

VOLUME NO. 38

OPINION NO. 33

OPEN MEETINGS - Quasi-judicial bodies, deliberations after public hearings;
RIGHT-TO-KNOW - Open meetings, quasi-judicial bodies, deliberations after public hearings;
ADMINISTRATIVE LAW - Quasi-judicial bodies, open meetings, deliberations after public hearings;
1972 MONTANA CONSTITUTION - Article II, section 9;
MONTANA CODE ANNOTATED - Sections 2-3-201, 2-3-203, 49-2-501, et seq., 49-2-505(2).

HELD: The deliberations of the Human Rights Commission following a contested case hearing are subject to the Montana Open Meeting Act. They must be open to the public unless the presiding officer determines that the discussion relates to a matter of individual privacy, and that the demands of individual privacy clearly exceed the merits of public disclosure.

14 August 1979

Karen Townsend, Chairperson
Montana Human Rights Commission
Power Block
Helena, Montana 59601

Dear Ms. Townsend:

You have requested my opinion on the following question:

May the Human Rights Commission lawfully close to the public its deliberations on contested cases after the cases have been heard in an open public hearing?

The Human Rights Commission is charged with the duty of conducting hearings upon and disposing of complaints alleging a prohibited discriminatory practice. § 49-2-501, et seq., MCA. These hearings are contested cases under the Montana Administrative Procedure Act. § 49-2-505(2), 2-4-601, et seq., MCA.

The Montana Open Meetings Act broadly intends that "actions and deliberations of all public agencies ... be conducted openly," and that its provisions be "liberally construed." § 2-3-201, MCA. Since the Act applies to meetings of all "governmental bodies, boards, bureaus, commissions, or agencies of the state" (emphasis added), the Human Rights Commission is subject to its provisions and must open all of its meetings unless one of the Act's exceptions applies. § 2-3-203, MCA.

Section 2-3-203(2), MCA, allows the presiding officer of a meeting to close it during the time the discussion relates to matters of individual privacy when a determination is made that the "demands of individual privacy clearly exceed the merits of public disclosure." See also, Mont. Const., art. II, § 9. The right of individual privacy may be waived, however, by the individual involved, and in that instance the meeting must be opened. Considering the nature of the cases heard by the Commission, it is likely that there are many instances in which the deliberations could be closed on this basis. The Act, however, does not allow a blanket policy in this regard. Each case must be considered individually.

You have raised the question of whether, notwithstanding the fact that the Open Meetings Act on its face applies to the Commission, its deliberations should be exempted therefrom because they are akin to the deliberations of a jury or an appellate court. This issue has not been litigated in any reported decisions in Montana. There is no general consensus among those jurisdictions in which the question has arisen.

Several states have specific exemptions in their open meeting laws for judicial proceedings, see, e.g., Appeal of Emmanuel Baptist Church, 364 A.2d 536 (Comm. Ct. Pa. 1976), while in others the judicial exemption is implied by the courts. See Canney v. Board, 278 So.2d 260 (Fla. 1963). The issue addressed in these cases is whether quasi-judicial deliberations are within the judicial exemption. While there is no such express or judicially created exemption in Montana, it can be presumed that one would probably be found by our Court in the proper case. The better reasoned of the opinions on this issue hold that quasi-judicial status means only that the body is acting under constitutional strictures imposed upon administrative boards, and not that these boards have become part of the judiciary. Canney, supra, 278 So.2d at 263; Appeal of Emmanuel Baptist Church, supra, 364 A.2d at 540. Construing the quasi-judicial bodies to be judicial bodies, it is held, would violate the doctrine of separation of powers since these administrative agencies are usually creatures of and under the control of the Legislature. Id. The argument in favor of full public accountability is held to be even stronger when the board involved is appointed and not elected. Appeal of Emmanuel Baptist Church, supra.

Other courts, however, have flatly held that quasi-judicial proceedings are entitled to the same exemptions from open meetings laws as appellate courts. Arizona Press Club v. Arizona Board of Tax Appeals, 558 P.2d 697 (Ariz. 1976); Stillwater S&L Board, 534 P.2d 9 (Okla. 1975); State v. State Career Service, 320 So.2d 846 (Fla. App. 1978). The State Career Service case is directly contra to Canney, supra, a prior decision of that state's supreme court, and reaches that result without even citing Canney. Therefore, its precedential value is doubtful. Unless the Legislature or the courts in Montana are inclined to adopt an exemption from the express provisions of our Open Meeting Act for quasi-judicial deliberations, I am unwilling to create that exemption here.

One major concern that the courts have, as demonstrated by the dissent in Canney, 278 So.2d at 264, is that any determination of individual rights in a quasi-judicial proceeding should, as a matter of due process, be conducted in a "judicial atmosphere." This would entail quasi-judicial bodies conducting open hearings and secret deliberations and then issuing public decisions under the applicable administrative procedure act. See Stillwater S&L, supra. Our Open Meeting Act specifically addresses this problem by allowing the closure of any proceeding in which the individual's right to privacy outweighs the public's right to know. In such cases, which may be common before the Human Rights Commission, the attributes of a "judicial atmosphere" can be preserved. In the case of other quasi-judicial bodies which consider questions of broader public impact, the expansive intent in our Constitution and statutes favoring public disclosure can be preserved. If this inhibits frank discussion of views and issues by board members, that is a price demanded by our Constitution and our Legislature so that the people of Montana do not "abdicate their sovereignty to the agencies which serve them."

THEREFORE, IT IS MY OPINION:

The deliberations of the Human Rights Commission following a contested case hearing are subject to the Montana Open Meeting Act. They must be open to the public unless the presiding officer determines that the discussion relates to a matter of individual privacy, and that the demands of individual privacy clearly exceed the merits of public disclosure.

Very truly yours,

MIKE GREELY
Attorney General