Montana Code Annotated

TITLE 2 GOVERNMENT STRUCTURE AND ADMINISTRATION
CHAPTER 3
PUBLIC PARTICIPATION IN GOVERNMENTAL OPERATIONS

Part 1
Notice and Opportunity to Be Heard

Administrative Rules:

ARM 1.3.102 Notice of agency action that is of significant interest to public.

2-3-101. Legislative intent. The legislature finds and declares pursuant to the mandate of Article II, section 8, of the 1972 Montana constitution that legislative guidelines should be established to secure to the people of Montana their constitutional right to be afforded reasonable opportunity to participate in the operation of governmental agencies prior to the final decision of the agency.

History: En. 82-4226 by Sec. 1, Ch. 491, L. 1975; R.C.M. 1947, 82-4226.

2-3-102. Definitions. As used in this part, the following definitions apply:

(1) "Agency" means any board, bureau, commission, department, authority, or officer of the state or local government authorized by law to make rules, determine contested cases, or enter into contracts except:

(a) the legislature and any branch, committee, or officer thereof;

(b) the judicial branches and any committee or officer thereof;

(c) the governor, except that an agency is not exempt because the governor has been designated as a member thereof; or

(d) the state military establishment and agencies concerned with civil defense and recovery from hostile attack.

(2) "Agency action" means the whole or a part of the adoption of an agency rule, the issuance of a license or order, the award of a contract, or the equivalent or denial thereof.

(3) "Rule" means any agency regulation, standard, or statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedures, or practice requirements of any agency. The term includes the amendment or repeal of a prior rule but does not include:

(a) statements concerning only the internal management of an agency and not affecting private rights or procedures available to the public; or

(b) declaratory rulings as to the applicability of any statutory provision or of any rule.

History: En. 82-4227 by Sec. 2, Ch. 491, L. 1975; amd. Sec. 23, Ch. 285, L. 1977; amd. Sec. 1, Ch. 452, L. 1977; R.C.M. 1947, 82-4227(part); amd. Sec. 1, Ch. 243, L. 1979.

Case Notes:

Public or Governmental Bodies -- Committee to Recommend Commissioner of Political Practices Appointees to Governor: The committee that recommends a list of persons from whom the Governor may select the Commissioner of Political Practices is not a board, bureau, commission, or agency within the meaning of those terms as used in the open meeting law.

However, the committee is a "public or governmental body" under the plain meaning of those terms as used in that law because it has a clear public and governmental purpose and was created for a specific governmental task and is thus subject to the open meeting law. Common Cause of Mont. v. Statutory Comm. to Nominate Candidates for Comm'r of Political Practices, 263 M 324, 868 P2d 604, 51 St. Rep. 77 (1994).

Meeting of City Employees and Private Contractors Not Subject to Open Meeting Law: The plaintiff television station argued that it had the right to have a reporter cover a meeting between the city engineer, the public works director, and representatives of a private construction company. The Supreme Court stated that the statutes require agencies to have open meetings and that the definition of "agencies" does not include individual employees. The Supreme Court, after examining the legislative history of Art. II, sec. 9, Mont. Const., concluded that the statutes, which limit the right to know to agencies, are consistent with the intent of the constitution and therefore the plaintiff was not entitled to have a reporter present at the meeting of individual employees and a private party. SJL of Mont. Associates Ltd. Partnership v. Billings, 263 M 142, 867 P2d 1084, 50 St. Rep. 1726 (1993).

Dismissal of Tenured Teacher -- Procedure Within MAPA: The County Superintendent of Schools and the State Superintendent of Public Instruction come under the definition of "agency" within the Montana Administrative Procedure Act (MAPA), and the decision not to award a contract to a tenured teacher is a "contested case" under MAPA. Yanzick v. School District, 196 M 375, 641 P2d 431, 39 St. Rep. 191 (1982).

Attorney General Opinions:

Municipal Entities Subject to Right of Public Participation -- Limit on Public Comment: Any municipal entity, including an advisory board, commission, and committee of a City Council, is subject to the right of the public to participate in any action that is of significant interest to the public. However, those municipal entities need not permit public comment on matters that are not of significant interest to the public. 51 A.G. Op. 12 (2005).

Proceedings of Workers' Compensation Board of Directors Subject to Open Meeting Law: Because the Board of Directors of the Montana self-insurers guaranty fund fits the definition of "agency" in state law and is considered a public agency because of its legal authority to compel membership, assess its members, and exercise other regulatory powers in the conduct of the people's business, a broad construction of laws guaranteeing the public's right to know requires the Board to comply with the state open meeting law. 46 A.G. Op. 1 (1995).

