Putting Notice to the Rights to Know and Participate

Creating a policy for the Montana University System campuses

Authored December 22, 2015, by Michael Pasque – mike@mikepasque.com

"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."[1]

I. Introduction

The right to participate, right to know, and right to privacy are protections embodied in Montana Constitutional Article II, §§ 8-10. 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. 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 right, not discussed here, is well covered in a series of Montana Law Review articles.[2]

At the University of Montana School of Law, the faculty meets regularly. This meeting requires 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 dismissal. 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 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 protections which 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 this question, these rights will be applied to create a policy proposal for the University of Montana, which can be modeled for any campus within the Montana University System ("MUS"). In order to distill this policy, an understanding of the constitutional provisions, as well as their associated statutory language, is needed. While the right to know and the right to

[1] 1971–1972 MONTANA CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPT vol. V, 1655, 1657 (1981).
[2] *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, Student Author, *Billings Gazette v. City of Billings: Examining Montana's New Exception to the Public's Right to Know* 76 MONT. L. REV. 185 (2015).

participate are often applied in the context of someone attending a meeting, when and how the meetings should be noticed is rarely analyzed. This question is 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.[3]

II. The rights and their evolution from a constitutional context

Montana's "Declaration of Rights" are 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 protection by the courts.[4] The rights to know and participate were included to ensure transparency in operations of government. 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]."[5] However the Constitutional Convention recognized that these rights would only ensure the transparency desired by making them companions to each other. "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."[6] These two rights will be discussed separately due to their physical separation within the Constitution; however 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.

[3] 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 pre-empt 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.
[4] Kloss v. Edward D. Jones & Co., 2002 MT 129, ¶ 52, 310 Mont. 123, 54 P.3d 1 (citations omitted; per specially concurring opinion of Justice Nelson for a majority of the Court).
[5] Bryan v. Yellowstone Cnty. Elem. Sch. Dist. No. 2, 2002 MT 264, ¶ 25, 312 Mont. 257, 60 P.3d 381.
[6] 1971–1972 MONTANA CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPT vol. II at 631 (1981) [hereinafter Constitutional Convention Transcript II].

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."[7] 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."[8]

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.[9]

The key is that the open meeting statutes "apply to a 'meeting,' which occurs upon the 'convening' of a 'quorum' of the 'constituent membership of a public agency'" all terms of which "shall be liberally construed."[10]

1. Meeting defined

The meaning behind the word "meeting" cannot be defined in an ordinary dictionary in the context of the right to know. 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

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[7] MONT. CONST. art. II, § 9.
[8] *Willems v. State*, 2014 MT 82, ¶ 14, 374 Mont. 343, 325 P.3d 1204.
[9] MONT. CODE ANN. § 2–3–203 (2015).
[10] *Willems*, ¶ 23 (citing Boulder Monitor v. Jefferson High Sch. Dist. No. 1, 2014 MT 5, ¶ 19, 373 Mont. 212, 316 P.3d 848).

the committee's members have executive authority and experience; and (7) the result of the meetings.[11]

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.[12] For instance, "meetings 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."[13]

For example, in *Associated Press v. Crofts* the Court used these principles 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.[14] 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*." [15] This demonstrates how important using the above list is; 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 governmental responsibility and thereby constituted a "public body and an agency of state government."[16]

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."[17] 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."[18] The last definition is the catch-all, public or governmental bodies, being broadly defined to "include a

[11] Associated Press v. Crofts, 2004 MT 120, ¶ 22, 321 Mont. 193, 89 P.3d 971.
[12] *Id.*
[13] *Id.*
[14] *Id.* at ¶ 23.
[15] *Id.* at ¶ 19 (emphasis added).
[16] *Bryan*, ¶ 26; Great Falls Tribune Co. v. Day, 1998 MT 133, ¶ 18, 289 Mont. 155, 959 P.2d 508.
[17] MONT. CODE ANN. § 2–3–203.
[18] Common Cause v. Statutory Comm. To Nominate Candidates for Comm'r of Political Practices, 263 Mont. 324, 329, 868 P.2d 604, 607 (Mont. 1994).

group of individuals organized for a governmental or public purpose."[19] To help clarify, imagine a school district which assembles a group of people to advise the district on closing schools,[20] or the local chamber of commerce which is partially funded by public money,[21] or even a private, non-profit corporation which preserves and restores state-owned property[22]; each of these has been found to have 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.

