

Peter Michael Meloy
MELOY LAW FIRM
P.O. Box 1241
Helena, MT 59624
(406) 442-8670

mtkca@meloylawfirm.com

Attorney for Petitioner

FILED

APR 02 2021

ANGIE SPARKS, Clerk of District Court
By *[Signature]* Deputy Clerk

**IN THE MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY**

THE ASSOCIATED PRESS, THE)
BILLINGS GAZETTE, THE BOZEMAN)
DAILY CHRONICLE, THE HELENA)
INDEPENDENT RECORD, THE)
MISSOULIAN, THE MONTANA)
STANDARD, MONTANA FREE)
PRESS, THE RAVALLI REPUBLIC,)
LEE ENTERPRISES, HAGADONE)
MEDIA MONTANA, THE MONTANA)
)
BROADCASTERS ASSOCIATION, and)
THE MONTANA NEWSPAPER)
ASSOCIATION.)

Petitioners,

vs.

BARRY USHER in his capacity as Chair)
of the Montana House of Representatives,)
Judiciary Committee)

Respondent.)

Cause No. ADV-2021-124

**MEMORANDUM IN
SUPPORT OF MOTION
FOR JUDGMENT ON
THE PLEADINGS**

This memorandum is submitted in support of Petitioners' Motion for Judgment on the Pleadings.

UNDISPUTED FACTUAL BACKGROUND

This is a declaratory judgment action brought by media Petitioners against the Chair of the Montana Legislature's House Judiciary Committee. It arises from an incident which occurred on January 12, 2021, in which the Chair conducted a Committee meeting to take executive action on several controversial bills involving transgender health care and abortion. After convening the meeting, but before a vote was taken, the Chair recessed the meeting to discuss the vote on the bills in private with other members of the Republican majority of the committee.

A reporter for Montana Free Press followed several Republican members of the Committee to a room in the basement of the Capitol building to observe and report on the matters to be discussed in the caucus. She was told by the Respondent that she was not allowed to stay during the discussion. He informed her that he made three of the members remain out of the meeting so there would be no quorum of the Committee in attendance. He explained that he did this "on purpose" to conduct the meeting in private. He told her that this was his normal practice, not just something he did on controversial bills.

A controlling majority of the House Judiciary members on the Committee

remained in the room. Accordingly, any decisions made in the room, whether a vote was taken or not, controlled the Judiciary Committee votes on the bills because a majority of that Republican members of the Committee was involved in the closed session. No rights of privacy were affected by the ensuing discussion on the bills.

After this private meeting, the Respondent reconvened the Judiciary Committee and proceeded to take executive action on the bills. Respondent said he was following protocol established by those before him: "We just always have, that's the way I was taught. Some of the things we have to talk about when we're talking and discussing how we're going to vote are personal and you know, as you can see, our committee does get a little emotional."

All the members of the House Judiciary Committee are publicly elected officials. The Committee is comprised of nineteen members, twelve of whom are Republicans and seven whom are Democrats. A quorum of the entire Committee is ten. Respondent believes that by convening only nine members of the Committee, the open meeting requirements of state law do not apply, and he could close the meeting to the public. However, the nine constituent members of his group constitute a majority of the Committee, by party, and those members have the power to control all legislation considered by the Committee.

There are no material disputes of fact about the actions and occurrences described, above. The issue presented is one of law.

DISCUSSION

Article II, § 9, of the Montana Constitution mandates that the public be allowed “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.” This provision exists to ensure trust, truth, and faith in our state government and is “too fundamental to be entrusted to the whims of those who neither understand its constitutional birthright nor honor its power to breach the wall of secrecy that divides the government from the governed.” *Havre Daily News, LLC v. City of Havre*, 2006 MT 215, ¶ 85, 333 Mont. 331, 142 P.3d 864 (Nelson, J., concurring and dissenting). The press assists and facilitates the public’s rights under Art. II, § 9.

The closed government meeting outlined above does not serve this purpose and undermines Montana citizens’ right to know how their government is operating and observe all deliberations. Accordingly, Petitioners move for judgment on the pleadings, pursuant to M.R.Civ. P. 12(c) and (d). A party moving for judgment on the pleadings pursuant to Rule 12(c) must establish that no issues

of fact exist and that it is entitled to judgment as a matter of law. *Curtis v. Citibank*, 2011 MT 247, ¶ 6, 362 Mont. 211, 261 P.3d 1059.

When evaluating a Rule 12(c) motion, a district court must assume as true all of the well-pleaded factual allegations in the nonmovant's pleadings and must assume as false all contravening assertions in the movant's pleadings. *Curtis*, ¶ 6; *Firelight Meadows, LLC v. 3 Rivers Telephone Coop., Inc.*, 2008 MT 202, ¶ 11, 344 Mont. 117, 186 P.3d 869. A motion for judgment on the pleadings is appropriate in situations where all material allegations of fact are admitted, or not controverted, in the pleadings, and only questions of law remain to be decided by the court. *Curtis*, ¶ 6; *Conway v. Benefis Health Sys., Inc.*, 2013 MT 73, ¶ 21, 369 Mont. 309, 297 P.3d 1200. This action presents such a case.

