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# COMMENT

## PUTTING NOTICE TO THE RIGHTS TO KNOW AND PARTICIPATE: CREATING A POLICY FOR THE MONTANA UNIVERSITY SYSTEM CAMPUSES

Michael Pasque\*

*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.<sup>1</sup>*

### I. INTRODUCTION

The right to participate, the right to know, and the right to privacy are protections embodied in the Montana Constitution, Article II, Sections 8, 9, and 10. The rights to know and participate were created to ensure transparency within government by allowing people to observe and participate in the decision-making process.<sup>2</sup> While all three of these rights are inherently intertwined, this discussion will revolve around only the right to participate and the right to know. The intersection of these rights with the privacy

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1. 5 Montana Constitutional Convention Verbatim Transcript 1657 (1981) [hereinafter Constitutional Convention Transcript V].

2. Shockley v. Cascade Cnty., 336 P.3d 375, 378 (Mont. 2014).

right, not discussed here, is well covered in a series of Montana Law Review articles.<sup>3</sup>

At the University of Montana School of Law, the faculty meets regularly. These meetings require the attendance of at least half of its membership to properly conduct business. The faculty discuss items such as policies of the law school, admissions standards, curriculum changes, faculty promotions, and student dismissals.<sup>4</sup> Consider the following hypothetical: a local citizen wishes to attend these meetings but doesn't know when they are held or what is being discussed. A review of University policies sheds no light on whether the citizen can attend or not. With no policy in place, the citizen wonders if there is a law to help him understand when he is entitled to attend meetings and how those meetings should be noticed. Montana provides an important set of constitutional rights that allow for the public to have an open view into the operations of government, no matter how big or small the issue may be.

To answer the hypothetical, this article will apply these rights to create a policy proposal for the University of Montana, which can be modeled for any campus within the Montana University System ("MUS"). This policy is rooted in an understanding of the constitutional provisions and their associated statutory language. While the right to know and the right to participate are often applied in the context of someone attending a meeting, when and how the meetings should be noticed is rarely analyzed. Questions concerning notice are best answered by focusing on what the rights mean, how they attach, and the type of notice they require in various situations. The final application of these answers will shape the policy proposed for the University of Montana.<sup>5</sup>

## II. THE RIGHTS AND THEIR EVOLUTION FROM A CONSTITUTIONAL CONTEXT

Montana's "Declaration of Rights" concerns fundamental rights that are "significant components of liberty . . . any infringement of which will trigger the highest level of scrutiny, and, thus, the highest level of protec-

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3. See David Gorman, *Rights in Collision: The Individual Right of Privacy and the Public Right to Know*, 39 MONT. L. REV. 249 (1978); Fritz Snyder, *The Right to Participate and the Right to Know in Montana*, 66 MONT. L. REV. 297 (2005); Adam Wade, Note, *Billings Gazette v. City of Billings: Examining Montana's New Exception to the Public's Right to Know*, 76 MONT. L. REV. 185 (2015).

4. Alexander Blewett III School of Law, *Faculty Handbook*, 1-12, 22, 24, 44, 48-58 (rev. ed. Aug. 2015).

5. This policy proposal only addresses the attachment of the rights to know and participate. In the higher education issue presented, there are other areas that may preempt these rights, such as the right to privacy, student information protection, and academic freedom. These equally vital pieces of the puzzle are not analyzed here and should be researched for a full understanding of how to apply the rights to know and participate in this example.

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tion by the courts.”<sup>6</sup> The rights to know and participate were included to ensure transparency in operations of government.<sup>7</sup> These rights are contained in two separate sections of Article II, with Section 9, the right to know, being “broader in application than Article II, Section 8,” the right to participate.<sup>8</sup> However, delegates at the 1972 Montana Constitutional Convention recognized these rights would only ensure the transparency desired by making them companions to each other.<sup>9</sup>

Both arise out of the increasing concern of citizens and commentators alike that government’s sheer bigness threatens the effective exercise of citizenship. The committee notes this concern and believes that one step which can be taken to change this situation is to Constitutionally presume the openness of government documents and operations.<sup>10</sup>

Although these two rights will be discussed separately due to their physical separation within the Constitution, they depend on each other to create a true transparent government and should be applied as a whole. This is not mere puffery; the Montana Supreme Court has repeatedly affirmed the strength of the rights.

### A. *The 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.”<sup>11</sup> These words set a concrete foundation for the right to know. The legislature continued building on this foundation by “promulgat[ing] guidelines to protect the Section 9 guarantees at §§ 2–3–201 through –221, MCA,” known as the “open meeting statutes.”<sup>12</sup>

The open meeting statutes provide that:

- (1) All meetings of public or governmental bodies, boards, bureaus, commissions, agencies of the state, or any political subdivision of the state or organizations or agencies supported in whole or in part by public funds or expending public funds, including the supreme court, must be open to the public.
- (2) All meetings of associations that are composed of public or governmental bodies referred to in subsection (1) and that regulate the rights, duties, or privileges of any individual must be open to the public.<sup>13</sup>

6. *Kloss v. Edward D. Jones & Co.*, 54 P.3d 1, 12 (Mont. 2002) (internal citations omitted).