3. Convening of a quorum

If there was a meeting of a public body without a quorum, the action taken would be worthless. A quorum of a meeting's members is required for that meeting to apply under the open meeting statutes. In *Willems v. State*, 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."[23] Accordingly, the rule in Montana is that a quorum is a majority of members, unless defined by the internal rules of the individual group. 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[.]"[24] This was exemplified in *Crofts* where the advisory Policy Committee regularly invited different people to take an active role in their meetings.[25] 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.[26]

A special note about quorums; Montana has declined to adopt "constructive-quorums." 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

[19] *Id.* at 330, 868 P.2d at 608.
[20] *Bryan*, ¶ 26.
[21] Mont. Att'y Gen. Op., 44 A.G. Op. 40 (1992).
[22] Mont. Att'y Gen. Op., 42 A.G. Op. 42 (1987).
[23] *Willems*, ¶ 23 (citing Black's Law Dictionary 1370 (Bryan A. Garner ed., 9th ed., West 2009)).
[24] *Crofts*, ¶ 31 (citing Application of Havender, 181 Misc. 989, 992, 44 N.Y.S.2d 213 (1943)).
[25] *Id.*
[26] *Id.*

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" refusing to adopt constructive-quorums where the legislature has not chosen to do so.[27]

4. No action is required nor reason need be given

As long as the preceding elements are met, the meeting must be noticed; however, some cases have challenged whether or not elements left out of the statute should be considered. In *State v. Conrad*, the Court looked at the history of what is now Mont. Code Ann. § 2–3–203 under the open meeting statutes and found that the legislature explicitly removed the words "at which any action is taken."[28] As long as a meeting occurs upon the convening of a quorum of the membership, those meetings need to be open to the public "whether action was taken or not."[29] 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, generally, the public has a right to observe.

Nor should the public be required to provide a reason why they wish to attend a meeting. The attorney general, in an advisory opinion, stated,

> [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 necessity of an open government and the public's ability to observe how its government operates regardless of each person's subjective motivation.[30]

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 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.

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[27] *Willems*, ¶ 23.
[28] State v. Conrad, 197 Mont. 406, 411, 642 P.2d 239, 242 (Mont. 1982).
[29] *Id*., 642 P.2d at 242.
[30] Mont. Att'y Gen. Op., 39 A.G. Op. 17, 4 (1981).

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[31]; the differences being that 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."[32] This expectation is codified under Mont. Code Ann. §§ 2-3-101 through -114.[33] 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.[34] Simply put "the essential elements of public participation are notice and an opportunity to be heard."[35]

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."[36] Unlike the right to know, the broad "public bodies" definition is absent. In *Allen v. Lakeside Neighborhood Planning Commission*, the Court examined this subtle change and noted that the committee in question had no final authority to make a decision, as the committee's recommendation to a local board, which made recommendations to the county commissioners, could be disregarded at either the local board or county commissioner level.[37]

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[31] *Bryan*, ¶ 25.
[32] Mont. Const. Art. II., § 8.
[33] *Willems*, ¶ 14.
[34] MONT. CODE ANN. § 2–3–103(1)(a) (2015).
[35] Bitterroot River Protective Ass'n v. Bitterroot Conservation Dist., 2008 MT 377, ¶ 21, 346 Mont. 507, 198 P.3d 219.
[36] *Id.* at ¶ 26.
[37] Allen v. Lakeside Neighborhood Planning Comm., 2013 MT 237, ¶ 30, 371 Mont. 310, 308 P.3d 956.

