

EXHIBIT 1
DATE 3/8/2011
SB 217



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JOHN M. BARROWS
EXECUTIVE DIRECTOR

March 8, 2011

Rep. Ken Peterson
Members
House Judiciary Committee

Proponent Testimony: SB 217 – Attorney fees on right to know cases

Following the 1972 Montana Constitutional Convention, citizens were granted the Constitutional Right to Know. It was the first state in the country to afford its citizens the right to know, including both the right to know and to participate in the actions of government as constitutional rights.

Until 2006, the Montana Supreme Court had consistently held that a citizen who prevailed in a right-to-know suit was entitled to recover fees under 2-3-221.

Until that time, the Court recognized the importance of the "fee-shifting" provision in enforcing the constitutional guarantees of Article II, Section 9 and encouraging a governmental entity to provide documents or open meetings without litigation, lest they have to pay attorney fees if they refuse. The Court also recognized certain protections for the governmental entity in that the courts could deny fees in cases where the requesting party did not prevail and the lawsuit was frivolous or without foundation.

The purpose of 2-3-221 when initially enacted had a dual purpose. First, the one cited above, to act as an incentive for government to comply with requests for access in order to avoid the financial implications of having to pay the requestors fees.

Second, most citizens, and, indeed, many media outlets, can't afford to bring litigation because of the costs. Without the "fee-shifting" provisions of 2-3-221 many of the leading cases enforcing the right-to-know would never have happened and the legal guarantees to access to government would be toothless. It really is the only "penalty" for a governmental entity that refuses to comply with the constitutional mandates.

In 2006, the Supreme Court dealt with a case arising out of Yellowstone County, Billings High School v. Billings Gazette, 2006 Mont. 329, 149 P.3d 565, 335 Mont. 94. In this case, The

Gazette asked the Billings School District for certain pay information on its teachers and administrators.

Instead of complying with the request, the School District filed a declaratory judgment action asking the district court to review its documents and determine whether they involved questions of individual privacy and thus exempt from disclosure under the right-to-know.

The Court ultimately found that there were no privacy concerns and ordered production of the documents. The Gazette then asked for an award of its attorney fees under 2-3-221 as the prevailing party. The district court refused to award fees because 2-3-221 authorizes fees for the prevailing "plaintiff." Since the Gazette was not a "plaintiff", even though it prevailed, it was denied fees.

On appeal, the Court affirmed the release of the documents, but in what amounted to a 3-2 decision, also affirmed the denial of fees. The two dissenters from the fee issue, Justices Morris and Nelson, recognized that the majority ruling was wrong and would "hinder the public's right to know established under Article II, Section 9." More importantly, the dissenters noted, "the Court's interpretation will have the unintended effect of encouraging, rather than discouraging litigation surrounding these requests." This is so, because instead of asking for documents, a media organization or private citizen will be forced to sue in order to be the "prevailing plaintiff".

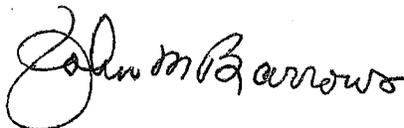
As Justice Morris recognized, "To ask first and litigate later runs the risk of having the public entity file a preemptive declaratory judgment action to immunize itself from any claim of attorney fees pursuant to 2-3-221, MCA."

Since 2006, then, it has been a race to get to the courthouse and some cases have been litigated that would never have occurred if the requestor had been able to follow through and persuade the governmental entity to release the documents.

SB 217 simply restores 2-3-221 to achieve its original purpose: to act as an incentive for government to follow the mandates of the right-to-know and to continue the policy of permitting Montana citizens to recover their attorneys fees if the government is ordered to permit access to documents or open its meetings. It will also have the salutary effect of reducing litigation by eliminating the "race to the courthouse" effect caused by the Billings High School decision.

We urge a "do pass" on SB 217.

Sincerely,

A handwritten signature in black ink that reads "John M. Barrows". The signature is written in a cursive, flowing style.

Executive Director

Attachments: Letter from Ian Marquand; Editorial from Billings Gazette

March 8, 2011

Ian Marquand
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Proponent Testimony for SB 217 – Revise attorney fees in Right to Know cases

Rep. Ken Peterson, Chairman
Members of the Committee
House Judiciary

My name is Ian Marquand and I make these comments as Chairman of the Montana Freedom of Information Hotline and as President of the Montana Professional Chapter of the Society of Professional Journalists. The Hotline serves both journalists and citizens who have questions about open government or are unable to obtain public records or attend public meetings. We offer advice and information at no charge to the requestor. In recent years, we have received a large portion of our requests from non-journalists.

