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FILED

JUL 8 2021

ANGIE SPARKS, Clerk of District Court
By ~~MARY M GOYINS~~ Deputy Clerk

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

Cause No.: ADV-2021-124

**ORDER ON
PETITIONER'S MOTION FOR
JUDGMENT ON THE
PLEADINGS
and
RESPONDENT'S MOTION TO
DISMISS**

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
BROADCASTER'S ASSOCIATION,
and THE MONTANA NEWSPAPER
ASSOCIATION,

Petitioners,

v.

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

Respondent.

1 Before the Court are two motions. Petitioners Associated Press,
2 Billings Gazette, Montana Standard, Helena Independent Record, Bozeman Daily
3 Chronicle, Missoulian, Montana Standard, Montana Free Press, Ravalli Republic,
4 Lee Enterprises, Hagadone Media Montana, Montana Broadcaster's Association,
5 and Montana Newspaper Association filed a motion judgment on the pleadings.
6 Respondent Barry Usher (Usher), in his capacity as Chair of the Montana House
7 of Representatives Judiciary Committee, filed a motion to dismiss.

8 STATEMENT OF FACTS

9 Petitioners are wire news and digital services, daily Montana
10 newspapers, publishers and owners of Montana newspapers, and membership
11 organizations of radio, television and news media. Usher is the Chair of the
12 Judiciary Committee of the Montana House of Representatives. On January 12,
13 2021, Usher presided over a meeting of the House Judiciary committee in which
14 the matter of executive action would occur on several bills, some of which
15 pertained to transgender health and abortion. Upon convening the meeting with a
16 quorum present, before the members voted on the legislation, Usher called for a
17 recess. The apparent reason for doing so was to allow Usher to discuss the
18 proposed legislation in private with other members of the Republican majority on
19 the committee. During the recess, Usher and some Republican members of the
20 committee convened in a room in the basement of the Capitol building. Mara
21 Silvers, a reporter for the Montana Free Press, sought to enter the room to
22 observe and report on the matters discussed. Usher told Silvers the meeting was
23 closed. He further explained that three Republican members of the House
24 Judiciary committee were excluded from the meeting. Of the 19 members of the
25 committee, only 8 or 9 were present in the basement. Because those remaining

1 did not constitute a quorum of the full committee, Usher told Silvers the meeting
2 could proceed in private.

3 After the meeting, Usher reconvened the House Judiciary
4 committee and proceeded to take executive action by voting on the bills.
5 Petitioners subsequently brought this action, asking the Court to declare Usher's
6 closure of the meeting in violation of Montana's constitutional right to know, as
7 guaranteed under Article II, Section 9 and Article V, Section 10 of the Montana
8 Constitution. Petitioners filed a motion seeking judgment on the pleadings.
9 Usher filed a motion to dismiss.

10 PRINCIPLES OF LAW

11 "No person shall be deprived of the right to examine documents or
12 to observe the deliberations of all public bodies or agencies of state
13 government and its subdivisions, except in cases in which the
14 demand of individual privacy clearly exceeds the merits of public
15 disclosure."

Article II, Section 9 of the Montana Constitution.

16 To conform with Article II, Section 9, Montana's open meeting law provides,

17 "[a]ll meetings of public or governmental bodies, boards, bureaus,
18 commissions, agencies of the state, or any political subdivision of
19 the state or organizations or agencies supported in whole or in part
20 by public funds or expending public funds, including the supreme
21 court, must be open to the public."

Montana Code Annotated § 2-3-203(1).

22 "As defined by statute, a "meeting" is a "convening of a quorum of
23 the constituent membership of" the public or governmental body or
24 board, "whether corporal or by means of electronic equipment, to
25 hear, discuss, or act upon a matter over which the [body or board]
has supervision, control, jurisdiction, or advisory power."

Section 2-3-202, MCA.

Raap v. Bd. of Trs., 2018 MT 58, ¶ 8, 391 Mont. 12, 414 P.3d 788.

1 In reviewing a motion to dismiss pursuant to Montana Rule of
2 Civil Procedure 12(b)(6), courts must consider the complaint in the light most
3 favorable to the plaintiff and accept the allegations in the complaint as true.
4 *Goodman Realty, Inc. v. Monson*, 267 Mont. 228, 231, 883 P.2d 121, 123 (1994).
5 A complaint should not be dismissed under Rule 12(b)(6) unless it appears
6 beyond a doubt that the plaintiff can prove no set of facts to support his claim
7 which would entitle him to relief. *McKinnon v. W. Sugar Coop. Corp.*,
8 2010 MT 24, ¶ 12, 355 Mont. 120, 225 P.3d 1221. In other words, dismissal is
9 justified only when the allegations of the complaint itself clearly demonstrate the
10 plaintiff does not have a claim. *Buttrell v. McBride Land & Livestock Co.*,
11 170 Mont. 296, 298, 553 P.2d 407, 408 (1976). For these reasons, a trial court
12 rarely grants a motion to dismiss for failure to state a claim upon which relief can
13 be granted. If a complaint lacks specificity, further discovery may be the
14 appropriate remedy, rather than dismissal. *McKinnon*, ¶ 24.

