

Freedom of Information in Montana: Frequently Asked Questions

Part 2: Public Records

Mike Meloy - Open Meeting Specialist, Attorney, and MNA Representative

Ian Marquand – Society of Professional Journalists

What is the basis for access to public records in Montana?

Montana Constitution Article II, Section 8
Right to Participate.

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.

This includes the right of the public to access documents which the agency relies upon in making decisions of significant public interest prior to the meeting.

What is the basis for access to public records in Montana?

Montana Constitution Article II, Section 9
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.

NOTE: Virtually all FOI disputes involve the balance between the Right to Know and individual privacy.

What are public records (public writings)?

Montana Code Annotated 2-6-101: Public Records

(2) Public writings are:

(a) The written acts or records of the acts of...public officers, legislative, judicial and executive...

(b) Public records, kept in this state, of private writings, including electronic mail...

In short, any record in the custody of an agency concerning matters within the jurisdiction of the governmental entity are “public records.”

What are public records (public writings)?

Montana Code Annotated 2-6-102: Public Records

- (1) Every citizen has a right to inspect and take a copy of any public writings of this state, except...
- Constitutionally protected information
 - Information protected by statute
 - Library records
 - Burial site records held by MT Historical Soc.

When can records be withheld?

Montana Code Annotated 2-6-102: Public Records

(4) Records may be withheld on grounds of:

- Clear individual privacy or safety interest
- Public safety
- Security features of jails, prisons & other correctional facilities
- Legitimate trade secrets

Are “draft” copies of public documents open for viewing by the public?

Montana Code Annotated 2-6-102: Public Records

Yes. §2-6-102 makes no distinction between “draft documents” and completed documents. The courts have also ruled that draft documents are public documents. The most commonly occurring issue is whether minutes of meetings of governmental entities in “draft” form are available to the public. The answer, of course, is yes.

Are letters written to a public agency by a private individual public documents?

Montana Code Annotated 2-6-101: Public Records

Yes. Once in possession of the government, letters are public documents unless there is a sufficiently strong right of privacy that overrides the public's right to know. In most cases, those who write letters to a government agency or body, especially to complain, do not have an expectation of privacy.

In short, any record concerning matters within the jurisdiction of the governmental entity are “public records.”

Are driving records and driver's license information public records?

Montana Code Annotated 61-11-503

Yes and No. Some information from driver and vehicle records is available, including information about traffic law violations.

Information that is NOT available from driver's license, vehicle titles, vehicle registration and vehicle insurance status includes:

Driver's photograph, Social Security number, street address and medical/disability information.

Are motor vehicle accident records public records?

Montana Code Annotated
61-76-114

No. This law states that motor vehicle accident records are for the “confidential” use of government agencies.

However, the reports may be examined and copied by persons named in the reports or involved in the accident.

Are birth and death certificates public records?

Montana Code Annotated
50-15-121

Death certificates are public under this law.

Birth certificates are not available to the public until 30 years after the date of birth.

Are applications for marriage licenses public records?

50-15-122 (5)(b) MCA

Once the marriage license has been filed with the clerk of court the following information is public: names, ages and birth places of parties, names of parents, name of officiant and type of ceremony. All other information contained in the application is confidential.

Are tax records public?

Assoc. Press v. Montana Department of Revenue
300 Mont. 233, 4Pd5 (2000)

The Montana Supreme Court struck down a state Revenue Department policy that made formerly public coal tax records confidential. The court said the practice violated citizens' constitutional right to know.

This part of the law is in flux. The availability of records will depend on the records themselves.

Are tax records public?

Elliott v. Montana Department of Revenue
2006 MT 267, 344 Mont., 195, 146 P.3d 741

In this case, the Montana Supreme Court found that the federal statute making confidential tax records of “C” corporations prevented disclosure of those records.

The decision preserved the right to challenge the constitutionality of the section under state law.

This part of the law is in flux. The availability of records will depend on the records themselves.

Does the right of individual privacy extend to corporations?

