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MEMORANDUM

TO: Flathead Reservation Water Management Board

FROM: Hallee C. Frandsen & W John. Tietz

DATE: November 16, 2022

RE: Open Meetings

QUESTIONS PRESENTED

What open meeting laws apply to the Flathead Reservation Water Management Board (the “Board”), and how does the Board balance situations involving the right to know and right to participate?

ANALYSIS

I. OPEN MEETINGS

The Confederated Salish & Kootenai Tribes—Montana Compact (the “Compact”) and the Unitary Administration and Management Ordinance (the “Ordinance”) govern the Board’s authority and further define what laws apply to particular Board functions, e.g. open meetings. Under Article IV(H)(7) of the Compact, the Board is defined as a *public agency* for purposes of the applicability of State and Tribal right to know laws. (Emphasis added.) Subsections (b), (c), and (e) further provide:

(b) All regular and special meetings of the Board, including all hearings conducted by the Office of the Engineer or the Board, shall be open to the observation of the general public pursuant to State and Tribal open meeting laws. Where there is a conflict of laws, the law that provides for *greater openness* to the public applies. (Emphasis added.)

(c) Where no more specific notice provisions are set forth in the Law of Administration, notice of any meeting, including an agenda, shall be provided to the public in a manner and timeframe consistent with the criteria set forth in State and Tribal law. Where there is a conflict of laws, the law that provides for *earlier notice* shall apply. (Emphasis added.)

(e) All Board records are public records and shall be made available to the public for inspection under such reasonable terms and conditions as the Board shall establish.

The Ordinance also reflects the same provisions regarding open meeting laws through § 1-2-104(1) through (5). Because CSKT code is silent on the issue of open meetings, the Board must look to state law on the subject.

“Public agency” is defined as the executive, legislative, and judicial branches of Montana state government, a political subdivision of the state, a local government, and any agency, department, board, commission, office, bureau, division, or other public authority of the executive, legislative, or judicial branch of the state of Montana. Mont. Code Ann. § 2-6-1002. *Quasi-governmental organizations* that have authority to compel membership, assess members, and exercise powers of the conduct of members are treated as *agencies under Montana right to know laws*.

Under Mont. Code Ann. § 2-3-202, a “meeting” is defined as the convening of a quorum of the constituent membership of a public agency or association, whether corporal or by means of electronic equipment, to hear, discuss, or act upon a matter over which the agency has supervision, control, jurisdiction, or advisory power. 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 *must be open to the public*. Mont. Code Ann. § 2-3-203(1) (emphasis added). 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*. Mont. Code Ann. § 2-3-203(2) (emphasis added).

Individual privacy outweighs the need to have a public meeting, however, the right of individual privacy may be waived by the individual. Mont. Code Ann. § 2-3-203(3). A meeting may be closed to *discuss a strategy to be followed with respect to litigation* when an open meeting would have a detrimental effect on the litigating position of the public agency; however, a meeting may not be closed to discuss strategy to be followed in *litigation in which the only parties are public bodies or associations*. Mont. Code Ann. § 2-3-203(4)(a)-(b) (emphasis added). Any *committee or subcommittee* appointed by a public body or an association for the purpose of *conducting business* that is within the jurisdiction of that agency is subject to the requirements of this section. Mont. Code. Ann § 2-3-203(6) (emphasis added).

A. Right to Participate in Open Meetings

Article II, Section 8 of the Montana Constitution provides:

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. (Emphasis added.)

“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 decision making process. *Jones v. County of Missoula, et al.*, 330 Mont. 205, 127 P.3d 406 (2006) (emphasis added). Failure to address public comments before issuing a decision violates the public’s right to participate and renders it meaningless. *North 93 Neighbors, Inc. v. Board of County Comm’rs of Flathead County*, 2006 MT 132, 332 Mont. 327, 137 P.3d 557. The right to participate applies to local governments and advisory boards, commissions, and committees of those local governments when taking any action that is of *significant interest to the public*.

