

OPINIONS OF THE ATTORNEY GENERAL

VOLUME NO. 42

OPINION NO. 42

CORPORATIONS - Application of open meeting law to private corporation that has contract with state to operate and maintain state property;
HISTORICAL SOCIETY - Duty to maintain and preserve property which it owns;
HISTORICAL SOCIETY - Power to contract with private party;
OPEN MEETINGS - Application of open meeting law to private corporation that has contract with state to operate and maintain state property;
PROPERTY, PUBLIC - Application of open meeting law to private corporation that has contract with state to operate and maintain state property;
PROPERTY, STATE - Application of open meeting law to private corporation that has contract with state to operate and maintain state property;
MONTANA CODE ANNOTATED - Sections 2-3-201, 2-3-203, 22-2-305, 22-3-101, 72-16-445 to 72-16-450;
MONTANA CONSTITUTION - Article II, section 9;
OPINIONS OF THE ATTORNEY GENERAL - 37 Op. Att'y Gen. No. 170 (1978).

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HELD: The Daly Mansion Preservation Trust is a public body within the meaning of the open meeting law as it is performing a public function and is receiving funds generated by public property.

3 December 1987

John W. Robinson
Ravalli County Attorney
Ravalli County Courthouse
Hamilton MT 59840

Dear Mr. Robinson:

You requested my opinion regarding the following question:

Is a private corporation that has contracted with the state to restore and preserve state-owned property subject to the open meeting law standards set forth in section 2-3-203, MCA?

The Marcus Daly mansion and the 40 acres on which it is located near Hamilton, Montana, were deeded to the Montana Historical Society on December 31, 1986. The property was transferred pursuant to sections 72-16-445 to 450, MCA, which allow transfers in kind to the Historical Society. On that same date, an agreement was entered into by the Historical Society, the Valley Community Arts Council of Hamilton (hereinafter Arts Council), and the Daly Mansion Preservation Trust, Incorporated (hereinafter Trust). The agreement provides for the restoration and preservation of the Mansion by the Arts Council and the Trust. It states in part:

The Council through the Trust as well as in its own right, does hereby accept responsibility for the operation, stabilization and restoration of the property known as the Daly Mansion located in Ravalli County, Montana.

....

The Council through the Trust, and the Trust itself when formed in accepting this responsibility, does agree to:

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- 1) Raise funds by:
 - a) conducting tours
 - b) organizing special events and other promotions
 - c) planning commercial activities in keeping with the special covenants applicable to the building and its grounds
 - d) applying for local, state and national grants, donations and other traditional channels of funding.

- 2) Maintain daily operational procedures and provide:
 - a) security
 - b) insurance
 - c) advertising
 - d) staffing
 - e) maintenance
 - f) financial reports on a quarterly basis which shall be provided to the Society
 - g) generally accepted commercial procedures
 - h) Notwithstanding anything contained herein to the contrary, no work including maintenance, shall be done which alters the fabric of any structure on the real property without the written concurrence of the Society and provided further that all work when authorized shall be done in accordance with Secretary of Interior Standard for Historic Structures.

- 3) Stabilization procedures for all of the buildings and grounds by:
 - a) seeking professional architectural, engineering and contracting help
 - b) funding all material and labor costs
 - c) seeking in-kind and donated labor where ever possible.

- 4) Establishing long term goals for the restoration of the buildings, grounds and gardens.

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- 8) The Council through the Trust and the Trust itself when formed agrees to work

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closely with and accept direction from the Montana Historical Society.

The agreement provides that the "Trust shall be formally organized and qualified under all state and federal laws to perform the obligations herein outlined." After the agreement was entered into the Trust was organized as a private nonprofit corporation.

Montana's open meeting statute is coextensive with the constitutional right to know. Both must be considered where there is a question of the right to attend a meeting wherein matters of public interest are allegedly being discussed. 37 Op. Att'y Gen. No. 170 at 718 (1978).

Article II, section 9 of the Montana Constitution provides:

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.

Relevant Montana statutes also strongly favor open meetings of governmental bodies. Section 2-3-201, MCA, states that it "is the intent of this part that actions and deliberations of all public agencies shall be conducted openly." Section 2-3-203, MCA, provides:

(1) All meetings of public or governmental bodies, boards, bureaus, commissions, agencies of the state, or any political subdivision of the state or organizations or agencies supported in whole or in part by public funds or expending public funds must be open to the public.

The corporation involved here was not created by or as a governmental body. However, given the circumstances under which it was formed, the nature of the Trust must be examined.

The State of Montana has the power to contract with private parties for the performance of some activities. In this case a state agency, the Historical Society, contracted with two private parties. The Historical Society, according to section 22-3-101, MCA, was created for, among other things, "the acquisition, perservation, and protection of ... historical places ... and the

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custody, maintenance, and operation of ... historical places." Here the Historical Society contracted with the Trust for the restoration, preservation, and general operation of property which it now owns. The agreement provides that in doing so, the Trust must maintain a working relationship with the Historical Society; the Trust is to accept direction from the Historical Society.

The nature of the contract in this case is unique. The Historical Society arguably has the duty to maintain and preserve property which it owns. It also has the power to contract with private parties for the performance of those activities. But in so doing, it does not lose all power and responsibility with regard to the property. Conversely, the Trust, as a private entity, has not gained all power over the property.

One of the duties stated in the agreement is to conduct tours of the Daly Mansion property. The Trust collects a fee for such tours. According to the agreement, the Trust is also to plan "commercial activities" regarding the property and to apply for grants, donations, and other funding. Finally, it is to keep all funds "generated or received by the Valley Community Arts Council or the Daly Mansion Preservation Trust" and use them for the "perpetuation of the Daly Mansion and related grounds." Thus, in performing duties pursuant to the agreement, the Trust is allowed to keep moneys generated by the promotion, viewing, and enjoyment of state property.

This interplay of private and public functions leads me to the conclusion that the Trust is acting as a public body within the intentment of Article II, section 9 of the Montana Constitution and section 2-3-203, MCA. Although this issue has not arisen in Montana, courts in other states have determined the applicability of open meeting laws based on such factors as the funding, membership, and public or nonpublic nature of an association's functions and activities. See Hunerjager v. Dixie Electric Membership Corporation, 434 So. 2d 590 (La. Ct. App. 1983) (corporation that receives no public funds and that is not involved in a direct governmental function is not a public body within open meeting law definition); Seghers v. Community Advancement, Inc., 357 So. 2d 626 (La. Ct. App. 1978) (corporation organized to perform governmental function, supported by tax-derived funds, is subject to open meeting law); Perlongo v. Iron River Cooperative TV Antenna Corporation, 332 N.W.2d 502 (Mich. Ct. App. 1983) (corporation given a nonexclusive franchise to operate within a city is not subject to open meeting law); Courier-Journal and Louisville Times

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Company v. University of Louisville Board of Trustees,
596 S.W.2d 374 (Ky. Ct. App. 1977) (university
foundation must hold open meetings as long as bylaws
require quorum of the members of a public agency).

My conclusion that the meetings of the private corporation involved here are subject to the open meeting law of Montana does not preclude a different conclusion where a corporation is involved in nongovernmental activities. Here the Trust's functions and activities involve state-owned property and therefore its operations are permeated with state concerns. The public's right to know requires that the Trust's meetings be subject to the open meeting law.

THEREFORE, IT IS MY OPINION:

The Daly Mansion Preservation Trust is a public body within the meaning of the open meeting law as it is performing a public function and is receiving funds generated by public property.

Very truly yours,

MIKE GREELY
Attorney General