No, after repeatedly upholding this notion, the Montana Supreme Court abandoned this position, ruling that the Montana Constitution never intended to give a privacy right to “non-human entities.”

The ruling came in a lawsuit filed by news groups seeking access to power-purchase deals that a former utility had filed with the Montana Public Service Commission. The court, however, said that nothing in the state Constitution requires disclosure of trade secrets and other confidential proprietary information where the data is protected by statute.

*Great Falls Tribune v. Montana Public Service Commission, 2003 MT 359,
319 Mont. 38, 82 P.3d 876.*

Are the salaries of government employees public information?

Montana Attorney General's Opinion 43 Att'y Gen. Op. 119 (1988)

Yes. This opinion by the Attorney General confirmed that government employee salaries are public information, regardless of the level of government. (State, city, county, school district, etc.)

Information about state workers' salaries is available on the state of Montana website.

Can the public inspect competitive bids on government projects?

Montana Code Annotated
18-4-304

Yes. The law requires public inspection of bids after they are opened, subject to some restrictions.

The public may inspect the bids before the contract is awarded.

Is the public entitled to examine legal settlements involving government?

Pengra v. State of Montana
302 Mont. 276, 14 P.3d 499 (2000)

Yes. The Montana Supreme Court ruled that the family of a murdered Helena woman had no right to privacy in the amount of money the government paid to settle the family's lawsuit against the state.

Following the decision, the Legislature enacted **MCA 2-9-303**, which states that court settlements involving the state are public, and **2-9-304**, which extends the law to political subdivisions. (Counties, cities, etc.)

Are votes by legislators about calling a special session available to the public?

Montana Code Annotated
5-3-106

Yes, but only after all votes have been received and voting has closed.

Until then, the law requires that legislative poll results remain secret.

Are school records of students available to the public?

Family Education Records Privacy Act (“FERPA”)

These requests likely will be denied based on FERPA, which is federal law.

However, the Montana Supreme Court applied Montana’s “right to know” in holding that FERPA is not applicable when student names are redacted.

This issue is being litigated again in “Krakauer v. Commissioner of Higher Education.”

Schools should produce redacted student records.

Can a public agency withhold reports alleging gross negligence or official misconduct by public employees??

Bozeman Chronicle v. City of Bozeman

A Bozeman police officer was accused of raping a cadet at the state Law Enforcement Academy.

No charges were filed and the officer resigned before disciplinary action could be taken by the city.

The city denied access to documents by the Chronicle.

The Supreme Court ruled that the public's right to know exceeded the officer's right to privacy.

It ordered an "in camera" inspection of the documents to protect the privacy rights of the victim and witnesses.

Can a public agency withhold reports alleging gross negligence or official misconduct by public employees??

Citizens to Recall Mayor v. Whitlock

The mayor of Hamilton was accused of sexually harassing the city judge. No charges were brought.

The city hired an investigator to prepare a report for the city. The city refused to release the report.

The Supreme Court ruled the mayor's expectation of privacy was unreasonable.

Can a public agency withhold reports alleging gross negligence or official misconduct by public employees??

Billings High School Dist. #2 v. Billings Gazette

The Gazette sought documents related to the suspension of two high school teachers found in a “compromising position” by a student.

The Supreme Court ruled the Gazette was entitled to the documents under the Chronicle decision.

What about government e-mails?

Montana Code Annotated

2-6-202: Definitions (for records management)

(1) (b) The term (“public records”) includes electronic mail sent or received in connection with official business.

What are “electronic records”?

Montana Code Annotated 2-6-110: Electronic Records

(1) (a) Except as provided by law, each person is entitled to a copy of public information compiled, created, or otherwise in the custody of public agencies that is in electronic format or other nonprint media...

What are “electronic records”?

Montana Code Annotated 2-6-110: Electronic Records

E-mail

Microfilm

Videotapes

Film

Photographs

Computer Disks

E-mail as public records: A case study.

Montana Code Annotated

2-6-110: Electronic Records

In 2002, the Governor's office turned over more than 3,000 e-mails to media requestors. Before the release, the e-mails had been screened to determine whether the right of individual privacy clearly exceeded the public's right to know.

