

CHECKLIST – PUBLIC RIGHT TO KNOW (EXAMINE DOCUMENTS) – LEGAL REVIEW
CONSTITUTIONAL CONSIDERATIONS (Last updated 12/13/2016)

Note: “No single rule or policy can be used to determine what information may be released upon public request because each request requires a fact specific, case-by-case analysis of the interests at issue and a balancing of the demands of individual privacy and the merits of public disclosure.” *Billings Gazette v. City of Billings*, 2013 MT 334, 372 Mont. 409, 313 P.3d 129, citing *Havre Daily News v. Havre*, 2006 MT 215, ¶ 17, 333 Mont. 331, 142 P.3d 864.

The Court has also “consistently held that Article II, Section 9, is unambiguous and clear on its face.” See, e.g., *Great Falls Tribune v. Great Falls Pub. Schools*, 255 Mont. 125, 129, 841 P.2d 502, 504 (1992) (citing *Great Falls Tribune v. Dist. Court*, 186 Mont. 433, 437, 608 P.2d 116 (1980), and *Associated Press v. Bd. of Educ.*, 246 Mont. 386, 804 P.2d 376 (1991)).

However, ambiguities will likely be construed in favor of the public’s right to know. The Court has a “presumption of openness” and an “affirmative duty of disclosure” except where a privacy interest is involved. *Havre Daily News, LLC v. City of Havre*, 2006 MT 215, 333 Mont. 31, 142 P.3d 864.

Mont. Constit. Art. II, Sec. 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.

A three-prong analysis:

_____ **Does the provision apply to the particular group or division against whom enforcement is sought?** *Becky v. Butte Silver-Bow Sch. Dist. 1*, 274 Mont. 131, 136, 906 P.2d 193, 196 (1995); *Bryan v. District*, 2002 MT 264, ¶ 16, 312 Mont. 257, ¶ 16, 60 P.3d 381, ¶ 16.

- For instance, a legislative caucus (both pre-session caucuses and session caucuses) is considered a public body and subject to the open meeting laws. *Assoc. Press v. Mont. Senate Repub. Caucus*, 1995 Mont. Dist. LEXIS 798 (Mont. Dist.); *Assoc. Press v. Mont. Senate Repub. Caucus*, 1998 Mont. Dist. LEXIS 516 (Mont. Dist.). The Supreme Court has held that “the common understanding of the phrase ‘public or governmental body’ would include a group of individuals organized for a governmental or public purpose, whether officially recognized or de facto. *Assoc. Press v. Mont. Senate Repub. Caucus*, 1995 Mont. Dist. LEXIS 798 (Mont. Dist.) citing *Common Cause v. Statutory Committee*, 263 Mont. 324, 330, 868 P.2d 604, 608 (1994).
- A county detention officer union was a private collective bargaining group, not a public or governmental body not subject to Art. II, sec. 9. *Shockley v. Cascade*

_____ **Are the items considered “documents of public bodies” which are subject to public inspection?** *Becky v. Butte Silver-Bow Sch. Dist. 1*, 274 Mont. 131, 136, 906 P.2d 193, 196 (1995); *Bryan v. District*, 2002 MT 264, ¶ 16, 312 Mont. 257, ¶ 16, 60 P.3d 381, ¶ 16.

_____ Are the documents somehow related to the **deliberations** of the public body? Mont. Constit. Art. II, Sec. 9, *Frenchtown Rural Fire Dist. v. Ross*, 2011 Mont. Dist. LEXIS 57 (Mont. Dist.)

OR:

_____ Are the documents **generated or maintained** by the public body? *Becky v. Butte Silver-Bow Sch. Dist. 1*, 274 Mont. 131, 906 P.2d 193, (1995).

_____ Are the documents related to the function of the public body?; OR

- “Although 'documents of public bodies' is not defined in the Montana Constitution, it must reasonably be held to mean documents generated or maintained by a public body which are somehow related to the **function** and duties of that body.” *Becky v. Butte Silver-Bow Sch. Dist. 1*, 274 Mont. 137, 906 P.2d 193, 197 (1995).