Proceedings of Workers' Compensation Board of Directors Subject to Montana Administrative Procedure Act: The Board of Directors of the Montana self-insurers guaranty fund fits the definition of "agency" in state law. The fund is considered a public organization because it has a public purpose and because it has been granted statutory authority to adopt public rules and to enter public contracts. Therefore, when the Board adopts rules or resolves contested cases, it must comply with the provisions of the Montana Administrative Procedure Act. 46 A.G. Op. 1 (1995).

2-3-103. Public participation -- governor to ensure guidelines adopted. (1) (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 agency 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 proceedings.

(2) The governor shall ensure that each board, bureau, commission, department, authority, agency, or officer of the executive branch of the state adopts coordinated rules for its programs. The guidelines must provide policies and procedures to facilitate public participation in those programs, consistent with subsection (1). These guidelines must be adopted as rules and published in a manner so that the rules may be provided to a member of the public upon request.

History: En. 82-4228 by Sec. 3, Ch. 491, L. 1975; amd. Sec. 24, Ch. 285, L. 1977; amd. Sec. 2, Ch. 452, L. 1977; R.C.M. 1947, 82-4228(1), (5); amd. Sec. 1, Ch. 425, L. 2003.

Compiler's Comments:

2003 Amendment: Chapter 425 in (1)(a) inserted third through fifth sentences concerning meeting agendas; inserted (1)(b) defining public matter for purposes of this section; in (2) near middle of first sentence after "officer of the" inserted "executive branch of the"; and made minor changes in style. Amendment effective April 22, 2003.

Cross References:

Right of public participation in government, Art. II, sec. 8, Mont. Const.

Adoption of rules, 2-4-302.

Publication of rules -- availability, 2-4-312.

Case Notes:

Standard for Publication of Public Notice of County Commission Meetings -- Adoption of Formal Guidelines for Public Participation Not Required: Missoula County had policies and procedures for the posting of public meetings to encourage public participation in county business, but the procedures were not formally adopted or published for public distribution under this section. At a meeting in April 2003, the agenda listed a discussion of adding domestic partner benefits as an amendment to the county employee benefits plan. In May 2003, plaintiffs filed a complaint alleging that the county had failed to give proper notice of the April meeting in violation of the public right to participate in government and sought to void the action of the Board of County Commissioners making the benefits available. The District Court granted summary judgment to the county. Under this section, notice and public participation are required on actions of significant public interest, and given recent national attention, the issue of adding domestic partner benefits was held to be of significant public interest. However, the statute does not set out a specific method of notification. The standard is simply that a Board of County Commissioners must provide notice that is adequate to ensure public opportunity to participate in the decisionmaking process. Here, the Board published notice of the meeting in the local newspaper, posted notice of the meeting 24 hours in advance, and e-mailed the meeting agenda to the newspaper the day before the meeting. This notice was sufficient to alert plaintiffs, who attended the meeting and voiced their concerns, as well as the general public. Additionally, the fact that the county did not formally adopt or publish the procedures for public distribution under this section was irrelevant because the formal adoption requirement applies only to state

agencies. Summary judgment was affirmed. Jones v. Missoula County, 2006 MT 2, 330 M 205, 127 P3d 406 (2006). See also Sonstelie v. Bd. of Trustees, 202 M 414, 658 P2d 413 (1983).

Discretion of District Court Whether to Void School Board Decision: Motta filed a pro se lawsuit against a school district board, contending that the district did not have an appropriate procedure in place for public participation in the decisionmaking process and that because the school board did not adequately publicize a series of negotiation sessions and a special meeting to approve a negotiated agreement between the board and the teachers' union, results of the meeting should be void. The District Court found that the board violated state open meeting laws, granted partial summary judgment for Motta, and ordered that the district submit copies of its public participation procedures and maintain minutes consistent with applicable statutes, but the court did not void the agreement. On appeal, Motta argues that the District Court erred and moved the Supreme Court to void the agreement. The Supreme Court declined. Under 2-3-213, the decision whether to void any decisions reached at a meeting held in violation of state open meeting laws is clearly within the discretion of the District Court, and because that discretion was not abused, the partial summary judgment was affirmed. Motta v. Philipsburg School Bd. Trustees, District No. 1, 2004 MT 256, 323 M 72, 98 P3d 673 (2004).