To provide clarity, *Allen* looked to *Common Cause v. Statutory Comm. to Nominate Candidates for Comm'r of Political Practices*, a case the Court had decided in 1994, where a governmental committee met without providing notice to the public.[38] 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.[39] This further evidences the fact that a meeting with no authority to enter into a final action of the agency is not subject to the right to participate but is still subject to the right to know. The delineation is clear when a meeting was created for purely advisory purposes and not to make final decisions. But take the law faculty meeting presented at the beginning. They can make binding decisions on behalf of the school, but other times act in purely an advisory fashion; this subjects the meetings to the right to know for every meeting but the right to participate only when the faculty take final action on a matter. This exemplifies how intertwined the right to know and participate are, and why they are complimentary to each other.

2. Significant public interest of the matter

Within this narrower subset of bodies, the statutes require that the final agency action must be of significant interest to the public.[40] Significant interest means something more than a mere ministerial act.[41] A ministerial act is generally performed pursuant to legal authority, and requires no exercise of judgment.[42] "[A] duty is to be regarded as ministerial when it . . . has been positively imposed by law, and its performance required at a time and in a manner or upon conditions which are specifically designated; the duty to perform under the conditions specified not being dependent upon the officer's judgment or discretion."[43] Even if there was a question if something was of significant interest, any doubt should be resolved in the favor of the public.[44] Because it is nearly impossible for a group to understand what actions have meaning to the

[38] *Supra* note 18.
[39] *Id*. at 333, 868 P.2d at 609.
[40] MONT. CODE ANN. § 2–3–103(1)(a).
[41] *Id.* § 2-3-112(3).
[42] *Id.* § 2-3-112(5).
[43] State ex rel. Workers' Compensation Div. v. District Court, 246 Mont. 225, 229, 805 P.2d 1272, 1275 (Mont. 1990).
[44] Seliski v. Rosebud Cnty., No. DV 94–13, slip op. at 5 (Mont. 16th Jud. Dist. Apr. 12, 1995).

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

The requirements above being met, to permit and encourage the public to participate in agency decisions, 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."[45] 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."[46] 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.[47] It is because of this link that the Court has reiterated notice being inherently required by both the right to know and participate for "[w]ithout public notice, an open meeting is open in theory only, not in practice."[48] Without notice it would be difficult to accomplish the legislative purpose of the open meeting statutes.[49]

a. How to properly notice

How a meeting is noticed is different for each situation, the amount of which "should increase with the relative significance of the decision to be made."[50] While this is a very broad definition, there are certain acts that would clearly fall outside of acceptable parameters. One such unacceptable act would be to provide notice in such a general way that the public cannot easily determine when the meeting is to occur. For example, notice for a meeting to occur sometime between 9:30 a.m. and 5 p.m. on specified days of the week is not sufficient.[51] In that context, trying to determine when a meeting will occur is impractical and does not encourage the

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[45] MONT. CODE ANN. § 2–3–101(1)(a).
[46] CONSTITUTIONAL CONVENTION TRANSCRIPT II, *supra* note 5, at 631.
[47] *Bryan*, ¶ 31.
[48] Bd. of Trs. v. Bd. of Cnty. Comm'rs, 186 Mont. 148, 156, 606 P.2d 1069, 1073 (Mont. 1980); Sonstelie v. Bd. of Trs., 202 Mont. 414, 420, 658 P.2d 413, 416 (Mont. 1983); *Boulder Monitor*, ¶ 28; *Jones v. Cnty of Missoula*, 2006 MT 2, ¶ 90, 330 Mont. 205, 127 P.3d 406; *Common Cause*, 263 Mont. at 331, 868 P.2d at 609.
[49] *Bd. of Trs.*., 186 Mont. at 155, 606 P.2d at 1073.
[50] *Seliski*, slip op. at 5; *Citizens v. Bd. of Trustees*, 1992 Mont. Dist. LEXIS 384, 6 (1992).
[51] *Seliski*, slip op. at 4; Mont. Att'y Gen. Op., 47 A.G. Op. 13 (1998).

