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Montana Legislative Services Division

Legal Services Office

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TO: Legislative Council

FROM: Greg Petesch

RE: Open Caucuses

Article II, section 9, of the Montana Constitution provides:

> **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.

Article V, section 10(3), of the Montana Constitution provides:

> (3) The sessions of the legislature and of the committee of the whole, all committee meetings, and all hearings shall be open to the public.

In February 1995, twenty-two Montana newspapers, television stations, and trade and professional news organizations (the media) sued the four caucuses of the Montana Legislature seeking an order from the District Court declaring that the caucuses held by the Democratic and Republican legislators must be open to the public in order to comply with Article II, section 9, of the Montana Constitution and the open meeting laws, Title 2, chapter 2, part 3, MCA. Associated Press, et al. v. Montana Senate Republican Caucus, et al., Cause No. CDV 95-218 (First Judicial District Court, Lewis and Clark County). Four legislators serving in the 1995 Legislature, Senate Majority Leader John Harp, Senate Minority Leader Mike Halligan, Speaker of the House John Mercer, and House Minority Leader Ray Peck, were served with process. These four legislators entered a special appearance, by counsel, without admitting that they were the proper persons to receive service of process on behalf of the caucuses. The legislators filed a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6), Montana Rules of Civil Procedure (MRCP), contending, among other things, that the caucuses were not "persons" within the meaning of Rule 4, MRCP, and that the caucuses were, therefore, not subject to the jurisdiction of the court. The District Court effectively differentiated between the presession and the in-session party caucuses. The District Court held that because presession caucuses are required by section 5-2-201, MCA, to meet and because they clearly perform a governmental or public purpose, these caucuses were subject to the open meeting laws. On the other hand, the District Court ruled that the caucuses during a legislative session were not "persons" within the meaning of Rule 4A, MRCP, since the caucuses were not unincorporated associations, groups of two or more persons having a joint or common interest, or any other legal or commercial entity. The District Court concluded that the party caucuses were unofficial gatherings of legislators and not separate legal entities and, therefore, they were not persons within the meaning of Rule 4A

MRCP. The District Court denied the motion to dismiss the media's complaint as to the presession caucuses, but granted dismissal, and later converted that to summary judgment, as to the in-session caucuses. Associated Press, et al. v. Montana Senate Republican Caucus, et al., Memorandum and Order, Cause No. CDV 95-218 (First Judicial District Court, Lewis and Clark County, November 16, 1995).

The media appealed the District Court's grant of summary judgment, which dismissed their complaint as to the in-session caucuses, to the Montana Supreme Court. The caucuses did not file a cross-appeal with regard to the presession caucuses. The media argued, using dictionary definitions, that the word "caucus" had two related, yet distinct meanings. On the one hand, a "caucus" could be a group of persons sharing common interests and attempting to influence the decision of a larger group. In this context, a caucus was "[a] group within a legislative or decision-making body seeking to represent a specific interest or influence a particular area of policy" or "a group of people united to promote an agreed-upon cause". The caucuses argued, using a dictionary definition, that a "caucus" was the meeting of the defined groups. Under this usage of the word, caucus is variously defined as "a closed meeting of a group of persons belonging to the same political party or faction [usually] to select candidates or to decide on policy". The media focused their claims for purposes of this case on the first definition of caucus. Specifically, the media defined each of the four defendant caucuses as consisting of state Senators or Representatives elected, respectively, to the Senate or House on either the Republican or Democratic party ticket. A majority of the Montana Supreme Court adopted the position of the media and held that the caucuses were persons within the meaning of Rule 4A, MRCP, by reason of their being unincorporated associations. (Justice Gray and Chief Justice Turnage dissented.) The Supreme Court also held that the caucuses were "persons" within the meaning of Rule 4A, MRCP, by reason of their being "two or more persons having a joint or common interest". The Supreme Court reversed the order of dismissal and the order granting summary judgment entered by the District Court and remanded the case for further proceedings.

The only issue addressed by the Montana Supreme Court was whether, under Montana law, the Senate and House caucuses of the Republican and Democratic parties were "persons" within the meaning of Rule 4A, MRCP. The Court held that the caucuses were persons upon whom process could be served and were therefore subject to the jurisdiction of the courts. Associated Press v. Montana Senate Republican Caucus, 286 Mont. 172, 951 P.2d 65 (1997).

On remand, the District Court rejected the argument of the caucuses that the party caucuses did not fit within the description of a "public or governmental body" as used in Article II, section 9, of the Montana Constitution. The District Court held that the party caucuses were public bodies and were subject to the provisions of Article II, section 9, of the Montana Constitution in spite of the omission of "caucuses" from the provisions of Article V, section 10(3), of the Montana Constitution and in spite of the statements made by the delegates to the 1972 Constitutional Convention during the consideration of Article V, section 10(3), that the caucuses were not a part of the proceedings of the Legislature. The District Court rejected the caucuses' defense that requiring the caucuses to be open to the public would violate the rights of political speech and association of members of political parties. The District Court also rejected the argument that

the case presented nonjusticiable political questions within the meaning of Article III, section 1, of the Montana Constitution, providing for the separation of powers. Finally, the District Court rejected the argument that the caucuses and their members are immune from suit under Article V, section 8, of the Montana Constitution. Associated Press, et al. v. Montana Senate Republican Caucus, et al., Memorandum and Order, Cause No. CDV 95-218 (First Judicial District Court, Lewis and Clark County, June 4, 1998). The caucuses did not appeal from the District Court's determination that the party caucuses were public bodies and were subject to the provisions of Article II, section 9, of the Montana Constitution.

