To: Faculty Senate

From: Lee Banville, Professor of Journalism

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RE: Open Meeting Policy

The proposed open meeting policy represents a mixed bag for the public and faculty. On the one hand, UM lacks any formal policy covering the public’s right to know and participate in the governing of this public institution. This policy appears to be an effort to address that and the administration should be applauded for beginning this process.

Unfortunately, the policy, as proposed, puts more burden on staff and faculty running the plethora of smaller committees while allowing critical university committees to move into a hazy area of the policy where public access and participation become less certain. Frankly, coming at this time and when the administration is moving more of its discussions behind closed doors, this policy appears to be an effort to create loopholes to allow public meetings to become more private.

It is important to note that Montana has a much broader public participation and right-to-know than most states because of the state’s constitution and that the state law stresses that those rights are to viewed broadly when considering whether meetings should be open to public scrutiny. It is also worth noting that the state law includes a section allowing decisions that are made in a process that is not public to be voided. Therefore, it is critical that the University of Montana embrace its public nature and ensure transparency in deliberation and decision-making.

Specific recommendations:

* Base policy on the function of the gathering, not its name or website listing.

The policy focuses on listing, or enumerating, specific “official” committees that will always meet as open meetings. These are listed at the University Committee website -- <http://www.umt.edu/committees/>. These 77 committees cover everything from General Education to the Arboretum to placement of public art. For these committees, a more formal requirement of posting agendas and minutes would greatly increase the work of these groups and if this policy is implemented, the Senate should consider how to perhaps restructure these committees that may not need to meet all of the time to ensure they abide by the public nature of the work but not bog them down. This may be by creating more ad hoc committees that would still need to produce these documents, but may not need to maintain archives of past work, for example. Or creating templates chairs can use to simplify the agenda and minutes tasks.

* Ensure that the critical groups at UM are covered by the policy.

The other problem with this list is the committees that are not on it – like the Academic Officers group or the President’s Cabinet or new groups that form. By creating a list of committees, we end up being focused on who is on the list and who is not. Instead the policy should stress a committee (or work group or task force or study group) should meet in the open if it is *DELIBERATING* or *DECIDING* matters of policy at the University. By focusing on function over their name, I believe it will better serve this institution.

* UM must address the growing use of informal “huddles”

Also left unaddressed is a new policy at the University to have informal huddles that do not require public notice, minute-taking or transparency. I believe this policy runs a real risk of being found unconstitutional and in violation of Montana’s Open Meeting Law. Decisions dating nearly 40 years have ruled that “a clandestine meeting violates the spirit and the letter of

the Montana Open Meeting Law.” *Sonstelie* v. *Board of Trustees* (1983) If huddles are made up of public employees discussing policies that affect the University those are meetings and should be open unless closed for matters of *individual* privacy.

I understand that policy-making in the public eye is difficult and at times awkward, but I believe there is a misunderstanding in this administration that the failures of leadership in the past are at least partially a result of openness or bad press. That is an effort to blame “others” for our own problems and does not justify moving public discussions behind closed doors.

* Careful consideration of the *Crofts* decision is critical

The policy uses as its test a section of a 2004 decision by the Montana Supreme Court in the case *Associated Press* v. *Crofts*. The case stemmed from an “informal” group that met over two years at the request of the Commissioner of Higher Education. This group, which changed names over the years, met every few months to discuss the MUS system and included leaders from the different campuses. The press tried to attend one of those meetings and the Commissioner said he did not need to make the meeting public. OCHE lost this case.

But in its decision, the court opined about what kind of factors would make working groups or staff meetings not public. That is the list included in the UM policy. But missing from that policy are two critical parts of the *Crofts* decision. First, the court went on to say, “Meetings where staff report the result of fact gathering efforts would not necessarily be public. Deliberation upon those facts that have been gathered and reported, and the process of reaching decisions would be open to public scrutiny.” So, the staff could report its findings, but if the group intended to discuss what those findings mean, that should be open.

Additionally, the court then stresses, “The guiding principles are those contained in the constitution;  that is ‘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,’ and ‘all meetings of public or governmental bodies, supported in whole or in part by public funds, must be open to the public.’”

Conclusion

The current policy does not help the chair of a committee navigate these confusing issues. Instead, it creates ambiguity for the public and participants. Does the Academic Officers meeting need to take minutes of its discussions? It is not listed on the University Committee website. It may not be voting on any matter. It may never vote on a matter. Is it just a staff meeting for the provost? This policy does not help us answer those questions. Or, more concerning in my view, it seems to create a system where those meetings will always be closed to the public and only the decisions will appear for limited feedback and without any meaningful participation by the public.

It is my hope that the Faculty Senate will call on the administration to clarify the policy to address these issues. I believe it is also critical that the counsel and administration explain the policy of “huddles,” being sure to outline when they are used and what can and cannot be done in those meetings.

This policy discussion creates an important opportunity for the University, at a time when we are asking the public to renew its commitment to higher education through the 6-mill levy, to recommit itself to public transparency and participation. The Montana Constitution requires it and we must do more to achieve it.