7. *Shockley*, 336 P.3d at 378.

8. *Bryan v. Yellowstone Cnty. Elem. Sch. Dist. No. 2*, 60 P.3d 381, 387 (Mont. 2002).

9. 2 Montana Constitutional Convention Verbatim Transcript 631 (1979) [hereinafter Constitutional Convention Transcript II].

10. *Id.*

11. MONT. CONST. art. II, § 9.

12. *Willems v. State*, 325 P.3d 1204, 1207 (Mont. 2014).

13. MONT. CODE ANN. § 2–3–203 (2015).

Critically, the open meeting statutes “apply to a ‘meeting,’ which occurs upon the ‘convening’ of a ‘quorum’ of the ‘constituent membership of a public agency.’”<sup>14</sup> All of these key terms “shall be liberally construed.”<sup>15</sup>

### 1. *Meeting defined*

The meaning behind the word “meeting” cannot be defined in an ordinary dictionary in the context of the right to know.<sup>16</sup> Recognizing this, the Montana Supreme Court has established a non-exhaustive list of factors to consider when a meeting occurs:

- (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.<sup>17</sup>

Of course, these factors may not be present in every instance of a meeting that must be open to the public, and is merely a list of some examples.<sup>18</sup> For instance, “[m]eetings where staff report the result of fact gathering efforts would not necessarily be public [but] deliberation upon those facts that have been gathered and reported, and the process of reaching decisions would be open to public scrutiny.”<sup>19</sup>

For example, in *Associated Press v. Crofts*,<sup>20</sup> the Court used these factors to categorize the Policy Committee, an *ad hoc* group that advised the Commissioner of Higher Education on policy issues, as a meeting envisioned by the statute.<sup>21</sup> While “the Policy Committee was not formally created by a government entity to accomplish a specific function,” it still “was organized to serve a *public purpose*.”<sup>22</sup> *Crofts* demonstrates the importance of using the above list; even though the Policy Committee sat in an advisory role, it served a public purpose and fell within the statutory and constitutional provisions of a public meeting. In two other cases with similar facts, committees operating in an advisory role still involved facets of

14. *Willems*, 325 P.3d at 1208 (citing *Boulder Monitor v. Jefferson High Sch. Dist. No. 1*, 316 P.3d 848 (Mont. 2014); MONT. CODE ANN. § 2-3-202).

15. *Id.*

16. *Associated Press v. Crofts*, 89 P.3d 971, 974–977 (Mont. 2004).

17. *Id.* at 975–976.

18. *Id.* at 976.

19. *Id.*

20. 89 P.3d 971 (Mont. 2004).

21. *Id.* at 976.

22. *Id.* at 975 (emphasis added).

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governmental responsibility and thereby constituted a “public body and an agency of state government.”<sup>23</sup>

## 2. Public or governmental bodies

Triggering the statutory definition of a meeting is only the first step; the meeting must occur within “public or governmental bodies, boards, bureaus, commissions, [or] agencies of the state.”<sup>24</sup> Whether a meeting occurs within a board, bureau, or commission is often easily determined as each is commonly labeled as such within their organizational title. Agencies are defined as “any board, bureau, commission, department, authority, officer of state or local government authorized to make rules, determine contested cases, or enter into contracts.”<sup>25</sup> The catch-all is “public or governmental bodies,” being broadly defined to “include a group of individuals organized for a governmental or public purpose.”<sup>26</sup> To help clarify, imagine a school district that assembles a group of people to advise the district on closing schools;<sup>27</sup> the local chamber of commerce that is partially funded by public money;<sup>28</sup> or even a private, non-profit corporation that preserves and restores state-owned property.<sup>29</sup> Each of these scenarios has a purpose, in some way, shape, or form, to execute a public function, even if that is to simply expend public money, thus subjecting each to the right to know.<sup>30</sup>

## 3. Convening of a quorum

A meeting requires a quorum of that meeting’s members for the open meeting statutes to apply.<sup>31</sup> In *Willems v. State*,<sup>32</sup> the Court held that a quorum of a five member group requires at least three members, referencing Black’s Law Dictionary definition of quorum, which is “[t]he minimum number of members (usu. a majority of all the members) who must be present for a deliberative assembly to legally transact business.”<sup>33</sup> Accordingly, the rule in Montana is that a quorum is a majority of members, unless

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23. *Great Falls Tribune Co. v. Day*, 959 P.2d 508, 513 (Mont. 1998); *Bryan*, 60 P.3d at 387.

24. MONT. CODE ANN. § 2–3–203(1).

25. *Common Cause v. Statutory Comm. to Nominate Candidates for Comm’r of Political Practices*, 868 P.2d 604, 607 (Mont. 1994) (citing MONT. CODE ANN. § 2–3–102).