15 An asserted claim is subject to dismissal if, as pled, it is
16 insufficient to state a cognizable claim entitling the claimant to relief. Mont. R.
17 Civ. P. 12(b)(6). Under Rule 12(b)(6), the court must take all well-pled factual
18 assertions as true and view them in the light most favorable to the claimant,
19 drawing all reasonable inferences in favor of the claim. *Anderson v. ReconTrust*
20 *Co., N.A.*, 2017 MT 313, ¶ 8, 390 Mont. 12, 407 P.3d 692.

21 ANALYSIS

22 Usher asks the Court to dismiss the petition because it is undisputed that
23 fewer than a quorum of representatives attended the gathering in the Capitol
24 basement. Accordingly, he argues, their discussion of the proposed legislation
25 did not constitute a “meeting” pursuant to Montana Code Annotated § 2-3-202,

1 and thus does not invoke Montana’s guarantee of open meetings and right to
2 know. The Court agrees. The gathering of a minority of committee members
3 during a recess does not constitute a public meeting that would require the Court
4 to invoke the balancing test pursuant to Article II, Section 9 of the Montana
5 Constitution.

6 Petitioners argue the subgroup of legislators who met to discuss
7 proposed legislation constitutes a quorum—as it was comprised of a majority of
8 the members of the majority party on the committee. The Court is unwilling to
9 redefine “quorum” as “a majority of a majority.” In this case, the eight or nine
10 legislators who gathered in the Capitol basement did not constitute a quorum of
11 the committee, hence no “meeting” occurred.

12 Petitioners cite to *Associated Press v. Crofts*, 2004 MT 120, ¶ 31,
13 321 Mont. 193, 89 P.3d 971, for the proposition that “[d]evices such as not fixing
14 a specific membership of a body, not adopting formal rules, not keeping minutes
15 in violation of § 2-3-212, MCA, and not requiring formal votes, must not be
16 allowed to defeat the constitutional and statutory provisions which require that
17 the public’s business be openly conducted.” Petitioners argue that intentionally
18 limiting the attendees of the recess-gathering to less than a quorum qualifies as a
19 “device” to defeat constitutional and statutory provisions as in *Crofts*. The Court
20 disagrees. *Crofts* is readily distinguished from the case at hand. In *Crofts*, the
21 public body at issue was a “policy committee” assembled by the Montana
22 Commissioner of Higher Education (*Crofts*) consisting of a group of upper-level
23 employees of the university system. *Crofts*, ¶ 6. In distinguishing the policy
24 committee from “merely a fact finding body” or “an *ad hoc* group which came
25 together to consider a specific matter”, the Supreme Court found:

1 The Policy Committee came together at times that were noticed,
2 and agendas were prepared. Moreover [...] the agendas make it clear
3 that the matters deliberated were somehow memorialized, as such
4 matters were remembered, and re-discussed at successive meetings.
5 The Policy Committee's meetings required substantial time,
6 inconvenience and travel by the attendees, all of whom were
7 expected to attend. Further, the various costs of conducting the
8 meetings were paid with public funds.

9 *Crofts*, ¶¶ 23-24.

10 In the present matter, Republican members of the House Judiciary
11 Committee who gathered during a committee recess more closely resembles an
12 *ad hoc* group than the organized deliberative body at issue in *Crofts*. In this
13 distinct circumstance, the precedent established in *Crofts* does not apply. The
14 facts here are further distinguished in that the policy committee, unlike a
15 legislative committee, had no quorum requirement. Accordingly, the Montana
16 Supreme Court took the opportunity to adopt the common law rule that in a
17 deliberative body with no quorum requirement, a quorum is deemed to be all
18 members in attendance. *Crofts*, ¶ 31. By contrast, the House Judiciary
19 committee has very clear quorum requirements. There is no dispute the
20 Representatives who gathered during the recess did not constitute a quorum. For
21 these reasons, *Croft* is not applicable.

22 Both parties cite *Willems v. State*, 2014 MT 82, ¶ 25, 374 Mont.
23 343, 325 P.3d 1204, in support of their positions. In *Willems*, the Montana
24 Supreme Court considered whether “serial one-on-one discussions” between
25 members of the State redistricting committee constituted a “meeting” under
 Montana Code Annotated § 2-3-202. The Montana Supreme Court concluded no
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1 meeting occurred and declined to adopt a so-called “constructive quorum” rule.
2 *Willems*, ¶ 25.

3 Though the *Willems* Court declined to adopt the constructive
4 quorum rule “under the facts presented” therein, (*Willems*, ¶ 25) petitioners argue
5 the Montana Supreme Court is likely to do so under the facts in this case. This
6 Court, however, will not apply the law in anticipation of the Montana Supreme
7 Court recognizing a standard it has previously declined to adopt.


8 Accordingly,

9 **ORDER**

10 **IT IS HEREBY ORDERED** Petitioner’s motion for judgment on
11 the pleadings is **DENIED**.

12 **IT IS HEREBY ORDERED** Usher’s motion to dismiss is
13 **GRANTED**.

14 DATED this 8th day of July 2021.

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17 **MIKE MENAHAN**
18 District Court Judge

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20 cc: Peter M. Meloy, via email at: mike@meloylawfirm.com
21 Austin Knudsen, via email at: Austin.Knudsen@mt.gov
22 Derek Oestreicher, via email at: Derek.Oestreicher@mt.gov
23 Aislinn Brown, via email at: Aislinn.Brown@mt.gov

24 MM/sm/ADV-2021-124 Order – Motion for Judgment on the Pleadings
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