Appropriate minutes of all meetings required to be open must be kept and *must be available for inspection* by the public. Mont. Code Ann. § 2-3-212(1). If an audio recording of a meeting is made, the recording constitutes the official record of the meeting. If an official recording is made, a written record of the meeting must also be made and must include: minutes of the date, time, and place of the meeting, a list of the members of the public body, agency, or organization who were in attendance; the substance of all matters proposed, discussed, or decided; and at the request of any member, a record of votes by individual members for any votes taken. Mont. Code Ann. § 2-3-212(2)(a)-(d).

B. Right to Know in Open Meetings

Article II, Section 9 of the Montana Constitution provides that:

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. (Emphasis added.)

The right to know does not apply to meetings between individual employees that work for a public body or agency, although it likely applies to *documents generated* as a result of such meetings. *SJL Associates of Mont. Ltd. P’ship v. City of Billings*, 263 Mont. 142 (1993) (emphasis added). However, if staff engage in regular meetings designed to *set policy or guide public body decisions*, the meetings can become “public.” *Id.* (emphasis added). In determining whether a committee’s meeting has become public and is required to be open, one can consider (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 gathers 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. *Associated Press v. Crofts*, 2004 MT 120.

The Montana Constitution does not define “documents of public bodies,” however caselaw has determined that documents of public bodies means documents generated or maintained by a public body which are somehow related to the *function and duties* of that body. *Bryan v. Yellowstone County Elementary School District No. 2*, 2002 MT 264 (emphasis added). The right to know and participate includes *meetings by telephone and email*. See *Board of Trustees, Huntley Project School Dist. No. 24, Worden v. Bd. of County Comm’rs*, 186 Mont. 148, 606 P.2d 1069 (emphasis added); see also *Anderson and Boulder Monitor v. Jefferson High School Dist. No. 1 School Bd.*, DV-2011-133, Montana Fifth Judicial District (email exchanges between school board members in *which decision was made* amounts to violation of Art. II, Section 9 and Mont. Code Ann. § 2-3-203) (emphasis added). “Public information” means information prepared, owned, used, or retained by any public agency relating to the transaction of official business, regardless of form, except for confidential information that must be protected against public disclosure under applicable law. Mont. Code Ann. § 2-6-1002 (11). Under Mont. Code Ann. § 2-3-1003, every person has a right to examine and obtain a copy of any public information.

Executive meetings, under § 2-3-203, are also subject to open meeting laws. In *Citizens for Open Gov’t v. City of Polson*, 2015 MT 55, ¶ 17, 378 Mont. 293, 343 P.3d 584, 378 Mont. 293, the Polson City Commission held a closed executive session to meet with interview panels and to deliberate on the selection of a City Manager. In holding the closed executive session, the Commission did not determine that the demands of individual privacy clearly exceeded the merits of public disclosure. The Court held that the Commission should have found in favor of privacy, however, stated that because the City allowed for public participation subsequent to the closed executive session, the district court did not abuse its discretion in not voiding the Commission’s hiring decision, which violated Montana’s open meeting laws. *Id.*, ¶ 29.

Essentially when the determination of a matter is of significant interest to the public, then the public has a right to inspect any documents and participate in said matter. This does not mean that the Board would not have the authority to close a public meeting if a matter of privacy arose. The Board in that instance would be required to close the public session, convene privately to discuss the matter, unless that individual or privacy concern was waived, and retain minutes of the closed session. The closed session minutes would be concealed, but still retained in the Board’s record retention system.

Moreover, Board communications or conversations between two members who are discussing matters that are not of “significant interest to the public” *would not need* to provide the public with such conversations or documents (e.g., emails, etc.) or the opportunity to speak on the matters. However, and again, the Board should establish a record retention system for retaining all email communications between Board members, staff, and the Office of the Engineer.

CONCLUSION

The Board operates as a “public agency” for purposes of open meetings laws, specifically open meetings laws pursuant to the Montana Code Annotated. Laws governing open meetings are *liberally construed* and are to be interpreted in a way to provide for greater openness. Thus,

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any meeting of the Board that pertains to matters of the public must be open or at least provide the public with the opportunity to inspect and participated, which include matters discussed between committee members, Board employees, etc. which are more than ministerial in nature (i.e. telephone conversations, emails, etc.).