26. *Id.* at 608.

27. *Bryan*, 60 P.3d at 387.

28. *E.g.*, 44 Mont. Att’y Gen. Op. 40 (Sep. 21, 1992).

29. *E.g.*, 42 Mont. Att’y Gen. Op. 42 (Dec. 3, 1987).

30. *Bryan*, 60 P.3d at 387; 44 Mont. Att’y Gen. Op. 40 (Sep. 21, 1992); 42 Mont. Att’y Gen. Op. 42 (Dec. 3, 1987).

31. MONT. CODE ANN. § 2–3–202.

32. 325 P.3d 1204 (Mont. 2014).

33. *Id.* at 1208 (citing BLACK’S LAW DICTIONARY 1370 (Bryan A. Garner ed., 9th ed. 2009)).

defined by the internal rules of the individual group.<sup>34</sup> If there is no defined membership, Montana has chosen to adopt the common law rule that “a quorum . . . consists of those who assemble at any meeting.”<sup>35</sup> This was exemplified in *Crofts* where the Policy Committee regularly invited different people to take an active role in their meetings.<sup>36</sup> The Court held that each meeting had a quorum as envisioned by the statute because the Policy Committee had no operating rules defining the group’s membership.<sup>37</sup>

A special note about quorums, Montana has declined to adopt “constructive-quorums.”<sup>38</sup> A constructive-quorum would occur when serial one-on-one discussions occur between members of the group. For example, take legislators meeting in the capitol halls to discuss items in small groups. This singular discussion does not meet the traditional quorum requirement; however, a constructive-quorum would exist when enough of these small groups meet independently of each other, discussing the same topics as if they had met together as a whole. The Court has found that “the language of § 2–3–202, MCA, is plain and unambiguous” and refused to adopt constructive-quorums where the legislature has not chosen to do so.<sup>39</sup>

#### 4. *No action is required and no reason need be given*

As long as the preceding elements are met, the meeting must be noticed and no other elements are required. In *State v. Conrad*,<sup>40</sup> the Court examined a district court’s analysis of the open meeting statutes’ history, which noted “while the original section required that meetings at which action was taken be open, the section as amended required that all public meetings be open, whether action was taken or not.”<sup>41</sup> Simply not acting on any issues is not an excuse to prevent members of the public from attending a meeting. If a meeting convenes within the definitions listed above, then the public generally has a right to observe.

Nor should the public be required to provide a reason why they wish to attend a meeting. According to the Montana Attorney General,

[n]either our Constitution nor our Open Meeting Law suggest that an individual must display a certain reason in order to inspect government operations and records. Both of these provisions in our law are concerned with the neces-

34. MONT. CODE ANN. § 2–3–202; *see also Crofts*, 89 P.3d at 977

35. *Crofts*, 89 P.3d at 977 (citing *Application of Havender*, 44 N.Y.S.2d 213, 215 (1943)).

36. *Id.*

37. *Id.*

38. *Willems*, 325 P.3d at 1209.

39. *Id.*

40. 643 P.2d 239 (Mont. 1982).

41. *Id.* at 242.

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sity of an open government and the public's ability to observe how its government operates regardless of each person's subjective motivation.<sup>42</sup>

While attorney general opinions are not binding, this statement follows the same line of justification that the Court gave when clarifying why no action needs to be taken for the right to know to attach. Being unambiguous, the Montana Constitution and statutes do not open any avenues for requirements to be imposed beyond those already set. There is no requirement for the public to state a reason for asserting their right so none should be required.

*B. The Right to Participate*

The same principles that guide the right to know also apply to the right to participate. However, the right to know is broader than the right to participate.<sup>43</sup> The right to participate attaches to a narrower group of public or governmental bodies and only in issues of significant public interest where final agency action can be taken. All other aspects, such as what defines a meeting and quorum, remain the same.

“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.”<sup>44</sup> This expectation is codified in Mont. Code Ann. §§ 2–3–101 through 2–3–114.<sup>45</sup> These public participation statutes require each agency to develop procedures for permitting and encouraging the public to participate in agency decisions that are of significant interest, ensuring adequate notice and assisting public participation before a final agency action is taken, and incorporating public comment on agendas for meetings of the agency.<sup>46</sup> Simply put: “the essential elements of public participation are notice and an opportunity to be heard.”<sup>47</sup>

*1. Bodies subject to the right to participate are more narrowly defined*

The right to participate attaches to “any board, bureau, commission, department, authority, officer of state or local government authorized to make rules, determine contested cases, or enter into contracts.”<sup>48</sup> Unlike the

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42. 39 Mont. Att’y Gen. Op. 17, at 4 (June 3, 1981) (quoting 37 Mont. Att’y Gen. Op. 107, at 4 (Jan. 27, 1978) (internal citations omitted)).

43. *Bryan*, 60 P.3d at 387.

44. MONT. CONST. art. II, § 8.

45. *Willems*, 325 P.3d at 1207.