_____ Do the documents relate to the duties of the public body?; OR

- “Although 'documents of public bodies' is not defined in the Montana Constitution, it must reasonably be held to mean documents generated or maintained by a public body which are somehow related to the function and **duties** of that body.” *Becky v. Butte Silver-Bow Sch. Dist. 1*, 274 Mont. 137, 906 P.2d 193, 197 (1995).
 - E.g. drafts of laws and bill draft files are open to public examination, except in those specific cases where matters of individual privacy are implicated. [*Mont. Environ. Info. Ctr. V. Mont. Environ. Quality Council*, 1995 Mont. Dist. LEXIS 898 (1st Dist.)]
- Presumably, public documents would not include documents related solely to activities not classified as or related to official duties for members of the Legislature, including:
 - Work performed for outside employment unrelated to legislative activities
 - Communications covering solely campaign activity, including:
 - Activity designed solely to affect or influence the results of an election or nomination for office by the general electorate and without respect to official legislative duties, such as certain campaign communications
 - Solicitations for campaign money
 - Campaign management
 - Campaign planning
 - Activity with respect to voting in a primary or general election such as get-out-the-vote activity
 - Non official activity affecting only the individual's personal rights

- Previously, because the Constitution does not define “documents . . . of . . . public bodies”, the Court looked to statute where it was relevant to, and did not conflict with, the Constitution. The Court previously determined that §§ 2-6-101 and - 102, MCA, pertaining to the right to inspect public writings, were relevant to the determination of whether certain documents were public. See *Becky v. Butte Silver-Bow Sch. Dist. 1*, 274 Mont. 131, 906 P.2d 193 (1995). With the revision of these statutes in 2015, the new statute concerning access to public documents is located at 2-6-1003 and 2-6-1002:
 - 2-6-1003. Access to public information -- safety and security exceptions - - Montana historical society exception. (1) Except as provided in subsections (2) and (3), every person has a right to examine and obtain a copy of any public information of this state. . .
 - 2-6-1002
 - . . . (10) "Public agency" means 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.
 - (11) "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 . . .

_____ **If the first two elements are satisfied, does privacy outweigh the need for public disclosure?** *Becky v. Butte Silver-Bow Sch. Dist. 1*, 274 Mont. 131, 136, 906 P.2d 193, 196 (1995).

_____ Does the person involved had a subjective or actual expectation of privacy? *Yellowstone County v. Billings Gazette*, 2006 MT 218, P. 20, 24, 333 Mont. 390, 143 P.3d 135.

- Collective bargaining strategy meetings do not involve a personal privacy interest, rather they involve an agency's desire to have a private meeting,. Collective bargaining strategy meetings may not be closed to the public. *Great Falls Tribune Co. v. Great Falls Pub. Sch.*, 255 Mont. 125, 841 P.2d 502 (1989).
- University presidents have an individual privacy interest in routine job performance evaluations which exceeded the merits of public disclosure. *Missoulian v. Bd. Of Regents of Higher Educ.*, 207 Mont. 513, 675 P.2d 962 (1984).
- Redacted records concerning the Commissioner of Higher Education's office processes concerning student discipline subject to disclosure because the student involved did not have a reasonable expectation of privacy. *Krakauer v. St.* 2014 Mont. Dist. LEXIS 33 (Mont. Dist).

_____ Is society is willing to recognize that expectation as reasonable? *Yellowstone County v. Billings Gazette*, 2006 MT 218, P. 20, 24, 333 Mont. 390, 143 P.3d 135.

- "Time, place and status are factors in the reasonableness determination . . . [T]he determination should include consideration of *all* relevant circumstances, including the nature of the information sought." *Missoulian v. Bd. Of Regents of Higher Educ.*, 207 Mont. 513, 523, 675 P.2d 962, 968 (1984).
- See, e.g., *Mont. Human Rights Div. v. Billings*, 199 Mont. 434, 649 P.2d 1283 (1982), where employees had a reasonable expectation of privacy in their employment records but the right of privacy was outweighed by equal protection considerations and the HRC's authority to investigate claims of discrimination.