The legal issue presented by this declaratory claim is whether the meetings of this sub-group of Republican members of the Judiciary Committee, who have majority control of the entire Committee, are subject to the "right-to-know" even if the nine member majority does not constitute a full quorum of the entire Committee. Or, conversely, whether a public body can evade the open meetings guarantees of Article II, Section 9 by reducing the members of the sub-group to less than a quorum of the body.

Section 2-3-202, MCA, defines a “meeting” as a “convening of a quorum of the constituent membership of a public agency...to discuss...a matter over which the agency has supervision, control, jurisdiction or advisory power.” Pursuant to § 2-3-203(1), MCA, all “meetings” must be open. Respondent’s purpose in convening one member short of a quorum was to conduct a meeting to discuss important legislation in private, outside the scrutiny of the public. Recognizing that a public body might seek to evade the open meeting requirements of the statute, the Legislature adopted an amendment to clarify that any such subgroup would also be subject to the law. Specifically, § 2-3-203(6), MCA, provides: “Any committee or subcommittee appointed by the public body...for the purpose of conducting business within the jurisdiction of that agency is subject to the requirements of this section.”

It is anticipated that the Respondent may argue that this group of Republican House members was not a “committee or subcommittee appointed by the public body,” so the open meeting requirements do not require the group to conduct business in open session. But these arguments beg the proverbial question: does Article II, Section 9, guarantee the public’s right to observe the discussions of this subgroup of the House Judiciary Committee? In the course of construing the meaning of Article II, Section 9, the Montana Supreme Court has applied the right-

to-know to similar subgroups which do not have quorums because they do not vote but do exercise governmental authority. From these decisions made in the context of subgroups like the one created by Respondent, the answer is clearly, yes.

Article II, Section 9, commonly referred to as the “Right to Know” provision of the Montana Constitution, has been implemented primarily through Montana’s open meeting laws, located at §§ 2-3-201 through -221, MCA. *Common Cause v. Statutory Committee*, 263 Mont. 324, 329, 868 P.2d 604, 607 (1994). The Legislature created the open meeting laws with the intent that the deliberations of the public agencies of this State be conducted openly. To that end, the provisions of the open meeting laws must be liberally construed. Section 2-3-201, MCA.

The Montana Supreme Court has determined that, in the context of § 2-3-203(1), MCA, the phrase “public or governmental bodies” means a group of individuals organized for a governmental or public purpose. *Common Cause*, 263 Mont. at 330, 868 P.2d at 608; *Bryan v. Yellowstone Cnty. Elem. Sch. Dist. No. 2*, 2002 MT 264, ¶ 25, 312 Mont. 257, 60 P.3d 381. Therefore, pursuant to § 2-3-203(1), MCA, any group of individuals organized for a governmental or public purpose must allow their meetings to be open to the public. *Associated Press v. Crofts*, 2004 MT 120, ¶ 17, 321 Mont. 193, 89 P.3d 971.

In several past cases, the Supreme Court has been asked to resolve whether certain “non-formal,” *ad hoc* groups created by governmental agencies were subject to the requirements of Article II, Section 9. In each instance, the Court concluded that if the committee was formed to perform some type of governmental function, they were required to open their meetings to the public. *See Common Cause*, 263 Mont. at 330, 868 P.2d at 608 (a committee created by statute to assist in the governor’s selection of a Commissioner was subject to the open meeting laws); *Bryan*, ¶ 26 (a committee created by a school district to research a proposition and submit a recommendation to the school board was subject to the “Right to Know” provision of the Montana Constitution); and *Great Falls Tribune Co., Inc. v. Day*, 1998 MT 133, ¶ 18, 289 Mont. 155, 959 P.2d 508 (a committee created by the Department of Corrections to screen proposals for the construction of a private prison was a public body subject to the right-to-know provision of the Montana Constitution).

The *Crofts* decision is directly relevant to the issue presented in this case. In *Crofts*, the open meetings issue arose when Richard Crofts, Montana’s Commissioner of Higher Education met over an 18-month period with a group of upper-level employees of the University System, such as University presidents and chancellors. The meetings were called to discuss issues related directly to the

operation of the University System. The various members who attended the meetings were in their official capacity as upper-level University employees and were compensated for their attendance with public funds.

Crofts contended that the employees with whom he met changed from meeting to meeting, and that it was not a public body as contemplated in the open meeting laws, because the Committee's membership was not fixed, no number of members were required to attend to constitute a quorum, and neither direct action nor votes were taken at the meetings. The Court rejected this argument and concluded that under Montana's Constitution and statutes, which must be liberally interpreted in favor of openness, the meetings were subject to Montana's open meetings laws.

In *Crofts*, the Court articulated the following non-exhaustive factors to consider when determining if a particular committee's meetings are required to be open to the public:

(1) whether the committee's members are public employees acting in their official capacity; (2) whether the meetings are paid for with public funds; (3) the frequency of the meetings; (4) whether the committee deliberates rather than simply gathers facts and reports; (5) whether the deliberations concern matters of policy rather than merely ministerial or administrative functions; (6) whether the committee's members have executive authority and experience; and (7) the result of the meetings.

