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FILE NO. SB 217



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**JOHN M. BARROWS**  
EXECUTIVE DIRECTOR

January 27, 2011

Chairman  
Members  
Senate Judiciary Committee

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

My name is John Barrows. I am the Executive Director of the Montana Newspaper Association, which represents Montana's daily and weekly newspapers.

I want to thank Sen. Murphy for bringing forth SB 217, which seeks to correct a condition that threatens to seriously affect the ability of citizens to obtain documents and observe the actions and deliberations of their public bodies.

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. And it was also the first to grant a Constitutional Right of Privacy.

Today, almost 40 years later, virtually every state has right to know laws, but only six grant them the force of a state constitutional right. And in every other state, there are a myriad of exemptions.

Only in Montana, however, is that right clearly defined... without a laundry list of ways of getting around it.

In Montana, Article II Section 9, declares that *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.*

This places an assumption of openness on government... which can only be exempted with a plain decision, when needed, that there is an individual right of privacy that is more important.

This has set up the famed balancing act, that requires a government entity to weight the two rights.

In some areas the right of privacy is clearly more important, and these have been defined by the legislative bodies... such as medical records, and other very personal information,

In most, however, the governing body has to make the decision on whether or not individual privacy prevails, and generally requires a claim by an individual of privacy to begin with.

The Legislature allowed only a few very basic, understandable exceptions... and over the years some of them have been eliminated by the Supreme Court outright, including the overturning closing a session for collective bargaining strategy and denying the litigation strategy when the two parties are both public bodies.

These are all included in 2-3-203, for public meetings, and 2-6-101 and following subsections.

The way to enforce a person's right to know were clearly defined, the party seeking the information could sue in district court to enforce its right, after it had been denied by the government body.

The penalties, compared to some states, were sparse... Sec., 2-3-213, allowed any decision made in violation of the Right to Know law, as determined by District Court, to be overturned, and costs and reasonable attorney's fees could be awarded to the person asserting his right.

And that is where this Bill comes into play.

Until 2006, the 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.

The cost of bringing an action in District Court to enforce a right to know can be substantial... in the thousands generally... and of course much more if an appeal is required.

The fees, of course, are at the discretion of the court, and awarded only if the person seeking the information wins.

Then things began to change.

In 2006, the Supreme Court dealt with a case arising out of Yellowstone County, in *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."

What has resulted has developed into a trend of using the declaratory judgment as a way of avoiding paying the attorney fees of the person trying to get the information or set aside a decision.

It has, become, to a point, a race to the courthouse.

A number of Supreme Court decisions, including *Havre City Police v. Havre Daily News*; *Yellowstone County v. Billings Gazette* and *Cut Bank School District v. Cut Bank Pioneer Press* have hinged on this technique of the declaratory judgment, and while in every case those seeking documents or access, have won their cases, all or in part, they all were denied all or part of their attorney fees, or remanded back to District Court to review that question.

So how does Senate Bill 217 deal with this?

Very simply.

The bill reads in Sec. 1,

**"2-3-221. Costs to ~~plaintiff party~~ in certain actions to enforce constitutional right to know.** A ~~plaintiff party~~ who prevails in an action brought in district court or on appeal from a decision of a district court to enforce the ~~plaintiff's party's~~ rights to obtain a document or to have access to a public meeting under Article II, section 9, of the Montana constitution may be awarded costs and reasonable attorney fees."

Let's break down just what is being asked in bill:

The bill changes *plaintiff* to *party*. This was done to avoid the difficulties posed by declaratory judgments, where who would normally be considered the defendant in a suit, is now considered the plaintiff.

With this simple change, and the addition of the words "*to obtain a document or have access to a public meeting*", it makes it very clear that whether it's a straight judicial action with the traditional plaintiff seeking to overturn a decision, or in a declaratory judgment where the body sues to avoid making the decision and relying on the court's decision before releasing information or granting access, the entity never becomes the plaintiff and is never entitled to fees, even if it wins

Note that what it does is eliminate the word plaintiff and substitutes the word party.... this is designed to avoid the problems rising from declaratory judgments... so it doesn't matter if a citizen files a suit against an entity, or if the entity races to the courthouse, and files for a declaratory judgment without granting or denying a request from the citizen... forcing it to have the judge make the decision and not doing the balancing test it is required to do.

When that happens, and it's happening a lot, especially in Billings, and we encountered it in the Havre and Cut Bank cases, among others, is that it effectively makes the entity, and not the person asking for the information, the plaintiff, by making them potentially eligible for fees from the person seeking the information!

While the court has not yet gone so far to do this, it has on several occasions, refused to grant fees the seeker of the information, and refused to reconsider on a request for supplemental relief.