Reversal of Conviction for Medicaid Fraud Based on Violation of Improperly Adopted Administrative Policy: Vainio, an optometrist, was charged with three counts of Medicaid fraud under 45-6-313. The jury found Vainio guilty, and the District Court concluded as a matter of law that a violation of the administrative policies at issue formed a criminal act. On appeal, Vainio argued that by criminalizing violations of administrative policies that were not formally promulgated as rules, 45-6-313 contravened the Montana Administrative Procedure Act (MAPA), Title 2, ch. 4, and that policies that were not promulgated according to MAPA lacked the force of law. The state contended that because 45-6-313 specifically refers to violations of "policies", it was not necessary for those policies to be embodied in a rule promulgated pursuant to MAPA. The Supreme Court agreed with Vainio. The use of the term "policies" in 45-6-313 is limited to those policies that have been formally adopted as rules pursuant to MAPA. The fact that 45-6-313 does not expressly reference MAPA does not mean that Medicaid providers can be criminally prosecuted for violating the state's informal policies. Further, 45-6-313 does not have to expressly reference MAPA for MAPA to apply; rather, MAPA must be followed because 45-6-313 does not expressly repudiate it. When the Legislature authorizes an agency to adopt rules, the procedures mandated by MAPA apply regardless of whether the authorizing statute refers to MAPA. The practices for which Vainio was convicted were not prohibited by rules adopted in compliance with MAPA and in effect at the time of the alleged offenses and thus were not illegal, so the convictions were reversed. St. v. Vainio, 2001 MT 220, 306 M 439, 35 P3d 948 (2001), following NW. Airlines, Inc. v. St. Tax Appeal Bd., 221 M 441, 720 P2d 676 (1986), and Rosebud County v. Dept. of Revenue, 257 M 306, 849 P2d 177 (1993), and distinguishing Huether v. District Court, 2000 MT 158, 300 M 212, 4 P3d 1193 (2000).

Advisory Body Meeting Without Notice -- Mootness of Issues When Ultimate Action Becomes Final: The committee that recommends a list of persons from whom the Governor may select the Commissioner of Political Practices met, without public notice, to discuss who would be recommended. The Governor appointed a recommended person. A suit was filed to void the appointment on the grounds that the submission of the list was void because there was no notice of the meeting. The committee was granted summary judgment in the District Court, and plaintiffs appealed. Before the appeal was heard, the Senate confirmed the appointment. That the confirmation vested the title to the office in the appointee did not make the appeal and issue

moot because alleged violations of the state constitutional right to know and open meeting statutes could occur again, both in the context of this committee and similar advisory entities. To allow an alleged violation to escape judicial scrutiny simply because legal proceedings are not always swift would take away the people's constitutional right to know. Common Cause of Mont. v. Statutory Comm. to Nominate Candidates for Comm'r of Political Practices, 263 M 324, 868 P2d 604, 51 St. Rep. 77 (1994).

Appointment by Governor Not Voided by Failure of Recommending Committee to Give Notice of Meeting at Which Recommended Persons Chosen: The committee that recommends persons to the Governor, who appoints the Commissioner of Political Practices, violated the open meeting law when it met, without public notice, to discuss who would be recommended. The Governor appointed a recommended person, and the Senate confirmed the appointment. Since the Governor is free to disregard the recommended persons, the Governor did not violate the law in appointing one of the recommended persons, and the appointment was not voided. Common Cause of Mont. v. Statutory Comm. to Nominate Candidates for Comm'r of Political Practices, 263 M 324, 868 P2d 604, 51 St. Rep. 77 (1994).

Failure to Give Notice of Meeting of Committee That Recommends Persons Governor May Appoint as Commissioner of Political Practices: When three members of the four-member committee that recommends a list of persons from whom the Governor may select the Commissioner of Political Practices met to discuss candidates and the transmission of their names to the Governor and gave no public notice of the meeting, the committee violated the open meeting law. Common Cause of Mont. v. Statutory Comm. to Nominate Candidates for Comm'r of Political Practices, 263 M 324, 868 P2d 604, 51 St. Rep. 77 (1994).

Meeting Open Only in Theory When No Public Notice Given: The open meeting law requires public notice of a meeting subject to that law. Without public notice, a meeting is open to the public in theory only, not in practice. Common Cause of Mont. v. Statutory Comm. to Nominate Candidates for Comm'r of Political Practices, 263 M 324, 868 P2d 604, 51 St. Rep. 77 (1994).

Notice of Public Meeting Held Insufficient: Where two of three County Commissioners held a telephone meeting to discuss approval of a preliminary subdivision plat and were required to give notice of the meeting, the Board failed to comply in that a county newspaper article did not supply sufficient facts concerning the time and place of the meeting to permit further public comment, nor was a 2-days' posted public notice ever given. Bd. of Trustees v. County Comm'rs, 186 M 148, 606 P2d 1069 (1980).