The Governor's office estimated the cost of screening at \$28,000 (not including technology expenses.)

It's important to specifically identify the e-mails being sought to narrow the search and potential costs.

Can a state agency charge for copies of public documents?

Montana Code Annotated

2-6-102: Public Records

Yes.

(2) Every public officer having the custody of a public writing that a citizen has a right to inspect is bound to give the citizen on demand a certified copy of it, on payment of the legal fees for the copy...

This language is from a time when clerks actually copied by hand a document and certified its authenticity.

Can a state agency charge for copies of public documents?

Montana Code Annotated 2-6-102: Public Records

Yes.

(2) Every public officer having the custody of a public writing that a citizen has a right to inspect is bound to give the citizen on demand a certified copy of it, on payment of the legal fees for the copy...

This language can still be used to justify a copying fee.

In 1996, Gov. Marc Racicot suggested 10 cents per page as an executive branch standard. He referred to this statute as “arcane.”

Electronic records-agency fees

Montana Code Annotated 2-6-110: Fees for Electronic Records

- (2) An agency may charge a fee, not to exceed:
 - (a) The agency's actual cost of purchasing the electronic media used for transferring data, if the person requesting the information does not provide the media;
 - (b) Expenses incurred by the agency as a result of mainframe and midtier processing charges;

Electronic records-agency fees

Montana Code Annotated

2-6-110: Fees for Electronic Records

- (2) An agency may charge a fee, not to exceed:
- (c) Expenses incurred by the agency for providing online computer access to the person requesting access;
- (d) Other out-of-pocket expenses directly associated with the request for information, including the retrieval or production of electronic mail; and...

Electronic records-agency fees

Montana Code Annotated

2-6-110: Fees for Electronic Records

(2) An agency may charge a fee, not to exceed:

(e) The hourly rate for the current fiscal year for a state employee classified as grade 10, market salary...for each hour, or fraction of an hour, after one-half hour of copying service has been provided.

Electronic records-agency fees

Montana Code Annotated

2-17-1101: Fees for Electronic Records

This law allows the state Department of Administration and local government agencies to charge “convenience fees” for electronic services that exceed the costs of actually making copies.

These laws appear to violate the Constitutional right to know.

Criminal Justice information

Montana Code Annotated 44-5-301: Criminal Justice Info

- (1) There are no restrictions on the dissemination of public criminal justice information.
- (2) These documents must be open...during the normal business hours of the agency. A reasonable charge may be made for providing a copy of public criminal justice information.

Public Criminal Justice information

Montana Code Annotated 44-5-103: Criminal Justice Info

Public Criminal Justice Information includes:

Information made public by law

Information of court records & proceedings

Information of convictions, deferred sentences, and deferred prosecutions

Information of post-conviction proceedings and status

Information originated by a criminal justice agency

Criminal Justice information-what's public?

Montana Code Annotated 44-5-103: Criminal Justice Info

(13) Public Criminal Justice Information means:

Initial offense reports

Initial arrest records

Bail records

Daily jail occupancy rosters

Information to secure public assistance in apprehending a suspect

Statistical information

Criminal Justice Information—what's public?

Attorney General Admin. Rules 23.12.202: Criminal Justice Info

(1) Pursuant to the Criminal Justice Information Act, initial offense reports and initial arrest records are public criminal justice information.

Initial offense reports—what's public?

Attorney General Admin. Rules 23.12.203: Initial Offense Reports

(1) Initial offense reports should contain the following:

- Nature of the charges against the accused
- Offense location
- Name, age and residence of the accused
- Name of the victim (unless a sex crime)
- Identity of a witness (with witness consent)

Are 9-1-1 recordings kept by law enforcement agencies public records?

Montana Code Annotated 44-5-103: Criminal Justice Info

Yes. A 9-1-1 call is clearly an “initial offense report” and therefore “public criminal justice information.” There is nothing in the law granting greater protection to 9-1-1 recordings versus other public records.

