the involved students, parents and school official. Generally, it would be a private matter and not a permissible subject for comment. But a disciplinary or other issue with a teacher or other employee might be a “public matter,” affecting the whole community, even though its discussion or consideration would lead to subjects about which the teacher or employee would have a legitimate privacy right. Consistent with this view, in 47 Op. Att’y Gen. No. 13 (1998), General Mazurek commented favorably on a case in which the Montana First Judicial District Court held that extension of a school superintendent’s contract was

a matter of significant interest to the public, and on similar holdings in two Texas cases involving termination of contracts of a school superintendent and a police chief.

This does not mean that the public comment period provides a license for members of the public to violate the privacy rights of other persons. The open meeting laws recognize that the chair of a meeting may close it to the public if the "discussion" touches matters of individual privacy and the presiding officer determines that the interest of individual privacy clearly outweighs the public's right to know. Mont. Code Ann. § 2-3-203(3), incorporated by reference in Mont. Code Ann. § 7-1-4141. If a member of the public ventures into an area in which the presiding officer makes such a finding, the officer may exclude other members of the public from the meeting and hear the comment in closed session under these provisions.

IV.

You have suggested that advisory boards, commissions and committees are not "agencies" as defined by Mont. Code Ann. § 2-3-102, and because they are not "agencies" they are not subject to the new requirements imposed by House Bill 94. I disagree.

As noted above, the right to participate under article II, section 8, is not self-executing but exists only as provided by law. Mont. Code Ann. § 7-1-4142 is quite clear in extending the right to participate to "each municipal governing body, committee, board, authority or entity, in accordance with Article II, section 8 of the Montana constitution and Title 2, chapter 3." Thus it is my opinion that any "municipal entity" is subject to the right of the public to participate in any action that is of significant interest to the public. Under the analysis in Part I, that would extend to such entities the obligation to comply with Mont. Code Ann. tit. 2, ch. 3 to the extent of any public comments directed at matters of significant public interest.

V.

You have asked if an item can be added to the city council agenda at the time of the meeting and acted upon at the same meeting. The answer to this question is suggested by the principles applied in part I above.

"The 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.” Mont. Code Ann. § 2-3-111. As noted above, “adequate notice” is required by Mont. Code Ann. § 2-3-103. Thus, if an issue of significant interest is discussed in the public comment period and the council wishes to take action on the issue, the council must place the matter on the agenda for a subsequent meeting and provide adequate notice. Through this procedure, the public’s right to participate will be protected.

If the council permits discussion on an issue that has no significant interest to the public and action is advisable, the council may act upon it immediately. The council is not required by Mont. Code Ann. § 7-1-4142 to place any matter on a future agenda or provide for public comment on any subject that was discussed if that matter has no “significant public interest.” Nor is it required to place items on a future agenda that are exempted from the public participation requirements by Mont. Code Ann. § 2-3-112.

You specifically inquired about “Council Initiatives.” Council initiatives are directions to staff on legislative or staff action to be considered at a future city council meeting. Such directions appear to be procedural and do not constitute a “final decision” on the substance of an issue. As noted, Mont. Code Ann. § 2-3-112 specifically exempts ministerial acts from the notice and public participation requirements. Moreover, Mont. Code Ann. § 7-1-4143 requires that the citizens shall be afforded a “reasonable opportunity to participate prior to the final decision.” Assuming that the public will be given such an opportunity at a later date, then the initiative suggestions need not be listed on the agenda.

THEREFORE, IT IS MY OPINION:

1. A city council must provide an agenda item for public comment on non-agenda matters only for issues that are of significant interest to the public. Public notice is required for any meeting of the council.
2. A city council must provide an agenda item for public comment on non-agenda matters of significant interest to the public even when the council meets in informal work sessions where no action may be taken.
3. The right of the public to comment at a meeting of a city council on non-agenda items extends to matters that may involve an interest in individual privacy. The presiding officer retains the power to close the meeting to other members of the public upon a determination that the right of individual privacy clearly outweighs the merits of public disclosure.

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4. Montana Code Annotated tit. 2, ch. 3 applies to all advisory boards, commissions and committees of the city council subject to the limitation that such entities need not permit public comment on matters that are not of significant interest to the public.
5. Only an item that is not of significant public interest or is otherwise exempt from the public participation requirements of Mont. Code Ann. § 2-3-103 may be added to the city council agenda and acted upon at the same meeting.

Very truly yours,

MIKE McGRATH
Attorney General

mm/je/jym