Telephone Conversation as Constituting a "Meeting" -- Notice Required to Be Given: Where two of three County Commissioners discussed by telephone the approval of a preliminary plat of a subdivision, a "meeting" as defined in 2-3-202 took place, and the Commissioners were subject to the requirement that notice of the meeting be given in accordance with statute. Bd. of Trustees v. County Comm'rs, 186 M 148, 606 P2d 1069 (1980).

Jurisdiction to Consider Right to Notice and Participation: The District Court lacked jurisdiction to consider plaintiffs' rights under this section since their complaint was filed more than 30 days after the date of decision. Kadillak v. The Anaconda Co., 184 M 127, 602 P2d 147 (1979).

Attorney General Opinions:

City Council Agenda -- Addition of and Immediate Action on Certain Items Limited: Only an item that is not of significant public interest or that is otherwise exempt from public

participation requirements may be added to a City Council agenda and acted upon at the same City Council meeting. 51 A.G. Op. 12 (2005).

Public Notice Required for City Council Meetings -- Requirement for Agenda Item for Public Comment on Nonagenda Matters Directed Only to Matters of Significant Public Interest but Applicable to Formal and Informal Council Sessions: Public notice is required for any meeting of a City Council. The mandate imposed upon a City Council to include an agenda item for public comment on nonagenda matters applies only to the extent that the public comments are directed to matters of significant interest to the public, but the City Council is not required to take public comments on matters that are not of significant interest to the public. The mandate applies both to formal City Council meetings and to informal City Council work sessions when no action may be taken. 51 A.G. Op. 12 (2005).

Right of Public to Comment on Nonagenda City Council Items Extended to Matters Involving Individual Privacy -- Right of Presiding Officer to Close City Council Meeting to Protect Individual Privacy: The right of the public to comment at a City Council meeting on nonagenda items extends to matters that may involve an interest in individual privacy. However, the presiding office of the City Council retains the power to close a City Council meeting to the public if the presiding officer determines that the interest of individual privacy clearly outweighs the public's right to know. 51 A.G. Op. 12 (2005).

Applicability of Open Meeting and Public Participation Laws to County Commission Meetings -- Notice Required in Matters of Significant Public Interest: The gathering of a quorum of County Commissioners to discuss, either among themselves or with members of the public, issues over which the County Commission has authority is a meeting subject to open meeting laws. Meetings involving the consideration of matters of significant public interest, meaning decisions involving more than a ministerial act requiring no exercise of judgment, are subject to public participation mandates, including notice requirements and the opportunity for public participation in the decisionmaking process. Thus, a County Commission that established the hours of 9:30 a.m. to 5 p.m., Monday through Friday, as its regular meeting time for public notice purposes, did not comply with Montana's constitutional and statutory public participation provisions. 47 A.G. Op. 13 (1998). See also 42 A.G. Op. 51 (1988).

Law Review Articles:

Comments on Government Censorship and Secrecy, Elison & Elison, 55 Mont. L. Rev. 175 (1994).

Montana Supreme Court Survey: Administrative Law, Snyder, 41 Mont. L. Rev. 151 (1980).

Collateral References:

Validity, construction, and application of statutes making public proceedings open to the public. 38 ALR 3d 1070.

What constitutes "agency" for purposes of Freedom of Information Act. 165 ALR Fed. 591.

2-3-104. Requirements for compliance with notice provisions. An agency shall be considered to have complied with the notice provisions of 2-3-103 if:

(1) an environmental impact statement is prepared and distributed as required by the Montana Environmental Policy Act, Title 75, chapter 1;

(2) a proceeding is held as required by the Montana Administrative Procedure Act;

(3) a public hearing, after appropriate notice is given, is held pursuant to any other

provision of state law or a local ordinance or resolution; or

(4) a newspaper of general circulation within the area to be affected by a decision of significant interest to the public has carried a news story or advertisement concerning the decision sufficiently prior to a final decision to permit public comment on the matter.

History: En. 82-4228 by Sec. 3, Ch. 491, L. 1975; amd. Sec. 24, Ch. 285, L. 1977; amd. Sec. 2, Ch. 452, L. 1977; R.C.M. 1947, 82-4228(2).

Cross References:

Montana Administrative Procedure Act -- proceedings, 2-4-302, 2-4-306, 2-4-601.

Publication and content of local government notices, 7-1-2121.

