

Freedom of Information in Montana: Frequently Asked Questions

Part 3: Contemporary Issues in Public Access and News-gathering

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

Ian Marquand – Society of Professional Journalists

What changes did the 2015 Montana Legislature make to FOI laws?

House Bill 123—Public Records Overhaul The Good, the Bad and The Ugly.

HB 123 was introduced in the 2015 legislature, passed and was signed into law by Gov. Steve Bullock.

House Bill 123 (2015 Montana Legislature)

The Good

- 1) Amends MCA 2-3-212 (Open Meeting law) to require that minutes be kept of closed (executive) sessions.
- 1) The right to inspect documents is now held by a "person", not a "citizen."
- 1) The agency must provide a written explanation for a denial of records.

House Bill 123 (2015 Montana Legislature)

The Bad—E-mails, Records not Designated for Retention

Defines “public information” to mean any information retained by a public agency.

Defines “public record” to mean “public information” fixed in any medium for future reference AND designated for retention by a records management committee.

No mention of e-mails. (Present law includes “...private writings, including electronic mail”)

Leaves open whether public has access to records NOT designated for retention.

House Bill 123 (2015 Montana Legislature)

The Bad—New Public Records Exemption

Permits withholding documents related to public schools if the release of information jeopardizes the safety of students in the school.

Adds a new layer of refusal to look at student and teacher records.

Present law addresses matters related to individual or “public safety”—jails, correctional facilities, etc. (+ individual privacy interests & legitimate trade secrets.)

House Bill 123 (2015 Montana Legislature)

The Bad—Fees for Copying Records

Agency authorized to charge for “the time required to gather the information.”

Under present law, the fee for copying documents is limited to actual costs of the copy.

House Bill 123 (2015 Montana Legislature)

The Bad—"Timely" Responses to Records Requests

The agency must "respond" to a records request "in a timely manner."

The response can be providing the requestor with the estimated time it will take to produce the document and the costs of production.

Costs must be paid up front before any identifying or gathering is performed by the agency.

Under present law, the agency must provide access within a "reasonable time period." (No mention of paying fees in advance.)

House Bill 123 (2015 Montana Legislature)

The Ugly—State Officials & Historical Records

A “constitutional officer” (inc. governor, attorney general, secretary of state, state auditor, etc.) may “restrict access” to certain records given to the Montana Historical Society after leaving office **for the lifetime of the officer.**

Similar to federal law allowing former presidents to block public access to their records for periods longer than normally allowed.

House Bill 123 (2015 Montana Legislature)

The Ugly—Personal Information to be Kept Secret

An agency which keeps information in digital form must maintain the “personal information of an individual” in secret.

No balancing test required.

House Bill 123 (2015 Montana Legislature)

The Ugly—Some Secrecy Provisions Left in Statute

- Domestic violence fatality review information
- Records of military discharges
- Voter e-mail addresses
- Information related to a family education savings account
- No-call data base
- Information related to Business and Industrial Development Corporations
- Insurer financial information kept by the state Insurance Commissioner
- Suicide review team records
- Livestock testing information

House Bill 123 (2015 Montana Legislature)

The Ugly—Donors of Records to MHS Can Restrict Access for Decades

Permits the Montana Historical Society to “honor restrictions imposed by private record donors” for 50 years from when the record was received.

House Bill 123 (2015 Montana Legislature)

The Ugly—Agency Distribution Lists

Prohibits the disclosure of agency-compiled distribution lists. Exemptions to this include:

- Voter lists
- Employee names
- Driver's license lists
- Professional and occupational license holders
- Claims examiners
- Meeting attendance lists
- Graduating student lists provided to armed forces recruiters

Court Records: What can be sealed or redacted?

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.

Court Records: What can be sealed or redacted?

Montana Constitution Article II, Section 9 Right to Know.

This applies to all court records.

Like other government records, all records filed with the Clerk of Court are presumed to be open, with these exceptions:

- Documents for which the court deems the right of privacy clearly exceeds the merits of public disclosure
- Discovery between parties in civil cases enforced by protective order
- Child abuse and neglect proceedings, including foster care
- Marriage license applications
- Social Security numbers, full birth dates, medical records, credit card info
- Probable cause affidavits for search warrants

Court Records: Probable Cause Statements

Are probable cause statements submitted in support of the filing of a criminal case open records?

YES. This is true for any court, from police court to district court.

Court Records: Montana Supreme Court Records

Are all Montana Supreme Court records open?

Generally, YES. The exceptions:

- If a district court's file of a case on appeal to the Supreme Court includes records sealed by the court.
- Certain records related to lawyer disciplinary proceedings.