46. MONT. CODE ANN. § 2–3–103(1)(a).

47. *Bitterroot River Protective Ass’n v. Bitterroot Conservation Dist.*, 198 P.3d 219, 225 (Mont. 2008).

48. MONT. CODE ANN. § 2–3–103(2).



right to know, the broad “public bodies” definition is absent. In *Allen v. Lakeside Neighborhood Planning Commission*,<sup>49</sup> the Court examined this subtle change and noted that the committee in question had no final authority to make a decision.<sup>50</sup> The committee’s recommendations, made to a local board that could then incorporate those recommendations to the county commissioners, could be disregarded at either the local board or county commissioner level.

To provide clarity, *Allen* looked to *Common Cause v. Statutory Committee to Nominate Candidates for Commissioner of Political Practices*,<sup>51</sup> a case the Court decided in 1994, where a governmental committee met without providing notice to the public.<sup>52</sup> While the committee violated the open meeting statutes, the Court did not void the governor’s decision that was based on the committee’s recommendation because he was not bound to make a decision consistent with the committee.<sup>53</sup> Thus, a meeting with no authority to enter into a final action of the agency is not subject to the right to participate, but it is still subject to the right to know. The delineation is clear when a meeting is created for purely advisory purposes but cannot make final decisions.

Returning to the example of the law faculty meeting, they can make binding decisions on behalf of the school but may at times act in a purely advisory fashion. This structure subjects all faculty meetings to the right to know, but only attaches the right to participate when the faculty may take final action on a matter. The example shows how intertwined the right to know and participate are and why they compliment each other.

## 2. *Significant public interest in the matter*

Within this narrower subset of bodies under the right to participate, the statutes require that the final agency action must be “of significant interest to the public.”<sup>54</sup> Significant interest means something more than a mere ministerial act.<sup>55</sup> A ministerial act is generally performed pursuant to legal authority and requires no exercise of judgment.<sup>56</sup>

“[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

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49. 308 P.3d 956 (Mont. 2013).

50. *Id.* at 962.

51. 868 P.2d 604 (Mont. 1994).

52. *Id.* at 605–606.

53. *Id.* at 609–610.

54. MONT. CODE ANN. § 2–3–103(1)(a).

55. *Id.* at § 2–3–112(3).

56. 47 Mont. Op. Atty. Gen. No. 13 (Apr. 6, 1998).

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the conditions specified not being dependent upon the officer's judgment or discretion."<sup>57</sup>

If questions of the public's significant interest arise, any doubt should be resolved in the favor of the public.<sup>58</sup> Because it is nearly impossible for a group to understand what actions have meaning to the people it affects, a matter that is of significant public interest can be simply defined as an act that is otherwise not ministerial.

### 3. Notice requirement

If the requirements of a body subjected to the right to participate are met, dealing with a matter of significant public interest, each agency is required to develop procedures that "ensure adequate notice and assist public participation before a final agency action is taken that is of significant interest to the public."<sup>59</sup> Notice has traditionally only been applied to public participation meetings as the open meeting statutes clearly lack a notice requirement. However, the right to know "is a companion to the preceding right of participation."<sup>60</sup> While both rights contain different language, there is an "inextricable association between the 'companion' provisions" and the Court has refused to examine the two rights separately from each other.<sup>61</sup> It is because of this link that the Court has recognized notice as an inherent requirement of both the right to know and the right to participate: "[w]ithout public notice, an open meeting is open in theory only, not in practice."<sup>62</sup> Without notice, it would be difficult to accomplish the legislative purpose of the open meeting statutes.<sup>63</sup>

#### a. How to properly notice

How a meeting is noticed is different for each situation, and the extent of the notice "should increase with the relative significance of the decision to be made."<sup>64</sup> While this is a very broad phrasing, there are certain acts that would be clearly unacceptable. For example, notice so general that the public cannot easily determine when the meeting is to occur would be unac-

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57. State ex rel. Workers' Comp. Div. v. Dist. Ct., 805 P.2d 1272, 1277 (Mont. 1990).

58. Seliski v. Rosebud Cnty., No. DV 94-13, slip op. at 4 (Mont. Dist. Ct. Apr. 12, 1995).

59. MONT. CODE ANN. § 2-3-103(1)(a).

60. Constitutional Convention Transcript II, *supra* note 9, at 631.

61. Bryan, 60 P.3d 381 at 388.

62. Boulder Monitor, 316 P.3d at 854; Jones v. Cnty of Missoula, 127 P.3d 406, 420 (Mont. 2006); Common Cause, 868 P.2d at 609; Sonsteli v. Bd. of Trs., 658 P.2d 413, 416 (Mont. 1983); Bd. of Trs. v. Bd. of Cnty. Comm'rs, 606 P.2d 1069, 1073 (Mont. 1980).