Case Notes:

Standard for Publication of Public Notice of County Commission Meetings -- Adoption of Formal Guidelines for Public Participation Not Required: Missoula County had policies and procedures for the posting of public meetings to encourage public participation in county business, but the procedures were not formally adopted or published for public distribution under 2-3-103. At a meeting in April 2003, the agenda listed a discussion of adding domestic partner benefits as an amendment to the county employee benefits plan. In May 2003, plaintiffs filed a complaint alleging that the county had failed to give proper notice of the April meeting in violation of the public right to participate in government and sought to void the action of the Board of County Commissioners making the benefits available. The District Court granted summary judgment to the county. Under 2-3-103, notice and public participation are required on actions of significant public interest, and given recent national attention, the issue of adding domestic partner benefits was held to be of significant public interest. However, the statute does not set out a specific method of notification. The standard is simply that a Board of County Commissioners must provide notice that is adequate to ensure public opportunity to participate in the decisionmaking process. Here, the Board published notice of the meeting in the local newspaper, posted notice of the meeting 24 hours in advance, and e-mailed the meeting agenda to the newspaper the day before the meeting. This notice was sufficient to alert plaintiffs, who attended the meeting and voiced their concerns, as well as the general public. Additionally, the fact that the county did not formally adopt or publish the procedures for public distribution under 2-3-103 was irrelevant because the formal adoption requirement applies only to state agencies. Summary judgment was affirmed. Jones v. Missoula County, 2006 MT 2, 330 M 205, 127 P3d 406 (2006). See also Sonstelie v. Bd. of Trustees, 202 M 414, 658 P2d 413 (1983).

Reversal of Conviction for Medicaid Fraud Based on Violation of Improperly Adopted Administrative Policy: Vainio, an optometrist, was charged with three counts of Medicaid fraud under 45-6-313. The jury found Vainio guilty, and the District Court concluded as a matter of law that a violation of the administrative policies at issue formed a criminal act. On appeal, Vainio argued that by criminalizing violations of administrative policies that were not formally promulgated as rules, 45-6-313 contravened the Montana Administrative Procedure Act (MAPA), Title 2, ch. 4, and that policies that were not promulgated according to MAPA lacked the force of law. The state contended that because 45-6-313 specifically refers to violations of "policies", it was not necessary for those policies to be embodied in a rule promulgated pursuant to MAPA. The Supreme Court agreed with Vainio. The use of the term "policies" in 45-6-313 is limited to those policies that have been formally adopted as rules pursuant to MAPA. The fact that 45-6-313 does not expressly reference MAPA does not mean that Medicaid providers can be

criminally prosecuted for violating the state's informal policies. Further, 45-6-313 does not have to expressly reference MAPA for MAPA to apply; rather, MAPA must be followed because 45-6-313 does not expressly repudiate it. When the Legislature authorizes an agency to adopt rules, the procedures mandated by MAPA apply regardless of whether the authorizing statute refers to MAPA. The practices for which Vainio was convicted were not prohibited by rules adopted in compliance with MAPA and in effect at the time of the alleged offenses and thus were not illegal, so the convictions were reversed. St. v. Vainio, 2001 MT 220, 306 M 439, 35 P3d 948 (2001), following NW. Airlines, Inc. v. St. Tax Appeal Bd., 221 M 441, 720 P2d 676 (1986), and Rosebud County v. Dept. of Revenue, 257 M 306, 849 P2d 177 (1993), and distinguishing Huether v. District Court, 2000 MT 158, 300 M 212, 4 P3d 1193 (2000).

Publication Not Mandated: At its regular meeting on March 10, 1981, the Board of Trustees announced that had until April 1 to issue tenure contracts but that had not yet made final decisions. On March 12, the chairman contacted the clerk to tell her there would be a special meeting at 9 a.m. on March 14. The clerk contacted the local radio stations, who announced the meeting. The Board met and went into executive session. When plaintiff's contract was not renewed, she claimed the Board had violated the notice provisions of the open meeting law. The court held that the Montana open meeting law does not specifically mandate notice by publication. Publication is a method of proving notice. The obligation of the Montana open meeting law is to ensure that the public has ample opportunity to participate in decisions before final action is taken. The evidence in this case indicated that the opportunity was given. Sonstelie v. Bd. of Trustees, 202 M 414, 658 P2d 413, 40 St. Rep. 179 (1983).

Notice of Public Meeting Held Insufficient: Where two of three County Commissioners held a telephone meeting to discuss approval of a preliminary subdivision plat and were required to give notice of the meeting, the Board failed to comply in that a county newspaper article did not supply sufficient facts concerning the time and place of the meeting to permit further public comment, nor was a 2-days' posted public notice ever given. Bd. of Trustees v. County Comm'rs, 186 M 148, 606 P2d 1069 (1980).

Attorney General Opinions:

Constitutional Mandate: In the context of rulemaking, the Montana Administrative Procedure Act fulfills the mandate of Art. II, sec. 8, Mont. Const., requiring reasonable opportunity for citizen participation in agency operation, by providing notice and hearing. 38 A.G. Op. 69 (1980).