In response to the District Court decision, the Senate leadership for the 56th Legislature, 1999 Legislative Session, entered into a memorandum of agreement for the operation of Senate party caucuses. The memorandum provided that the Senate party caucuses agreed to implement the decision of the District Court that party caucuses constitute the convening of a quorum of the members of the respective party membership of Senators to discuss matters of common interest to the Senate members of the respective party. The memorandum stated that party caucuses have no authority to make decisions for the Senate, and therefore, there is no public right to participate in a party caucus. The memorandum also stated that the public right to participate in Senate decisions is provided for in the hearing process in the Senate standing and other committees. The memorandum contained six specific points of agreement: 1. A caucus may not prevent any individual from observing the deliberations of a caucus. 2. An individual who is not a member of a caucus does not have the right to participate in the caucus. However, a caucus may provide for its own procedure in order to invite an individual to address a caucus and to respond to questions from a caucus. 3. A caucus may adopt its own procedures for the interaction of the members of the caucus. 4. The procedures governing decorum in Senate committees apply to a meeting of a caucus. 5. The presiding officer of a caucus may enforce decorum in the same manner as a committee presiding officer. 6. A caucus may meet at the call of the caucus presiding officer and will meet in the location announced by the presiding officer. I am unaware of any formal action taken by the caucuses in the House of Representatives to implement the District Court decision.

There have been several judicial decisions involving the right to know and observe contained in Article II, section 9, of the Montana Constitution since the adjudication of the open caucus issue. Because the right to know and observe are included within Article II of the Montana Constitution, the declaration of rights, they are "fundamental rights". Butte Community Union v. Lewis, 219 Mont. 426, 712 P.2d 1309 (1986). Any infringement of a "fundamental right" will trigger the highest level of scrutiny, strict scrutiny, by the courts. See Wadsworth v. State, 275 Mont. 287, 911 P.2d 1165 (1996), and Gulbrandson v. Carey, 272 Mont. 494, 901 P.2d 573 (1995).

In Missoulian v. Board of Regents, 207 Mont. 513, 675 P.2d 962 (1984), the Missoulian challenged the closure by the Board of Regents of a job performance evaluation of the University System's presidents. The challenge was based on the constitutional right to know. The Montana Supreme Court held that the right to know is not absolute but must be balanced against competing constitutional interests in the context of each case. The Court applied a two-part test

to determine whether the presidents have a constitutionally protected privacy interest: (1) whether the presidents have a subjective or actual expectation of privacy, and (2) whether society is willing to recognize that expectation as reasonable. The first part of the test is satisfied because the presidents were assured that the evaluation would be confidential, as were others providing input to the Regents. The second part of the test was also satisfied by the need to assure an unabashed and candid evaluation of presidents. University presidents' job performance evaluations were matters of individual privacy protected by Article II, section 10, of the Montana Constitution. In this case, the demands of individual privacy of the university presidents and other university personnel in confidential job performance evaluation sessions by the Board of Regents clearly exceed the merits of public disclosure.

In Common Cause of Montana v. Statutory Committee to Nominate Candidates for Commissioner of Political Practices, 263 Mont. 324, 868 P.2d 604 (1994), three members of the four-member committee that recommends a list of persons from whom the Governor may select the Commissioner of Political Practices met to discuss candidates and the transmission of their names to the Governor and gave no public notice of the meeting, thus the committee violated the open meeting laws. The Montana Supreme Court determined that the Committee was a "public or governmental body" within the meaning of section 2-3-203, MCA. That section is the part of the open meeting laws designed to implement the open government provisions of the Montana Constitution. Because the committee did not give notice of its meeting, the open meeting laws were violated. The Governor appointed a recommended person, and the Senate confirmed the appointment. Because the Governor is free to disregard the recommended persons, the Governor did not violate the law in appointing one of the recommended persons, and the appointment would not be voided.

In Great Falls Tribune Co., Inc. v. Day, 1998 MT 133, 289 Mont. 155, 959 P.2d 508 (1998), a newspaper company sought to restrain the Department of Corrections from excluding the public from meetings of the committee that reviewed proposals for operating private prison facilities. The District Court held that the public had no right to observe the negotiation phase of the committee's work, but that once negotiations were completed, the process by which the conclusions were arrived at must be open to public observation. Both parties appealed. The Supreme Court noted that as part of an Executive Branch agency, the Department and the committee were considered governmental bodies pursuant to section 2-15-104, MCA, for purposes of procurement and that under the constitutional right to know, proposals submitted by private vendors were considered documents of a public body or agency that, under section 2-6-102, MCA, the public has a right to inspect. Under the two-part test in Missoulian v. Board of Regents, the only exception to the constitutional provision arises when the demand of individual privacy clearly exceeds the merits of public disclosure. The state contended that the meetings at issue were closed for economic advantage, but economic advantage is neither a privacy interest nor a sufficient reason for denying the public the opportunity to observe deliberations of public bodies or to examine public documents, including proposals submitted to the public body by a vendor, unless the proposal concerns a privacy interest involving legitimate trade secrets or individual safety. A public agency's desire for privacy does not provide an exception to the public's constitutional right to observe its government at work. To the extent

that provisions in section 18-4-304, MCA, or ARM 2.5.602 required the exclusion of the public from the competitive bid process, those provisions were unconstitutional and unenforceable.