The organizations I represent support Senate Bill 217 to insure that the letter of Montana's open government laws match their spirit. Montana's Constitution states clearly that the public has a right to know about the operations of state and local government and to participate in public processes, unless the right of individual privacy clearly exceeds the right to know.

When Montana citizens or organizations believe their right to receive public records or attend open meetings has been violated, they have no administrative remedy and sometimes must turn to the courts. As we all know, that's an expensive proposition. While Montana law does not contemplate real or punitive damages in these cases, it does allow the awarding of attorney fees to a successful seeker of public information or public access. At present, judges retain the discretion to award fees or not. We do not challenge that discretion.

However, there have been cases in Montana in which government entities have filed their own lawsuits seeking to deny the release of information by a judge's order. In such cases, the government entity is, technically, the "plaintiff." SB 217 simply clarifies that only the seeker of information may be awarded attorney's fees in a case involving public documents or public meetings.

In addition, SB 217 makes it clear that seekers of information may be awarded fees at the appellate level, as well as the district court level. These changes will align the letter of the law with its spirit. We strongly support Senate Bill 217 and ask for a "do pass" recommendation.

Sincerely,

Ian Marquand
Chair, Montana FOI Hotline
President, Montana Pro Chapter, Society of Professional Journalists

Billings Gazette

Gazette opinion: Bill removes barrier to public information

Published Monday, February 14, 2011

The price of accessing public information can include attorney fees when Montana governmental officials refuse to comply with the state's right-to-know laws.

State law does allow citizens to recover their legal costs if they prevail in court on their freedom of information lawsuit. However, some public governmental bodies have taken to filing their own lawsuits against those who request public information. According to the Montana Supreme Court, the law makes no provision for a judge to award legal costs to the public information seeker who is a defendant in a lawsuit filed by the governmental agency withholding the public information.

That Supreme Court ruling came in 2006 in case in which The Billings Gazette sought public information about sexual misconduct of two teachers in a school building. Although the courts ruled that the information was public, the Supreme Court said the District Court judge didn't have the option of making the school district pay part of the newspaper's legal costs because it was the district that sued the newspaper rather than turn over the requested information.

Suing rather than disclosing

In a more recent case, The Gazette requested a copy of a human resources investigation report about the commander of the county jail. Rather than responding to The Gazette directly, the county in February 2010 filed a lawsuit against the newspaper, asking that a District Court judge decide what could be released.

District Judge Ingrid Gustafson rejected the county's request and ordered it to turn over the public documents. Gustafson's decision came after attorney Martha Sheehy, representing The Gazette, argued that: "All of the issues Yellowstone County presents to this court have been resolved — repeatedly — by the Montana Supreme Court. It is a settled question that Yellowstone County has the authority, jurisdiction and duty to process documents requests, including weighing the interests involved."

The Montana Senate last week approved Senate Bill 217, which would give District Court judges the discretion to order government to pay public information seekers' legal costs, regardless of whether they sued government or government sued them.

This bill, sponsored by Sen. Terry Murphy, R-Cardwell, closes a loophole in the state's right to know law. The Senate passed it on a vote of 47-1. We thank all 47 senators who supported it, including the entire Yellowstone County Senate delegation.

Guaranteeing delay

Money is neither the only issue nor necessarily the main issue here. By suing those who request public information, government effectively delays compliance with state law and the constitutional mandate for open government. When government responds to information requests with a lawsuit, it creates a barrier for Montanans who want to exercise their right to know.

Violations of Montana's open records law don't carry any penalty other than the possibility that a judge may order the governmental body that violated the law to pay part or all of the information seeker's legal costs. However, by suing rather than complying with the open records law, government lawyers can guarantee that a decision will be delayed and that the information seekers will have to bear legal costs to assert their right to know.

The Gazette has had to go to court many times to obtain public information that was withheld by government. That's part of our duty as a community newspaper.

However, other information seekers may not have an attorney or be able to afford one. For those folks, the barrier that governmental agencies create by suing instead of disclosing may be insurmountable.

We call upon members of the House to support SB217 and close this loophole in Montana's open records law.