_____ Does the information bear on the abilities of an individual who holds a position of public trust to perform public duties?

- "[S]ociety is not willing to recognize as reasonable the privacy interest of individuals who hold positions of public trust when the information sought bears on that individual's ability to perform public duties. *Yellowstone County v. Billings Gazette*, 2006 MT 218, P. 21, 333 Mont. 390, 143 P.3d 135 (citations omitted).
- Public officials occupy unique positions with respect to expectations of privacy. *Frenchtown Rural Fire Dist. v. Ross*, 2011 Mont. Dist. LEXIS 57 (Mont. Dist.) citing *Great Falls Tribune Co. Inc. v. Cascade County Sheriff*, 238 Mont. 103, 775 P.2d 1267 (1989) (law enforcement officers occupy positions of great public trust).
- Positions of public trust include police officers (*Great Falls Tribune, 238 Mont. 103, 107, 775 P.2d 1267, 1269; Bozeman Daily Chronicle v. City of Bozeman Police Dept.*, 260 Mont. 218, 859 P.2d 435 (1993)), teachers (*Svaldi v. Anaconda-Deer Lodge County*, 2005 MT 17, 325 Mont. 365, 106 P.3d 548) public defenders (*Yellowstone County v. Billings Gazette*, 2006 MT 218, ¶¶ 21, 22, 333 Mont. 390, 143 P.3d 135), fire chief (*Frenchtown Rural Fire Dist. v. Ross*, 2011 Mont. Dist. LEXIS 57 (Mont. Dist.)), persons responsible for the expenditure of public money (*Missoula Cnty Pub. Sch. V. Bitterroot Star*, 2015 MT 95); and elected officials (*Citizens to Recall Mayor v. Whitlock*, 255 Mont. 517, 844 P.2d 74 (1992)).
 - Certain investigative documents concerning an allegation of sexual intercourse without consent by a cadet at the Montana Law Enforcement Academy against an off-duty police officer were subject to disclosure. *Bozeman Chronicle v. City of Bozeman Police Dept.*, 260 Mont. 218, 859 P.2d 435 (1993).
 - Investigative documents concerning a teacher's abuse of children were subject to disclosure. *Svaldi v. Anaconda-Deer Lodge County*, 2005 MT 17, 325 Mont. 365, 106 P.3d 548.

- Certain information may be protected and withheld, such as personnel records or job performance valuations. See *State v. Burns*, 253 Mont. 37, 830 P.2d 1318 (1992); *Mont. Human Rights Div. v. Billings*, 199 Mont. 434, 649 P.2d 1283 (1982); *Missoulian v. Bd. Of Regents of Higher Educ.*, 207 Mont. 513, 675 P.2d 962 (1984). Names may be redacted from public records to protect privacy. *Yellowstone County v. Billings Gazette*, 2006 MT 218, ¶¶ 25, 24, 333 Mont. 390, 143 P.3d 135 citing *Worden v. Mont. Bd. Of Pardons and Parole*, 1998 MT 168, ¶ 29, 289 Mont. 459, 962 P.2d 1157. Social security numbers and driver's license numbers may be protected from disclosure. *Jefferson County v. Montana Standard*, 2003 MT 304, 318 Mont. 173, 79 P.3d 805. Witness and victim names may be withheld pursuant to an in camera review. See *Bozeman Daily Chronicle v. City of Bozeman Police Dept.*, 260 Mont. 218, 859 P.2d 435 (1993).
- The Court will apply a fact-specific inquiry, consideration of the particular context from which disclosure will proceed, such as the purpose for which the information is sought. *Engrav v. Cragun*, 236 Mont. 260, 267, 769 P.2d 1224, 1229 (1989).

Note: The Legislature has also created statutory exemptions for the disclosure of certain public records, including the nondisclosure of library records under 22-1-1103 and burial site records under 22-3-807.

*****Statutory rights for access to public information are located in Title 2, ch. 6 and specifically 2-6-1003, MCA*****