In Associated Press v. Crofts, 2004 MT 120, 321 Mont. 193, 89 P.3d 971 (2004), media organizations sued the Commissioner of Higher Education, alleging that policy meetings between the Commissioner and other University System senior employees were subject to state open meeting laws. The District Court concluded that the meetings should be open to the public, and on appeal, the Supreme Court concurred. The Supreme Court noted that the Legislature created the open meeting laws with the intent that deliberations of state agencies be conducted openly, and to that end, the open meeting laws are liberally construed. In the context of section 2-3-203, MCA, public or governmental bodies means a group of individuals organized for a governmental or public purpose. Although the university policy committee was not formally created by a government entity to accomplish a specific function, the committee brought together public officials for an undeniably public purpose. The committee was not merely a staff meeting or factfinding body, nor was it an ad hoc group that came together to consider a specific matter or to gather facts on a particular issue. Rather, the group met to deliberate on matters of substance that were the public's business and thus was considered a "public body", within the meaning of Article II, section 9, of the Montana Constitution, whose meetings were required to be open to the public. The Commissioner argued that: (1) even if the committee was considered a public body, it did not hold meetings as contemplated in the open meeting laws; (2) because the committee's membership was not fixed, a specific number of members were not required to attend to constitute a quorum; and (3) neither direct action nor votes were taken at committee meetings. The Supreme Court disagreed. A quorum of any body of an indefinite number consists of the members who attend a meeting. All that is required under section 2-3-202, MCA, is that a quorum of the membership convene to conduct public business, not that the meeting produces some particular result or action or that a vote be taken. The Montana Constitution protects the public's right to observe the deliberations of public bodies, and the policy committee meetings were required to be open to the public. The Court stated that factors to be considered when determining whether a particular committee's meetings must be open to the public include but are not limited to: (1) whether committee members are public employees acting in their official capacities; (2) whether the meetings are paid for with public funds; (3) the frequency of meetings; (4) whether the committee deliberates rather than simply gathers facts and reports; (5) whether the deliberations concern matters of policy rather than merely administrative or ministerial functions; (6) whether committee members have executive authority and experience; and (7) the results of the meetings. This list of factors is not exhaustive, and each factor may not be present in every instance of a meeting that must be open to the public.

In Bryan v. Yellowstone County Elementary School District No. 2, 2002 MT 264, 312 Mont. 257, 60 P.3d 381 (2002), a school district assembled a group of people to research and advise the district on the closure of schools. The Legislature has given a school district the power to close schools. Therefore, the advisory group assumed the identity of the district with respect to the closure question and performed a legislatively designated governmental function that served a clear public and governmental purpose, and therefore the advisory group was a public or governmental body subject to Article II, section 9, of the Montana Constitution.

In addition to the cited cases, which all indicate a broad concept of "public or governmental body" as used in Article II, section 9, of the Montana Constitution, a fascinating discussion of the applicability of Article II, section 9, of the Montana Constitution to the Judicial Branch can be found in the Montana Supreme Court's August 3, 1999, order In re the Selection of a Fifth Member to the Montana Districting and Apportionment Commission. In that order, Justice Nelson and Justice Treweiler dissented from the process used to select the fifth member of the Commission. Justice Regnier specially concurred in an opinion in which Chief Justice Turnage, Justice Leaphart, and Justice Gray joined. Justice Leaphart also filed a special concurrence in which Chief Justice Turnage, Justice Gray, and Justice Regnier joined. As part of the dissent and special concurrences, the Justices discussed the intent of the framers of the Montana Constitution as contained in the 1972 Constitutional Convention Verbatim Transcripts with regard to the issue of whether the Montana Supreme Court was included within the meaning of "public or governmental body" as used in Article II, section 9, of the Montana Constitution. That is the methodology employed by the party caucuses and rejected by the District Court in Associated Press, et al. v. Montana Senate Republican Caucus, et al., Memorandum and Order, Cause No. CDV 95-218 (First Judicial District Court, Lewis and Clark County, June 4, 1998).

In summary, the Montana Supreme Court has taken a broad view as to what constitutes a "public or governmental body" as used in Article II, section 9, of the Montana Constitution and has concluded that both the constitutional provision and the implementing statutes apply to legislative committees. The Montana Supreme Court has never addressed the issue of whether a "party caucus" is a "public body" that the public has the right to observe within the meaning of Article II, section 9, of the Montana Constitution or to construe that issue in light of Article V, section 10(3), of the Montana Constitution.

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