However, like other public documents, they may be withheld when the demand for individual privacy clearly exceeds the merit of public disclosure.

An example is if the 9-1-1 call is for a health-related emergency for a private citizen.

Initial offense reports-what's secret?

Attorney General Admin. Rules 23.12.203: Initial Offense Reports

(2) Initial offense reports should not contain:

Drivers license numbers

Social Security numbers

Medical records

Other information that identifies the victim

Initial arrest reports-what's public?

Attorney General Opinion

42 Att'y Gen. Op. 119

“Initial arrest record” is the first record made by a criminal justice agency indicating the fact of person’s arrest, including the initial facts associated with the arrest.

Confidential information may be blacked out, but the edited report should be public.

The identify of crime victims may be protected.

Initial arrest reports-what's public?

Attorney General Opinion 50 Att'y Gen. Op. 6

Police may disclose a crime scene location, even if such disclosure may suggest the identity of the victim, even the victim of a sex crime.

Confidentiality attempts by a victim need to be subjected to a balancing test between public disclosure and privacy under the Montana Constitution.

Are jail occupancy records public?

**Montana Code Annotated
44-5-102 (13) (e) (iv)**

Yes. The public is entitled to know who is in jail, whether city, town, county or otherwise.

Are mug shots public?

Montana Code Annotated 44-5-103

“Confidential criminal justice information” includes “photographs.” Some police and sheriff’s offices refuse to provide copies of mug shots to the media, while others provide them.

Individuals should not expect privacy regarding their appearance.

Criminal Justice information-what's secret?

Montana Code Annotated 44-5-103: Criminal Justice Info

“Confidential Criminal Justice Information”:

Investigative information

Intelligence information

Fingerprints and photographs

Any other information not clearly defined as public criminal justice information

Criminal Justice information-what's secret?

Montana Code Annotated 44-5-311: Criminal Justice Info

Police cannot release the address, telephone number of place of employment of a victim who requests confidentiality.

Police may not release the names of sex crime victims except in certain situations.

Attorney General Opinion 50 Att'y Gen. Opn. 6 softened this with the requirement for a balancing test.

When are public records open to inspection?

Montana Code Annotated

2-6-204: Records of Officers Open to Public Inspection

Public records must be open to inspection by any person during office hours.

2-16-117: Office Hours

“Office hours” are from 8 a.m. to 5 p.m. Monday through Friday, unless otherwise provided by law.

What are the remedies if an agency withholds public records illegally?

2-3-221: Attorneys' Fees

A successful plaintiff can be awarded “ costs and reasonable attorneys’ fees.”

New Changes from the 2015 Legislature

HB 447

Signed into Law April 23—Effective Upon Gov's Signature

Section 2-3-114, MCA, is amended to read:

- "2-3-114. Enforcement. (1) 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~~ person learns, or reasonably should have learned, of the agency's decision.
- (2) A person alleging a deprivation of rights who prevails in an action brought in district court to enforce rights under Article II, section 8, of the Montana constitution may be awarded costs and reasonable attorney fees."

New Changes from the 2015 Legislature

HB 448

Signed into Law April 27—Effective Upon Gov's
Signature

Section 2-3-221, MCA, is amended to read:

"2-3-221. Costs ~~to plaintiff~~ in certain actions to enforce constitutional right to know. A plaintiff person alleging a deprivation of rights who prevails in an action brought in district court to enforce the plaintiff's person's rights under Article II, section 9, of the Montana constitution may be awarded costs and reasonable attorney fees."

What the law doesn't address

Montana law does not require:

Delivery of records in a defined period of time.

Submission of a form or "FOIA Request."

Requesters to declare the reason for the request.

It is not necessary for records requests to be in writing.

MCA 2-6-104 only requires governmental entities to make records available for inspection at all times during office hours.

Other public records topics

Montana law does not include:

- A standard or maximum fee for paper copies.
- A defined appeal process after denial.
- An agency or ombudsman to mediate.
- Criminal penalties for not providing public records.

Other Questions?