63. Bd. of Trs., 606 P.2d at 1073.

64. Citizens v. Bd. of Trs., No. ADV-92-450, 1992 Mont. Dist. LEXIS 384, at \*6 (Mont. Dist. Ct. Oct. 7, 1992); Seliski, slip op. at 4.

ceptable.<sup>65</sup> Notice for a meeting to occur sometime between 9:30 a.m. and 5:00 p.m. on specified days of the week is not sufficient.<sup>66</sup> In that context, trying to determine when a meeting will occur is impractical and does not encourage the openness envisioned by the Montana Constitution.<sup>67</sup>

Because the notice requirement is a fairly undeveloped area of the law, very few opinions discuss a minimum lead time before a meeting when notice is required. One state district court held forty-eight hours is enough time to notify the public of contemplated action, although this was based on school board meetings that statutorily recommend a forty-eight hour notice requirement to meeting members.<sup>68</sup> In light of this, each meeting should consider what amount of lead time would be appropriate to give adequate notice to the people affected by the decisions of the meeting.

*b. Agendas inherently required*

“The public participation and open meeting statutes do not expressly require the issuance of an agenda prior to a public meeting.”<sup>69</sup> However, suppose the law school faculty posts notice that a faculty meeting will be held on a certain day at 11:30 a.m. Just as an open meeting is only open in theory if public notice is not afforded, agendas are essential to the public’s exercise of the rights to know and participate. The First Judicial District examined this issue and found that, without an agenda being provided “a reasonable time before the meeting,” the public is “effectively deprived . . . of their rights to know and to participate.”<sup>70</sup>

Although it stopped short of defining the proper form for an agenda, the First Judicial District provided guidance by researching other states’ requirements:

In *Andrews v. Independent School District*, 737 P.2d 929 (Okla. 1987), an agenda published for a regular school board meeting stated that the superintendent would present his report concerning an “increase in academic requirements.” The Oklahoma Supreme Court held that the agenda was not required to specify that the issue of academic requirements to participate in extracurricular activities would be raised. *Id.* at 931. In *Carlson v. Paradise Unified School Dist.*, 18 Cal. App. 3d 196, 95 Cal. Rptr. 650 (1971), the school board meeting agenda listed as an item of business, “continuation school site change.” The action actually taken was to move the continuation school to another building, to discontinue elementary education at that building, and to transfer those elementary students to another school. The California court

65. *Seliski*, slip op. at 4; 47 Mont. Att’y Gen. Op. 13, (Apr. 6, 1998).

66. *Seliski*, slip op. at 4; 47 Mont. Att’y Gen. Op. 13, (Apr. 6, 1998).

67. *Seliski*, slip op. at 4.

68. *Citizens*, 1992 Mont. Dist. LEXIS 384, at \*6.

69. *Id.*

70. *Id.* at \*10.

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held that the agenda listing was “entirely inadequate notice to a citizenry which may have been concerned over a school closure . . . [and] was entirely misleading and inadequate to show the whole scope of the board’s intended plans.” *Id.* at 200, 95 Cal. Rptr. at 652.<sup>71</sup>

The District used these cases to examine whether a generic agenda item labeled as “Superintendent’s Contract” was adequate notice when the discussion held at the school board meeting concerned a one-year extension to the superintendent’s contract. The agenda item was found to be adequate because a member of the public “would have had enough information to inquire at the superintendent’s office about the details of the contract to be discussed.”<sup>72</sup>

While notice is explicitly required by the statutes, an agenda is likely inherently required in order to effectuate that notice. The requirement for an agenda ensures not only that the public can observe deliberations, but that they understand what the deliberations will be about. The policy favors the openness ideology the 1972 Constitutional Convention emphasized when they implemented Article II, Sections 8 and 9, and is in line with the liberal meaning given to the corresponding statutes by the courts of Montana.

#### *4. Agencies are required to adopt a policy to effectuate public participation*

The rights to participate and know are afforded high-profile status in Montana. For example, “each board, bureau, commission, department, authority, agency, or officer of the executive branch of the state” is required to ensure their meetings conform to the requirements of the right to participate.<sup>73</sup> In light of this requirement, the MUS, governed by the Board of Regents, has gradually adopted policies effectuating this requirement, allowing them to change as the rights to participate and know have evolved over time. Some of the campuses which fall under the control of the MUS have adopted policies as required, while others have not. By examining the policies of the MUS, as well as individual campus policies, and finessing the language to ensure compliance with the notice requirements, a general policy can be built into a framework that follows the principles of the MUS while complying with the law that governs how those agencies must operate within the public.

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71. *Id.* at \*7–8.

72. *Id.* at \*9.