openness as envisioned by the Montana Constitution.[52] Because of the variables that can occur when noticing meetings, proper notice is a balancing act, "the amount of [which] given should increase with the relative significance of the decision to be made."[53] The notice requirement being a fairly undeveloped area of the law, very few opinions discuss a minimum time limit when notice is required. One First Judicial District case held forty-eight hours is enough time to notify the public of contemplated action, although this was predicated on school board meetings, which statutorily recommend a forty-eight hour notice requirement to meeting members.[54] In light of this, each meeting should consider what amount of time, and in what avenue, 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".[55] However suppose the law school faculty posts notice that a faculty meeting will be held on a certain day at 11:30 am. Just as an open meeting is only open in theory if public notice is not afforded, how is the public expected to understand when they should exert that right without an agenda? 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."[56]

How an agenda should be formulated is not strictly defined; however, the First Judicial District provided guidance by researching other states' requirement:

> 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

[52] *Seliski*, slip op. at 4.
[53] *Id.* at 5.
[54] Citizens for Accountability in Education v. Board of Trustees, School District No. 9, No. ADV–92–450, slip op. at 6 (Mont. 1st Jud. Dist. Oct. 7, 1992).
[55] *Citizens*, 1992 Mont. Dist. LEXIS at 6.
[56] *Id.* at 10.

> elementary education at that building, and to transfer those elementary students to another school. The California court 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*.[57]

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."[58]

While notice is explicitly required by the statutes, an agenda is likely inherently required in order to effectuate that notice. This ensures not only that the public observe deliberations, but they understand what the deliberations will be about, favoring the openness ideology that the 1972 Constitutional Convention commented about when they implemented Art. II, §§ 8-9, 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 that their meetings conform to the requirements of the right to participate.[59] In light of this requirement, the MUS, governed by the board of regents, has slowly 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 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 MUS while complying with the law that governs how those agencies must operate within the public.

[57] *Citizens*, 1992 Mont. Dist. LEXIS at 7.
[58] *Id.* at 8.
[59] MONT. CODE ANN. § 2–3–103(2).

III. Creating a policy; giving the rights teeth

As an agency of the state, MUS is constitutionally organized to provide higher education in Montana.[60] The fact that public universities in Montana are constitutional, instead of statutory, does not change the requirement that the MUS must follow the constitutional right to participate or right to know. In *Board of Regents v. Judge*,[61] the Court held that the "Board of Regents is the competent body for determining priorities in higher education" and declared a legislative appropriations measure that would inhibit this right to be void.[62] Unlike *Judge*, the Montana Constitution created the rights to participate and know, not the legislature. That same Constitution created the MUS. The board of regents of higher education serve to oversee the MUS.[63] 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."[64] This is not a case where the legislature is directing the policy decisions of the MUS, the Constitution requires these rights to be applied to all public bodies, including the MUS.[65] The board of regents subsequently implemented the rights to participate and know in their policies, and so have some campuses, but there is not a singular policy to catch those which 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.[66]

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[60] MONT. CONST. art. X, § 9(2)(a).
[61] 168 Mont. 433, 543 P.2d 1323 (Mont. 1975).
[62] *Id.* at 454, 543 P.2d at 1335.
[63] MONT. CODE ANN. § 20–25–301 (2015).
[64] *Id.* at §§ 20–25–301(2)-(3).
[65] *See* Missoulian, a div. of Lee Enterprises, Inc. v. Board of Regents of Higher Education, 207 Mont. 513, 675 P.2d 962 (Mont. 1984).
[66] Mont. Univ. Sys., *Policy 203.2.2 – Board of Regents Meeting Notice*, mus.edu, http://mus.edu/borpol/bor200/203-2-2.pdf (last visited Dec 1, 2015).