2-3-105. Supplemental notice by radio or television. (1) An official of the state or any of its political subdivisions who is required by law to publish a notice required by law may supplement the publication by a radio or television broadcast of a summary of the notice or by both when in the official's judgment the public interest will be served.

(2) The summary of the notice must be read without a reference to any person by name who is then a candidate for political office.

(3) The announcements may be made only by duly employed personnel of the station from which the broadcast emanates.

(4) Announcements by political subdivisions may be made only by stations situated within the county of origin of the legal notice unless a broadcast station does not exist in that county, in which case announcements may be made by a station or stations situated in any county other than the county of origin of the legal notice.

History: En. Sec. 1, Ch. 149, L. 1963; R.C.M. 1947, 19-201; amd. Sec. 38, Ch. 61, L. 2007.

Compiler's Comments:

2007 Amendment: Chapter 61 made minor changes in style. Amendment effective October 1, 2007.

Case Notes:

Publication Not Mandated: At its regular meeting on March 10, 1981, the Board of Trustees announced that had until April 1 to issue tenure contracts but that had not yet made final decisions. On March 12, the chairman contacted the clerk to tell her there would be a special meeting at 9 a.m. on March 14. The clerk contacted the local radio stations, who announced the meeting. The Board met and went into executive session. When plaintiff's contract was not renewed, she claimed the Board had violated the notice provisions of the open meeting law. The court held that the Montana open meeting law does not specifically mandate notice by publication. Publication is a method of proving notice. The obligation of the Montana open meeting law is to ensure that the public has ample opportunity to participate in decisions before final action is taken. The evidence in this case indicated that the opportunity was given. Sonstelie v. Bd. of Trustees, 202 M 414, 658 P2d 413, 40 St. Rep. 179 (1983).

2-3-106. Period for which copy retained. Each radio or television station broadcasting any summary of a legal notice shall for a period of 6 months subsequent to such broadcast retain at its office a copy or transcription of the text of the summary as actually broadcast, which shall be available for public inspection.

History: En. Sec. 2, Ch. 149, L. 1963; R.C.M. 1947, 19-202.

2-3-107. Proof of publication by broadcast. Proof of publication of a summary of any notice by radio or television broadcast shall be by affidavit of the manager, an assistant manager, or a program director of the radio or television station broadcasting the same.

History: En. Sec. 3, Ch. 149, L. 1963; R.C.M. 1947, 19-203.

Cross References:

Affidavits -- generally, Title 26, ch. 1, part 10.

Affidavit defined, 26-1-1001.

2-3-108 through 2-3-110 reserved.

2-3-111. Opportunity to submit views -- public hearings. (1) Procedures for assisting public participation must include a method of affording interested persons reasonable opportunity to submit data, views, or arguments, orally or in written form, prior to making a final decision that is of significant interest to the public.

(2) When a state agency other than the board of regents proposes to take an action that directly impacts a specific community or area and a public hearing is held, the hearing must be held in an accessible facility in the impacted community or area or in the nearest community or area with an accessible facility.

History: En. 82-4228 by Sec. 3, Ch. 491, L. 1975; amd. Sec. 24, Ch. 285, L. 1977; amd.

Sec. 2, Ch. 452, L. 1977; R.C.M. 1947, 82-4228(3); amd. Sec. 1, Ch. 487, L. 1997.

Compiler's Comments:

1997 Amendment: Chapter 487 inserted (2) requiring that public hearing be held in accessible facility in impacted community or area when agency action directly impacts community or area; and made minor changes in style.

Cross References:

Right of public participation in government, Art. II, sec. 8, Mont. Const.

Submission of comments by electronic mail over Internet, 2-3-301.

Case Notes:

Lack of Standing of Person Who Fails to Allege Personal Interest or Injury: Fleenor brought an action for violation of her right to know and right to participate in a school district's decision to hire a new superintendent on grounds that she was not properly notified of votes. The suit was brought by Fleenor as a citizen of Montana and resident of the county and the school district. The District Court dismissed the suit for lack of standing, and Fleenor appealed, asserting that standing existed by virtue of her status as an interested party and that a liberal interpretation of the constitution regarding a citizen's right to know and participate included anyone with an interest in enforcing the broad constitutional policies and protections. The Supreme Court disagreed. To establish standing, a complaining party must clearly allege a past, present, or threatened injury to a property right or a civil right and allege that the injury is personal to the claimant and distinguishable from injury to the public generally. Additionally, the challenged action must result in a concrete adverseness personal to the party staking a claim in the outcome. However, simply being an informed and interested citizen is insufficient to confer standing. Fleenor made no assertion of injury and did not establish a personal, concrete adverseness that would result from the school district's action and thus failed to meet the threshold for establishing standing. The District Court was affirmed. Fleenor v. Darby School District, 2006 MT 31, 331 M 124, 128 P3d 1048 (2006), following Flesh v. Bd. of Trustees, 241 M 158, 786 P2d 4 (1990), Carter v. Dept. of Transportation, 274 M 39, 905 P2d 1102 (1995), and Bryan v. Yellowstone County Elementary School District No. 2, 2002 MT 264, 312 M 257, 60 P3d 381 (2002), followed in Lohmeier v. Gallatin County, 2006 MT 88, 332 M 39, 135 P3d 775 (2006), and followed, with regard to criteria to establish standing, in Bd. of Trustees, Cut Bank Pub. Schools v. Cut Bank Pioneer Press, 2007 MT 115, 337 M 229, 160 P3d 482 (2007).