73. MONT. CODE ANN. § 2–3–103(2).

### III. CREATING A POLICY; GIVING THE RIGHTS TEETH

As an agency of the state, the MUS is constitutionally organized to provide higher education in Montana.<sup>74</sup> The fact that public universities in Montana are constitutional, instead of statutory,<sup>75</sup> does not change the requirement that the MUS must follow the constitutional right to participate or right to know.<sup>76</sup> In *Board of Regents v. Judge*,<sup>77</sup> the Court held that the “Board of Regents is the competent body for determining priorities in higher education” and declared void a legislative appropriations measure that would inhibit the Board’s authority.<sup>78</sup> Unlike the statute at issue in *Judge*, the Montana Constitution created the rights to participate and know, not the legislature. That same Constitution created the MUS. The Board of Regents oversees the MUS.<sup>79</sup> The board “shall adopt rules for its own government that are *consistent with the constitution* and the laws of the state and that are proper and necessary for the execution of the powers and duties conferred upon it by law” and “shall provide, subject to the laws of the state, rules for the government of the system.”<sup>80</sup> The Constitution requires the rights to participate and know to be applied to all public bodies, including the MUS.<sup>81</sup> The Board of Regents has implemented the rights to participate and know in their policies, and so have some campuses, but there is no single policy to cover campuses that do not currently have a policy.

#### A. University system policy

Fortunately, the MUS has a very robust policy. The board requires: The commissioner of higher education will provide to presidents, chancellors and the press on or about 7 days prior to the board meeting a notice stating the time, place and agenda of board and committee meetings. The notice shall specify that the public may attend the board and committee meetings and comment on the issues or submit materials.<sup>82</sup>

Additionally, the individual campuses must notify their faculty, staff, and students to ensure the most effected population is targeted with the mandatory notice.<sup>83</sup>

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74. MONT. CONST. art. X, § 9(2)(a).

75. *Id.*

76. *Bd. of Regents v. Judge*, 543 P.2d 1323, 1335 (Mont. 1975).

77. 543 P.2d 1323 (Mont. 1975).

78. *Id.* at 1335.

79. MONT. CODE ANN. § 20–25–301 (2015) (emphasis added).

80. *Id.* at § 20–25–301(2)–(3).

81. *See Missouliau v. Bd. of Regents*, 675 P.2d 962 (Mont. 1984).

82. Mont. Bd. of Regents of Higher Educ., *Policy and Procedures Manual*, (Jan. 18, 2001), available at <https://perma.cc/EPK4-XHUY>.

83. *Id.*

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The above policy was created and thereafter revised from Article V of the original Board of Regents bylaws three times since its enactment.<sup>84</sup> As early as 1977, the Board had a fairly liberal policy, requiring notice (agenda included) at least seven days prior to a meeting, through publication in campus newspapers and bulletins, as well as a press release to the public.<sup>85</sup> While the Board revised the policy in September 1999, the principles remained the same, with one major change. The Board amended the policy to remove the required publication in written media, likely to allow electronic posting of meeting information, as is the current practice.<sup>86</sup> The policy change clearly tracks the right to know. It ensures all Board and committee meetings are open to the public, requiring notice of each.<sup>87</sup> The notice must include an agenda, and is posted in one of the most public spheres available today—the Internet.<sup>88</sup>

The Board also has an explicit public participation policy, defining the meetings that shall be open to the public, where the notice will be posted, how they will be noticed, and information on how to contact the Board for questions.<sup>89</sup> For instance, the policy names four “advisory councils” whose meetings require public participation, even though the right to know usually only attaches to advisory meetings and not the right to participate. The policy dictates the minimum notice required for regular meetings (seven days) and any special meetings (48 hours). The notice is posted online and given to the press, providing contact information to allow the public to request materials or ask questions prior to the meeting. This broad set of policies not only shows the MUS is serious about complying with their constitutional obligations, but lays a great foundation for the individual units to follow.

### B. University unit policy

The university system in Montana is considered one “university” with two units that oversee the eight campuses.<sup>90</sup> The two units are Montana State University (“MSU”) and the University of Montana (“UM”).<sup>91</sup> Montana State University adopted an “Open Meeting Policy” in January 1986<sup>92</sup>

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84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. Mont. Bd. of Regents of Higher Educ., *supra* note 82.

89. Office of the Comm’r of Higher Educ., *Public Participation Policy*, MONT. UNIV. SYS. (Sept. 7, 2010), available at <https://perma.cc/DME4-F9W5>.

90. MONT. CODE ANN. § 20–25–201.

91. MONT. CODE ANN. § 20–25–201.

92. *Open Meeting Policy*, MONT. STATE UNIV., <https://perma.cc/M5TN-7TE8> (last updated Mar. 5, 2015).

and a “Public Participation Policy” in March 2008.<sup>93</sup> Both have been revised since their enactments.<sup>94</sup> Currently, the Open Meeting Policy requires *all* meetings of MSU committees and boards to be open to the public. Additionally, the policy provides a checklist to ensure that when meetings are closed due to privacy concerns, they are closed ensuring the public isn’t excluded unnecessarily, such as when the right to privacy is invoked.<sup>95</sup> This policy is akin to the Board of Regents’ policy explained above. Likewise, MSU’s Public Participation Policy appears to be modeled after the board’s more defined public participation policy document, where MSU lists the meetings that must be open to the public, detailing where meeting agendas will be provided and how the public can comment on those meetings.

