VOLUME NO. 37 OPINION NO. 170

RIGHT TO KNOW - Constitutional right, individual privacy, public disclosure; OPEN MEETING LAW - Right to know, individual privacy, public disclosure; CONSTITUTION OF MONTANA - Article II, section 9; Article II, section 10; REVISED CODES OF MONTANA, 1947 - Section 82-3402.

HELD: A public body may close a meeting under section 82-3402 when the matter discussed relates to individual privacy and the demand for individual privacy clearly exceeds the merits of public disclosure.

27 November 1978

Harold F. Hanser, Esq.
Yellowstone County Attorney
Yellowstone County Courthouse
Billings, Montana 59101

Dear Mr. Hanser:

You have requested my opinion on the following question:

> Can a public body close a meeting under the collective bargaining exception to the Open Meeting Law when the matter discussed relates to wages, but not the wages of the bargaining unit?

The material accompanying your letter indicates that during the pendency of contract negotiations between the city and the police union, the city council closed a portion of its regular meeting while discussing wage increases to be given to non-union police supervisory personnel. The material also indicates that the discussion involved personal and private matters relating to the individual supervisory personnel involved.

The answer to your question must begin with an examination of Article II, section 9 of the Montana Constitution, which 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 subdivision, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

This constitutional provision provides public access to governmental documents and operations. However, this right to know is not absolute. When the demands of individual privacy clearly exceed the merits of public disclosure, government documents and operations are not subject to public disclosure. The Constitutional Convention Bill of Rights proposal on the right to know proclaimed:

> The committee intends by this provision that the right to know not be absolute. The right of individual privacy is to be fully respected in any statutory embellishment of the provision as well

> as the court decisions that will interpret it. To the extent that a violation of individual privacy outweighs the public right to know, the right to know does not apply. Montana Constitutional Convention, Bill of Rights Proposal, No. VIII, p.23. (Emphasis added.)

The right of individual privacy is recognized by Article II, section 10, Constitution of Montana 1972, as follows:

> The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.

The 1972 Montana Constitution applies a balancing test between the public's right to know and the demands of individual privacy when concerned with public accessibility issues.

This test is found in our Open Meeting Law, section 82-3402, R.C.M. 1947, which requires all meetings of public and governmental bodies to be open to the public. As section 82-3402 states in part:

> ...Provided, however, the presiding officer of any meeting may close the meeting during the time the discussion relates to a matter of individual privacy, and then, if, and only if, the presiding officer determines that the demands of individual privacy clearly exceed the merits of public disclosure.

The history of this statutory provision indicates that the Legislature has repeatedly broadened its coverage, even though it is not yet coextensive with the rights granted by Article II, section 9 of the Constitution.

To the extent quoted, the open meeting statute is coextensive with the constitutional right to know. Both allow closing a meeting where there is an interest in individual privacy which outweighs the merits of public disclosure. While it is not the function of an Attorney General's opinion to find and determine facts, it is apparent that the meeting which is the subject of your inquiry involved matters of individual privacy. Therefore, the privacy provisions of both the Constitution and the open meeting statutes are triggered and the meeting was properly subject

to closure to the extent that matters of individual privacy were discussed, and to the extent that the privacy aspect of those matters outweighed the merits of public disclosure.

A proper application of this balancing test involves the following steps: (1) determining whether a matter of individual privacy is involved, (2) determining the demands of that privacy and the merits of publicly disclosing the information at issue, and (3) deciding whether the demand of individual privacy clearly outweighs the demand of public disclosure. This balancing test and the extent and applicability of claims to individual privacy are more fully explored in 37 OP. ATT'Y GEN. NO. 107. The test must be made and the decision to close a meeting with the reasons therefore must be made publicly prior to closing a meeting.

The open-meeting statute purports to go beyond the interests of individual privacy by providing (section 82-2302):

> However, a meeting may be closed to discuss a strategy to be followed with respect to collective bargaining or litigation when an open meeting would have a detrimental effect on the bargaining or litigating position of the public agency.

Article II, section 9 of the Constitution contains no such provision. On its face, section 82-3402 would allow an agency to close a meeting to the public which Article II, section 9 would require to be open.

While it is beyond the scope of this opinion to question the constitutionality of section 82-3402, the patent conflict between the statute and the constitution is unavoidable. If such a conflict is found by a court to exist, the constitutional provision must prevail and the meeting must be open to allow the public "to observe the deliberations." When there is an overlap between collective bargaining or litigation strategy and matters of individual privacy, the balancing test in both Article II, section 9 and 82-3402 can be utilized to determine whether the meeting should be closed. It is clear, however, that the mere presence of discussions relating to collective bargaining or litigation strategy without more is insufficient to allow a meeting to be closed under Article II, section 9.

This conflict between Article II, section 9 and section 82-3402 has caused a great deal of confusion for public bodies, the press and interested citizens. These persons are unsure, on the one hand, of when they can close meetings

and, on the other, of whether meetings that are closed have been lawfully closed. The Legislature should remedy this situation by either amending the open-meeting statute, section 82-3402, to conform with Article II, section 9, or taking steps to amend Article II, section 9 to allow closure in instances other than matters of individual privacy. This choice between these alternatives is one for the Legislature or the people to make, but it must be made.

THEREFORE, IT IS MY OPINION:

> A public body may close a meeting under section 82-3402 when the matter discussed relates to individual privacy and the demand for individual privacy clearly exceeds the merits of public disclosure.

Very truly yours,

MIKE GREELY
Attorney General