Dissemination of Incomplete Document Used to Make Decision -- Right to Participate Entails Complying With Right to Know: A school district assembled a group of people to research and advise the district on the closure of schools, and a member of the group summarized the closure research information on a computer-generated spreadsheet and delivered various versions of the spreadsheet to various people and groups. The version given the school district contained a system rating the schools and explaining the rating system, but the group of parents that plaintiff belonged to was given a version not containing the rating system when a member of the group requested a copy. The school district told the group that a spreadsheet comparing the schools did not exist. The spreadsheet was a document of a public body subject to public inspection prior to the time that the school district's board met and used the spreadsheet to help determine which schools to close. The school district violated plaintiff's right to examine public documents. At a minimum, the "reasonable opportunity" standard articulated in Art. II, sec. 8, Mont. Const., and this section for the right to participate demands compliance with the right to

know contained in Art. II, sec. 9, Mont. Const. When the school district violated plaintiff's right to know, it reduced what should have been a genuine interchange into a mere formality. Bryan could and did voice her opinion to the school district, but did so without the ratings information contained on the version of the spreadsheet used by the school district. Therefore, the school district also violated her Art. II, sec. 8, Mont. Const., right of participation. The Supreme Court stated that this violation tainted the entire process from start to finish and ruled that the school district's closure decision was void. The court stated that on remand, the school district should allow plaintiff an opportunity to rebut the closure decision and should then reexamine the decision and affirm or modify it. Bryan v. Yellowstone County Elementary School District No. 2, 2002 MT 264, 312 M 257, 60 P3d 381 (2002).

Attorney General Opinions:

Applicability of Open Meeting and Public Participation Laws to County Commission Meetings -- Notice Required in Matters of Significant Public Interest: The gathering of a quorum of County Commissioners to discuss, either among themselves or with members of the public, issues over which the County Commission has authority is a meeting subject to open meeting laws. Meetings involving the consideration of matters of significant public interest, meaning decisions involving more than a ministerial act requiring no exercise of judgment, are subject to public participation mandates, including notice requirements and the opportunity for public participation in the decisionmaking process. Thus, a County Commission that established the hours of 9:30 a.m. to 5 p.m., Monday through Friday, as its regular meeting time for public notice purposes, did not comply with Montana's constitutional and statutory public participation provisions. 47 A.G. Op. 13 (1998). See also 42 A.G. Op. 51 (1988).

2-3-112. Exceptions. The provisions of 2-3-103 and 2-3-111 do not apply to:

(1) an agency decision that must be made to deal with an emergency situation affecting the public health, welfare, or safety;

(2) an agency decision that must be made to maintain or protect the interests of the agency, including but not limited to the filing of a lawsuit in a court of law or becoming a party to an administrative proceeding; or

(3) a decision involving no more than a ministerial act.

History: En. 82-4228 by Sec. 3, Ch. 491, L. 1975; amd. Sec. 24, Ch. 285, L. 1977; amd. Sec. 2, Ch. 452, L. 1977; R.C.M. 1947, 82-4228(4).

Cross References:

Emergency rules, 2-4-303.

Disaster and emergency services, Title 10, ch. 3.

Attorney General Opinions:

Applicability of Open Meeting and Public Participation Laws to County Commission Meetings -- Notice Required in Matters of Significant Public Interest: The gathering of a quorum of County Commissioners to discuss, either among themselves or with members of the public, issues over which the County Commission has authority is a meeting subject to open meeting laws. Meetings involving the consideration of matters of significant public interest, meaning decisions involving more than a ministerial act requiring no exercise of judgment, are subject to public participation mandates, including notice requirements and the opportunity for

public participation in the decisionmaking process. Thus, a County Commission that established the hours of 9:30 a.m. to 5 p.m., Monday through Friday, as its regular meeting time for public notice purposes, did not comply with Montana's constitutional and statutory public participation provisions. 47 A.G. Op. 13 (1998). See also 42 A.G. Op. 51 (1988).