Not only has MSU made its meetings accessible in the ways the Constitutional Convention delegates envisioned, three out of the four campuses it oversees have followed suit.<sup>96</sup> Conversely, UM has not published any policies giving effect to the right to know or participate at any of its campuses. It should be noted that the lack of policies at five of Montana’s eight campuses does not mean the rights to know and participate are being quashed, it simply means there is no official guidance to those who are meeting.

### C. A policy proposal for all

The MUS has recognized the importance of instituting policies governing the rights to know and participate. These rights are not easy to navigate. Each organization should concentrate on educating those who will be conducting meetings as to the obligations imposed by the rights. Since the focus here has been on the notice requirement of meetings, the policy recommendation in this article should not be considered complete and adopted without alteration, but instead used as a framework so uniformity and openness can be achieved in Montana’s higher education environment.

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93. *Public Participation Policy*, MONT. STATE UNIV., <https://perma.cc/QGS4-APB9> (last updated Feb. 15, 2012).

94. *Id.*

95. *Open Meeting Policy*, *supra* note 92.

96. *Public Participation Policy*, *supra* note 93; *1023 Open Meeting Policy*, MSU-NORTHERN, <https://perma.cc/GQ86-LMCM> (last updated Jan. 4, 2011); *1022 Public Participation Policy*, MSU-NORTHERN, <https://perma.cc/SK74-ANXZ> (last updated Jan. 4, 2011); *102.2 Open Meeting*, GREAT FALLS COLLEGE, <https://perma.cc/5DKH-HA72> (last updated Nov. 2014); *102.1 Public Participation*, GREAT FALLS COLLEGE, <https://perma.cc/68GT-VV97> (last updated Nov. 2014); MSU-Billings has not published any open meeting or public participation policy.

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1. *Open Meeting and Public Participation Policy*

To comply with the rights to know and participate, an all-encompassing policy should be developed. This helps to dispel a misperception that the open meeting and public participation laws are separable simply because they are separate Constitutional provisions.<sup>97</sup> As discussed, the two are inextricably linked; the requirements for both should be satisfied within the same policy to avoid confusion to the public and those running the meetings. A starting point, which covers these issues, is the following policy:

(1) All meetings of official [University] committees and boards shall be presumed open to the public, except when the discussions or deliberations of these committees or bodies relate to a matter of individual privacy. All meetings under this policy shall provide adequate notice to the public by listing the name of the meeting, date, time, and location, and posting that notice on the [University] web site. New notice shall be provided for each meeting held. Each notice shall contain an agenda, published no less than 48 hours prior to the meeting, which contains a brief list of the items to be discussed and all issues to be acted on. Minutes shall be taken at each meeting and made available for public inspection.

(2) Meetings in which final action is taken on an item shall allow for public participation prior to the vote on the final act. Acts that fall under this policy shall include any act that is of significant interest to the public. These meetings shall follow the same procedure as § 1 of this policy, but will include an opportunity for public comment. The following meetings shall allow public participation at every meeting: [list meetings pre-determined to fall under this subsection here]. The above list is not exhaustive and each group holding a meeting shall analyze whether individual meetings require public participation on a meeting-by-meeting basis, with enough time to publish the agenda as required by this policy.

Clearly, all meetings of official groups within the University system would be required to abide by the open meeting policy, but it should be up to the University to determine exactly to which meetings subsection 2 of the policy would apply. The law school faculty meeting example is explained below, and would be governed by subsection 2 above. However, not all committees are created equal. For example, UM's School of Business faculty lacks the final authority power that the UM School of Law has in curriculum creation, and it is differences like this one, between committees of similar names, that should be carefully analyzed by the policy making authority at the University to determine what committees will be explicitly listed in subsection 2.<sup>98</sup>

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97. See *infra* Part II.

98. *Faculty Handbook*, *supra* note 4, at 31.



Just as the right to privacy provides exceptions to the right to know and participate, there are explicit protections for student information in the higher education context. The Family Education Rights and Privacy Act<sup>99</sup> (“FERPA”) and Mont. Code Ann. § 20–25–515 govern how and when student information may be released. The general idea of these laws is that student records may be released only with student consent, presenting situations when information relating to students may invoke a valid closure of an otherwise public meeting. However just as the right to privacy is not covered in this article, neither are the relevant student protections. Due to their relevance, any campus choosing to adopt this policy should ensure meeting administrators know when the right to privacy, FERPA, or other state law require a portion of that meeting to be closed to the public.

## 2. *Examples of policy application*

There will certainly be some grey areas in which policy application will vary. Applying the analysis to specific examples helps identify the pertinent issues in deciding when and how the rights to know and participate attach. The following examples will examine these rights as they apply to student groups, faculty committees, and university councils.