Additionally, the individual campuses must notify their faculty, staff, and students to ensure the most effected population is targeted with the mandatory notice.[67] The above policy was created, and thereafter revised from Article V of the original board of regents by-laws three times since its enactment. 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.[68] While the board revised the policy in September 1999, the principles remained the same, with one major change. The policy was amended to remove the required publication in written media, supposedly to allow electronic posting of meeting information, as is the current practice. The above policy clearly tracks the right to know. It ensures all board and committee meetings are open to the public, requiring notice of each. The notice must include an agenda, and is posted in one of the most publically available spheres available today – the internet.

The board also has an explicit public participation policy, defining the meetings which shall be open to the public, where the notice will be posted, how it will be noticed, and information on how to contact the board for questions.[69] For instance, the policy names four "advisory council" meetings which require public participation, when advisory meetings usually only attach to the right to know and not the right to participate. The policy dictates the minimum notice required for regular meetings (7 days) and any special meetings (48 hours). The notice is posted online as well as given to the press; providing contact information to allow the public an avenue to request materials or ask questions prior to the meeting occurring. This broad set of policies not only shows that 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 8 campuses.[70] The two units are Montana State University and the University of

[67] *Id.* at 203.2.2(II)(B).
[68] Mont. Univ. Sys., *203-2-2 Proposed Revision*, mus.edu, http://mus.edu/borpol/sept1999amend/203-2-2.htm (last visited Dec. 1, 2015).
[69] Mont. Univ. Sys., *OCHE Public Participation Policy*, mus.edu, https://mus.edu/OCHE-PublicParticipationPolicy.pdf (last visited Dec. 1, 2015).
[70] MONT. CODE ANN. § 20–25–201.

Montana.[71] Montana State adopted an "Open Meeting Policy" in January 1986,[72] and a "Public Participation Policy" in March 2008.[73] Both have been revised since their enactments. Currently, the Open Meeting Policy explains that *all* meetings of Montana State University committees and boards are required 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. This policy is akin to the board of regents' policy explained above. Likewise, Montana State's Public Participation Policy appears to be modeled after the board's more defined public participation policy document, where Montana State 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 Montana State made their meetings accessible in the ways the Constitutional Convention delegates envisioned, three out of their four campuses have followed suit.[74] Conversely, the University of Montana has not published any policies giving effect to the right to know or participate at any of their 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 squashed, 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; thus each organization should concentrate on educating those who will be conducting meetings as to how to operate them. Since the focus here has been on the notice requirement of meetings, the policy proposal below

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[71] *Id.*
[72] Mont. State Univ., *Open Meeting Policy*, montana.edu, http://www.montana.edu/policy/open_meetings (last visited Dec. 1, 2015).
[73] Mont. State Univ., *Public Participation Policy*, montana.edu, http://www.montana.edu/policy/public_participation (last visited Dec. 1, 2015).
[74] *Id.*; MSU-Northern, *1023 Open Meeting Policy*, msun.edu, http://www.msun.edu/ admin/policies/1000/1023.aspx (last visited Dec. 1, 2015); MSU-Northern, *1022 Public Participation Policy*, msun.edu, http://www.msun.edu/admin/policies/1000/1022.aspx (last visited Dec. 1, 2015); Great Falls College, *102.2 Open Meeting*, gfcmsu.edu, http://www.gfcmsu.edu/about/policies/PDF/100/102_2.pdf (last visited Dec. 1, 2015); Great Falls College, *102.1 Public Participation*, gfcmsu.edu, http://www.gfcmsu.edu/about/ policies/PDF/100/102_1.pdf (last visited Dec. 1, 2015); (MSU-Billings has not published any open meeting or public participation policy).

should not be considered complete and adopted without alteration, but used as a framework so that uniformity and openness can be achieved in Montana's higher education environment.