Court Proceedings: Closed Courtrooms

When may a judge close a court proceeding?

In a criminal case when:

- The court makes an evidentiary determination that an open proceeding would present a clear and present danger to the fair trial rights of the defendant, and
- There is no other alternative to closure.

Court Proceedings: Gag Orders

Who do “gag orders” affect?

Gag orders only apply to the parties to a case, their attorneys and witnesses.

They may only be issued when participants' speech poses a substantial probability of harm to the trial process.

The First Amendment protects the media's rights to report on a trial; there is no right to receive information from participants.

The First Amendment does not prevent a court from prohibiting parties, attorneys and witnesses from speaking about a case.

Court Proceedings: Attorney Statements

Are attorneys limited in what they can say to the media about a litigated case?

Rule 3.6 of the Montana Supreme Court's Rules of Professional Conduct prohibits an attorney from making an "extrajudicial" statement that the attorney knows will have a "substantial likelihood of materially prejudicing an adjudicative proceeding."

A reporter can ask an attorney any question; it's the attorney's responsibility to answer in a way that won't affect the outcome of the case.

Court Proceedings: Cameras in the Courtroom

Are there limits to having cameras or other recording devices in a courtroom?

Rule 35, Montana Judicial Canons

A judge must permit such recording unless convinced that circumstances exist in a particular case that such recording “would substantially and materially interfere” with the court’s function to resolve disputes.

Court Proceedings: Cameras in the Courtroom

Are there limits to having cameras or other recording devices in a courtroom?

Rule 35, Montana Judicial Canons

Judges may require any or all of the following:

- “Pooling” of cameras. (media share video, audio or images from a single device)
- Taping down wires to the floor. (microphone cables, etc.)
- Cameras must be “inconspicuous.” (no noise or visual disruptions)
- Broadcast representatives must wear dress that doesn’t set them apart from other spectators. (this is aimed especially at videographers)

Juvenile Records

When are records involving juveniles confidential?

MCA 41-5-115

Youth records generated in a placement or "youth in need of intervention" proceeding (dependent-neglect cases) are confidential.

Juvenile (Youths under age 18) Records

When are records involving juveniles confidential?

Most juvenile court records are open until the youth's 18th birthday.

Then they are sealed and remain confidential unless unsealed by court order.

Certain medical records related to a youth court proceeding may be withheld from public inspection.

Police Vehicle and Body Cameras

Is video from police cars and body cameras available as a public record?

It depends on the circumstance.

If the video is related to a non-criminal matter, it likely will be considered subject to the statute making accident reports confidential.

In that case, the video is available only to the parties to the accident.

There is no statute that specifically governs this issue, so Article II, Section 9 "Right to Know" would govern these situations.

Police Vehicle and Body Cameras

Is video from police cars and body cameras available as a public record?

It depends on the circumstance.

If the video is related to a potential criminal offense, it would fall within "confidential criminal justice information" and be excluded from disclosure.

The video is subject to discovery during the course of the criminal proceeding and made available to the defendant, but not the general public.

Police Vehicle and Body Cameras

Is video from police cars and body cameras available as a public record?

It depends on the circumstance.

A law enforcement agency may release video from car or body cameras if it determines that release of that video is in the public interest or the agency's best interest. Such circumstances might include:

- To help the public find a fugitive.
- To demonstrate an officer's conduct in a controversial situation.
- To improve community relations.

Law Enforcement Investigation Records

Can the media ever have access to investigation records or materials?

NO, not while the investigation is underway.

Criminal justice investigatory records are confidential.

The county attorney or members of the public can petition for release of records if:

- No prosecution is commenced
- The prosecution has been completed

Government Databases

Are information databases considered “documents”?

YES. As such they are accessible like any other document.

Impairments that may make access impractical include:

- The government “custodian” may charge a fee to retrieve the data.
The larger the database, the greater the cost.
- The custodian must redact any information that may fall within the privacy exception to Article II, Section 9 “Right to Know.”

Agencies can charge you for the time an attorney takes to review the information prior to disclosure.

Government-owned Hospital & Health Records

Are Health or Hospital Records Owned by a Government Entity Open for Inspection?

Administrative records: YES, if the hospital is supported in whole or in part by tax funds.

Health care records: NO. They are almost always private within the exception to Article II, Section 9, "Right to Know." They also are protected from disclosure from federal law.

The “Shield Law”

Who is covered by Montana’s “Shield Law” for journalists?

Media Confidentiality Act—MCA 26-1-901

Applies to anyone acts “for the purpose of gathering, writing, editing, or disseminating news.”

Montana has one of the broadest “shield laws” in the country.