Student groups often consider themselves separate from university governance. In Montana, the rights to know and participate follow the money; where public funds are spent, the public has a right to know and participate.<sup>100</sup> The Board of Regents’ policy states that “[s]tudent fees [are] defined as ‘public funds.’”<sup>101</sup> Since student groups expend their funds to benefit the student body, those groups are making a policy choice on how public money is expended by deliberating how to, and why they should, spend that money. This meets the *Crofts* factors for the occurrence of a meeting with a public purpose, and thus brings the student group under the public body definition. Since they are also the final decision maker for how that money is spent, those student groups have the authority to enter into the type of agreements to which both the rights to participate and know attach. This has been put into practice by MSU, where the student body government is listed under MSU’s public participation policy.<sup>102</sup>

A university faculty committee presents a similarly intriguing scenario. The attachment of the right to know to every university committee is almost guaranteed. While each meeting must meet the required elements, committees of an MUS campus will be deciding matters that effect the way in

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99. 20 U.S.C. § 1232g (2013).

100. MONT. CODE ANN. § 2–3–203(1).

101. Mont. Bd. of Regents of Higher Educ., *Policy and Procedures Manual*, (Nov. 18, 1999), available at <https://perma.cc/KR4P-Q25D>.

102. *Public Participation Policy*, *supra* note 93.

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which public education is provided. When meeting to discuss changes to curriculum, admissions standards, and grading requirements, these committees are creating changes that directly shape the policy of providing public education. It is important to examine the other types of issues these committees deliberate upon in a broad manner, because the rights to know and participate do not require that the discussions impact a defined number of people for the issue to become significant. The purpose of these rights is to let the public view their government in action, participating in final actions that are significant to *them*. Thus a departmental faculty group that must obtain approval from a larger faculty group (typically termed a faculty senate) might only be bound to the right to know. Conversely, a faculty group that has the final authority to make binding decisions must abide by the additional weight of the right to participate. Neither can abdicate their constitutional obligation.

Unlike faculty committees, the right to participate will likely always attach to the university councils. While the same right to know analysis applies to these councils as to the faculty committees, there is a significant departure from the faculty committee example in light of the decision-making element. Even if a university president has the ultimate authority on items relating to budgets, planning, and policy making, if the public has no opportunity to participate before the president makes the final act, then there must be a procedure to permit and encourage the public to participate. Applying this analysis to require high level committees—which are the last stop before a budget or policy proposal is presented to the president—to encourage public comment through participation is likely the very reason MSU included these committees in its public participation policy.<sup>103</sup>

There are certainly times when items on an agenda do not have to be open to public participation yet still require obedience to the open meeting statutes. For example, UM obtained approval in 2015 to rename the law school in exchange for a ten million dollar donation.<sup>104</sup> This discussion began between the donor and various groups affiliated with the University.<sup>105</sup> In the MUS, the Board of Regents has final approval in the renaming of a school at the University of Montana.<sup>106</sup> When presented to the law faculty, neither public participation nor notice that the matter was being discussed at a meeting was provided.<sup>107</sup> As the Board of Regents is the final decision-

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103. *Id.*

104. Karen Sloan, *Montana Law Receives \$10M Gift, Name Change*, Nat'l L.J. (Online) (May 27, 2015).

105. Keila Szpaller, *UM School of Law: Regest questions renaming school without public input*, MIS-SOULIAN.COM (MAY 21, 2015), <https://perma.cc/6RQX-326A>.

106. Mont. Bd. of Regents of Higher Educ., *Policy and Procedures Manual*, (June 1, 2007), available at <https://perma.cc/7UUG-EQED>.

107. Szpaller, *supra* note 105.

maker on this issue, the faculty meeting is not required to allow public participation. However, absent an exception allowing the faculty to exclude members of the public from the meeting, the faculty meeting would still be required to abide by the open meeting laws and allow the public to observe deliberation on this issue. At the time the faculty met to approve the renaming of the law school, this author was both a law student and an elected voting member of the faculty committee. Citing confidentiality, this author was prohibited from attending the discussion and approval of the renaming. While this article does not analyze the privacy interests involved, which would potentially alter the final conclusion, the exclusion of a student, let alone a voting member of the faculty committee, violated the right to know. This illustrates the reason for each campus to adopt an open meeting and public participation policy, to prevent the public from being improperly excluded from meetings of public bodies.

#### IV. CONCLUSION

The rights to know and participate provide for a transparent operation of government in Montana. They require bodies organized for a public purpose to be open to those they serve, the people of Montana. Those required to abide by these constitutional rights should not fret because being “open” is not hard. When properly followed, the rights to participate and know enhance a meeting’s decision making process instead of hindering it.

Simply post your meeting details in a publicly accessible place; most organizations have a website, and that is the most public space in society today. Make sure you provide an agenda and allow for public comment when necessary, and educate yourself on the privacy laws so you can close a meeting when it is warranted. Most people do not realize the rights they think are restrictive to them when they are holding a meeting are the same rights they take advantage of when they voice their concerns to their local school board, county commissioners, or city council.