In fact, in the Yellowstone County v. Billings Gazette case Justice Gray left no doubt in her comments, noting there should not even be a question. The County, not the Gazette, filed the action to gain resolution. Since the Gazette was not the plaintiff it has no claim to attorney fees under 2-3-221.

This change would eliminate that reasoning.

We also included both meetings and records, because while it covers both, the current wording does not specify, and since it is included in the open meeting section may raise questions. It is a simple clarification that simply strengthens what the courts have, of course, recognized all along.

The current law specifies only district court... by adding the words dealing with the appeal, we remove that discrepancy.

And by specifying that fees can only go to the party who is seeking to obtain a document or appeal from a decision of a court we add further clarity.

The bill also specifies that even if an appeal follows, the one seeking the information is still the one deserving of reimbursement for costs and attorney fees.

What it does not do, is force the court to award fees at all... that is still within in its judgment. And, of course, fees are only awarded when the government entity has been found to be in violation of the open meeting law.

This was kept, so that the total effect of the bill is not to change 2-3-221's intent in anyway, nor has it was interpreted prior to 2006.

What it does do, however, is to prevent the lure of a government body not making the decision it is required to make vs. The Right to Know and the Right to Privacy, shuffling it off on the court, and being rewarded by insulating itself from any sort of effective penalty for breaking the law.

You will note there is fiscal note attached, and the sum is zero.

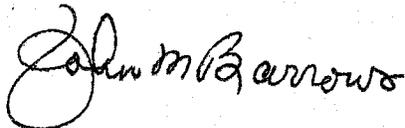
That is because essentially this bill mandates that the entities using the declaratory judgment to subvert the intent of the original 2-3-221 will not only not be rewarded, but in fact, could well force additional lawsuits as the public finds itself rushing to the courthouse ahead of the government, to avoid being involved in a declaratory judgment. In fact, it will continue to foster discussion and efforts to solve the Right to Know concerns prior to the entities final decision, and perhaps avoid a legal action altogether.

We have also included a letter from the Billings Gazette in this testimony, giving their experiences and feelings in this issue, and ask that this letter and our testimony be distributed to the individual members of the committee and made part of the record.

I believe you will also hear from Jan Anderson, publisher of the Boulder Monitor, on the necessity of receiving legal fees for asserting her Right to Know in Jefferson County.

We ask the Committee give this a Do Pass vote.

Sincerely,

A handwritten signature in cursive script that reads "John Barrows". The signature is written in dark ink and is positioned above the typed name and title.

John Barrows, Executive Director  
Montana Newspaper Association

  
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Jan. 28, 2011

To members of the Montana Senate Judiciary Committee:

I wish I could appear in person today, but I know John Barrows of the Montana Newspaper Association will represent our position well on Senate Bill 217.

In case after case in recent years, District Court judges in Yellowstone County have upheld the public's right to know.

Montana law requires production of public documents on request. It is a settled question of law. Yet in several instances in recent years, city and county officials have refused to follow the law and provide documents when requested.

State law doesn't say that citizens must wait to see public documents until a court reviews them. It says public officials who have custody of the documents are to make them available to the public. The law is also clear that county officials are responsible for reviewing documents before they are released. They have the jurisdiction, the authority and the duty to process document requests.

The law presumes that public documents are open. The only exception in law is when privacy interests clearly outweigh public interests. The public officials must weigh the privacy interests of those named in documents against the public's right to know. If there are disagreements over what the public entity releases, then it is appropriate to go to court to seek a judicial determination.

It is not appropriate for public entities to pass that "weighing" responsibility for document review on to a judge. Yet that is what officials from Yellowstone County and the City of Billings have done in recent years. These officials have maintained that they don't have authority or ability to review document requests and determine whether individual privacy trumps the public's right to know.

So they file suit against the requestor. In filing suit to force a judicial review of the issue, the public entity assumes role of plaintiff. Though a request for public documents may have triggered the city or county's lawsuit, the document requester finds himself in a position where he may be forced to pay attorney fees if the court decision goes in favor of the new plaintiff, the public entity.

This tactic delays the production of public documents. It also may be a tactic to discourage an individual or company from pressing for public documents for fear that their request will cost them attorney fees.

The award of attorney fees is one of the few pieces of leverage that an individual citizen, a taxpayer or the local newspaper has to compel a public official to follow the law. Without that attorney-fee provision, even more tactics would be employed to delay the release of public documents.

This amendment makes it clear that the participant in a court action entitled to recover fees is the one seeking to enforce rights under the Montana Constitution. I encourage you to support this needed clarification.

Respectfully submitted,

Steve Prosinski  
Editor  
The Billings Gazette