Crofts, ¶ 22.

The Court specifically addressed Crofts' contention that § 2-3-202, MCA, defines the term "meeting" as the convening of a quorum his meetings did not qualify because no "quorums" existed among the various University officials with whom he had met. The Court concluded that nothing in the plain language of § 2-3-202, MCA, required that a meeting produce some particular result or action, or that a vote on something be taken. All that is required is that a quorum of the group convene to conduct its public business. *Crofts*, ¶ 30. The parties agreed there were no established rules of procedure and no quorum requirements. Accordingly, the Court looked to the common law and held that a quorum consisted of the members who attended any particular meeting:

The common law rule is that a quorum of any body of an indefinite number consists of those who assemble at any meeting thereof. *Application of Havender* (1943), 181 Misc. 989, 992, 44 N.Y.S.2d 213. There being no statute, rule, or precedent to the contrary, this rule of common law applies in this instance to our interpretation of § 2-3-202, MCA (2001). Section 1-1-108, MCA (2001). Moreover, our constitution mandates that the deliberations of public bodies be open, which is more than a simple requirement that only the final voting be done in public. *Devices such as not fixing a specific membership of a body, not adopting formal rules, not keeping minutes in violation of § 2-3-212, MCA, and not requiring formal votes, must not be allowed to defeat the constitutional and statutory provisions which require that the public's business be openly conducted.*

Crofts, ¶ 31 (emphasis supplied).

The scheme utilized by Respondent to conduct closed discussions with his Republican colleagues on the House Judiciary Committee is to simply reduce the number of meeting members to less than a quorum. But, application of the *Croft* factors clearly mandates compliance with Montana's "Right to Know." The convening members of this group are public employees acting in their official capacity; they meet in the public's State Capital building and are paid by public funds, they apparently meet whenever important votes are to be taken in Committee; they deliberate concerning matters of public policy; the members of this group clearly have authority as members of the Judiciary Committee and because they can out vote the opposing party on the Committee they have the power to decide the fate of legislation considered by the Committee. Finally, consistent with the tenets of *Crofts*, the closed meeting violated the constitutional and statutory requirements of the "Right-to-Know" because a quorum of the Republican members of the House Judiciary Committee were present during the meeting.

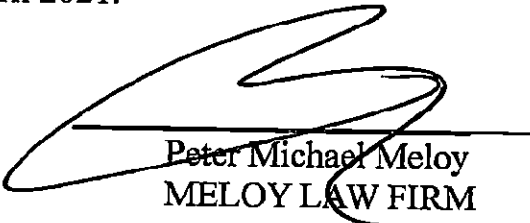
It is quite conceivable that after discussing the legislation in the closed meeting, the members could appear in open session and vote without ever disclosing the reasons or rationale for their action. Indeed, this is likely why the practice first evolved. The only way the public can be privy to the reasons for the

members' votes is to observe the matters discussed in the closed session, which as evidenced by this lawsuit, has been obstructed. Such a practice subverts the purpose of Article, II, Section 9, Mont. Const., and violates Montana citizens' right to know and observe all deliberations of public bodies. This Court must accordingly declare the same.

CONCLUSION

Article II, Section 9, of the Montana Constitution guarantees that no person shall be deprived of the right to observe the deliberations of public bodies. Government operates most effectively, most reliably, and is most accountable when it is subject to public scrutiny. *Day*, ¶ 34. Following the general mandate that right-to-know jurisprudence must be liberally construed, the meeting of these Republican members of the Judiciary Committee constitute a public body which deliberates on substantive issues that are the public's business. It is respectfully requested that the Court find and determine that the meetings of this body are subject to the requirements of Montana's open meeting laws and Article II, Section 9, of the Montana Constitution.

DATED this 1st day of April 2021.



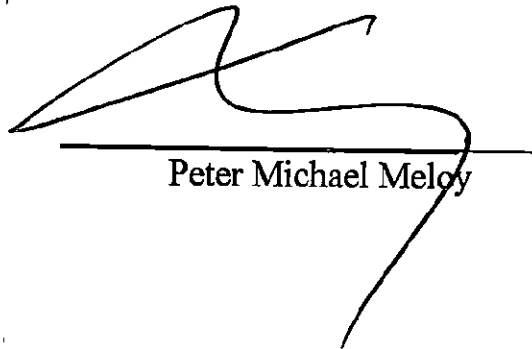
Peter Michael Meloy
MELOY LAW FIRM

P.O. Box 1241
Helena, MT 59624
Attorney for Petitioners

CERTIFICATE OF SERVICE

This is to certify that on the 1st day of April 2021, a true and exact copy of the foregoing document was served via by email and U.S. Mail on the following:

Austin Knudson
Derek Ostreicher
Aislinn Brown
P.O. Box 201401
Helena, MT 59620-1401



Peter Michael Meloy