2-3-113. Declaratory rulings to be published. The declaratory rulings of any board, bureau, commission, department, authority, agency, or officer of the state which is not subject to the Montana Administrative Procedure Act shall be published and be subject to judicial review as provided under 2-4-623(6) and 2-4-501, respectively.

History: En. 82-4227 by Sec. 2, Ch. 491, L. 1975; amd. Sec. 23, Ch. 285, L. 1977; amd. Sec. 1, Ch. 452, L. 1977; R.C.M. 1947, 82-4227(part); amd. Sec. 3, Ch. 184, L. 1979.

2-3-114. Enforcement. The district courts of the state have jurisdiction to set aside an agency decision under this part upon petition of any person whose rights have been prejudiced. A petition pursuant to this section must be filed within 30 days of the date on which the petitioner learns, or reasonably should have learned, of the agency's decision.

History: En. 82-4229 by Sec. 4, Ch. 491, L. 1975; amd. Sec. 25, Ch. 285, L. 1977; R.C.M. 1947, 82-4229; amd. Sec. 1, Ch. 211, L. 2007.

Compiler's Comments:

2007 Amendment: Chapter 211 near middle of first sentence after "petition" deleted "made within 30 days of the date of the decision" and inserted second sentence requiring filing of a petition within 30 days of the date the petitioner learns or reasonably should have learned of the agency's decision. Amendment effective October 1, 2007.

Preamble: The preamble attached to Ch. 211, L. 2007, provided: "WHEREAS, sections 2-3-114 and 2-3-213, MCA, now require that civil actions brought under either of those sections in District Court to enforce the laws allowing citizen participation in government be brought within 30 days of an agency decision made in violation of those laws; and

WHEREAS, the effect of the 30-day limitation is to prohibit suits brought after that 30-day limit, as was confirmed by the Montana Supreme Court in the case of Kadillak v. The Anaconda Co., 184 M 127 (1979), in which the Supreme Court held that a District Court had no jurisdiction to even consider a case brought after the 30-day period had passed; and

WHEREAS, if an agency, board, or other public entity holds a meeting but does not give notice of a meeting, does not publish an agenda for the meeting, and does not publish minutes of a meeting, there is no way for the public to know whether a meeting occurred, whether a decision was made by the agency, board, or other public entity that is of public interest, or whether the 30-day "clock" has in fact started, except by word of mouth; and

WHEREAS, if a potential plaintiff learns of the meeting by word of mouth at a time too late in the 30-day period to discuss the violation of the participation in government statutes with a potential defendant, it could force a hasty decision to bring suit against the agency, board, or other public entity just because the 30-day period has almost passed.

THEREFORE, it is the determination of the State Administration and Veterans' Affairs Interim Committee that the starting of the 30-day "clock" at the time that a potential plaintiff or petitioner learns or should have learned of a decision made at a meeting held in violation of the law will still apply a limitation to the time that a suit may be brought, but is more fair to a

plaintiff or petitioner who might otherwise be precluded from legal action, with the agency, board, or other public entity thereby being rewarded for its secrecy."

Case Notes:

Lack of Notice of Public Meeting as Voiding Decision -- Abuse of Discretion: Where County Commissioners failed to follow the statutory requirements for notice for a meeting of the Board of County Commissioners, the District Court had discretionary authority to void the results of the meeting, and where the Commissioners failed to fulfill their burden of proving the meeting legal, it was a clear abuse of discretion for the court not to void the results of the meeting. Bd. of Trustees v. County Comm'rs, 186 M 148, 606 P2d 1069 (1980).

Use of Mandamus to Void Unlawfully Held Public Meeting: Where respondent County Commissioners failed to give public notice of a meeting so that the result was voidable by the court under 2-3-114 and 2-3-213, a Writ of Mandamus would be appropriate in this case to void the illegal meeting. In future cases, the remedy should take the form of a simple petition to void an action or a petition for declaratory judgment. Bd. of Trustees v. County Comm'rs, 186 M 148, 606 P2d 1069 (1980), followed in Goyen v. Troy, 276 M 213, 915 P2d 824, 53 St. Rep. 353 (1996).

Jurisdiction to Consider Right to Notice and Participation: The District Court lacked jurisdiction to consider plaintiffs' rights under 2-3-103 since their complaint was filed more than 30 days after the date of decision. (See 2007 amendment.) Kadillak v. The Anaconda Co., 184 M 127, 602 P2d 147 (1979).

Part 2. Open Meetings