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 the myth that open meeting and public participation laws are separated. As discussed, the two are inextricably linked; the requirements for both should lie within the same policy to avoid confusion to the public and those running the meetings. A starting point, which covers the issues discussed above, is provided below:

> (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 of Montana would be required to abide by the open meeting policy; but it should be up to the University to determine exactly what meetings apply to subsection 2 of the policy. 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, the School of Business faculty lacks the final authority power that the law school has and it is these differences 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.

Just as the right to privacy provides exceptions to the right to know and participate, there are protections for student information in the higher education context. The Family Education Rights and Privacy Act ("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 discussion, neither are the relevant student protections. Due to their relevance, any campus choosing to adopt the above policy should ensure meeting administrators know when either the right to privacy, FERPA, or other state law require a portion of that meeting to be closed to the public.

2. A comparison of various groups illustrates the case by case analysis required when determining when the right to know and right to participate attach

There will certainly be some grey areas in which application of the above policy will vary. For instance, student groups often consider themselves separate from university governance. In Montana, the rights to know and participate clearly follow the money, where public funds are spent the public has a right to know and participate in how that is accomplished.[75] The board of regents policy states that "[s]tudent fees [are] defined as 'public funds'."[76] While not traditionally thought of as a public or governmental body, meetings of student group(s) that are responsible for expending student activity fees certainly fall under the public purpose application of the public body definition. Since they are also the final decision maker for how that money is spent, those student groups are bound by both the right to know and participate. This has been put into practice by Montana State, where the student body government is listed under Montana State's public participation policy.[77]

The University of Montana law faculty meetings present an equally interesting scenario. For instance, the equivalent faculty meeting at the School of Business requires University of Montana Faculty Senate approval before new courses may be offered, while the law faculty

[75] MONT. CODE ANN. § 2–3–203.
[76] Mont. Univ. Sys., *Policy 940.8 – Student Activity Fees*, mus.edu, http://mus.edu/borpol/bor900/940-8.pdf (last visited Dec. 1, 2015).
[77] *Supra* note 73.

decide on their own whether the law school may offer a new course. Law faculty also have the final authority on the metrics used to admit students, and which students are admitted. Here, because the law faculty is composed of public employees, making decisions on behalf of an agent of the State, expending public money, with the interest of the public in mind, their meetings would fall under both the right to know and participate.

There are certainly times when items on an agenda do not have to be open to the public to participate in, yet still require obedience to the open meeting statutes. For example, the University of Montana obtained approval in 2015 to rename the law school in lieu of a $10 million donation. This discussion began between the donor and various groups affiliated with the University. In the MUS, the board of regents has final approval in the renaming of a school at the University of Montana.[78] Ultimately, the faculty did not allow the public to participate in their discussion of the name change. Since the board of regents is the final decision maker on this issue, the faculty meeting is not required to allow public participation. However, absent an exception such as the right to privacy 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 the deliberation on this issue.

IV. Conclusion

The rights to know and participate provide for a transparent operation of government in Montana, one that is not afforded in all states. They require bodies organized for a public purpose to be open to those they serve, the people of Montana. This openness is often despised by people who meet and are not accustomed to these requirements. But people required to abide by this constitutional right should not fret, because not only is it their duty to ensure compliance with the law, but being "open" is not hard. When properly followed, the right to know and participate can enhance your meeting's decision making power, instead of hindering it.

Simply post your meeting details in a publically 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

[78] Mont. Univ. Sys., *Policy 218 – Institutional Organization*, mus.edu, http://mus.edu/borpol/bor200/218.pdf (last visited Dec. 18, 2015).

so that you can close a meeting when it is warranted. Most people don't realize that the same 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.

Authored December 22, 2015, by Michael Pasque – mike@mikepasque.com