The “Shield Law”

Who is covered by Montana’s “Shield Law” for journalists?
Media Confidentiality Act—MCA 26-1-901

Applies to anyone “connected with or employed by”:

Newspaper

Magazine

Press Association

News Agency

Radio Station

Television Station

Community Antenna Television Service

News Service

The “Shield Law”

Must a person be accredited by a news organization?

Media Confidentiality Act—MCA 26-1-901

NO--In 2000, the City of Missoula demanded that self-employed video producer Linda Tracy turn over her video of a public disturbance that accompanied a visit by the Hell’s Angels. (The city wanted to prosecute alleged offenders.)

Tracy was not employed or accredited by an entity listed in the law but had shared her video with a community advocacy group that regularly released video to promote its causes. The group then distributed the video to the media.

Tracy refused to give the video to the city; the case went to district court.

Judge Douglas Harkin ruled that Tracy was “connected to” a “news agency” when she provided her video to the advocacy group.

The “Shield Law”

Who is covered by Montana’s “Shield Law” for
journalists?

Media Confidentiality Act—MCA 26-1-901

No person covered by the Act may be required to disclose any information or the source of that information in any legal proceeding.

The “privilege” from testifying may not be waived by disclosing part of the information.

The “Shield Law”

What about bloggers or non-traditional online
journalists?

Media Confidentiality Act—MCA 26-1-901

So long as the person is engaged in the gathering,
writing, editing or dissemination of news, they fall
within the privilege.

Rights of Journalists During Emergency Responses

May a member of the news media follow emergency vehicles to the scene of an incident?

YES, so long as the media representative is properly identified to the emergency personnel and follows instructions about where he/she may be located so as to avoid interfering with the performance of emergency responders.

Rights of Journalists During Emergency Responses

May a member of the news media be present at crime or emergency scenes?

YES, but you must follow instructions and may not interfere with emergency responders.

Be mindful that the Montana law on "resisting arrest" or interfering with a peace officer does not rely on the peace officer acting "legally."

You still must comply with illegal instructions. Failure to do so is not a defense in a criminal prosecution.

Photographing People: When, Where, How

Are there restrictions about photographing people?

So long as the photographer is not interfering with emergency or law enforcement personnel at a crime or other emergency scene, there are no limits on photographing what or who can be seen.

NOTE: There may be ethical considerations to this question that are not related to FOI. Please consult the SPJ Code of Ethics for guidance to ethical questions related to news-gathering.

Photographing Places: When, Where, How

Can a news photographer take pictures of private property while standing on public property?

So long as the photographer is not trespassing, such photography is not prohibited.

The photographer also must not be interfering with emergency or law enforcement personnel at a crime or other emergency scene.

NOTE: There may be ethical considerations to this question that are not related to FOI. Please consult the SPJ Code of Ethics for guidance to ethical questions related to news-gathering.

Other Routine Questions to the Montana FOI Hotline

Are mugshots considered public records?

MCA 44-5-103

There are no court cases bearing on this issue. Article II Section 9 "Right to Know" is the ultimate standard.

The Criminal Justice Information Act defines confidential information to include "fingerprints and photographs."

MIKE'S VIEW:

An arrested person does not have a right of privacy regarding his/her physical appearance in a photograph. Arrest records are public information and a person's image is public in any criminal proceeding, including their initial appearance in court.

Other Routine Questions to the Montana FOI Hotline

How do I get access to criminal justice information?

MCA 44-5-301

A county attorney can petition the district court to release confidential criminal justice information when a prosecution has been declined or is completed.

MIKE'S VIEW:

This law does not preclude a private citizen from making a similar petition to a court and requesting information under Article II Section 9 "Right to Know."

Some judicial districts have a simple procedure for obtaining a judicial disclosure order, but most courts require the filing of a lawsuit.

Other Routine Questions to the Montana FOI Hotline

Can a journalist record someone secretly, such as by hidden camera?

MCA 45-8-213

NO—Montana law imposes criminal sanctions for “violating privacy in communications” by recording a conversation without the knowledge of all parties to the conversation.

1st offense: \$500/6 months in jail; 2nd offense: \$1,000/1 year; 3rd offense: \$10,000/5 years.

MIKE’S VIEW:

This does not apply to recording elected or appointed officials when performing official duties. Nor does it apply to persons speaking at public meetings.

When in doubt...

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.

And be aware of...

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.

Thanks to:

Montana Newspaper Assoc.

Montana Broadcasters Assoc.

Montana Historical Society

Greater Montana Foundation

Technical Director: Eric Hyypa, Montana State Univ.

Thanks to all for making this series of FOI in Montana webinars possible.

These webinars originated from the E.B. Craney Media Studio at the Montana Historical Society in Helena MT.

Other Questions?