46 Op. Att'y Gen. No. 24

INSURANCE - Applicability of open meeting law to Montana Life and Health Insurance Guaranty Association board of directors;
OPEN MEETINGS - Applicability of open meeting law to Montana Life and Health Insurance Guaranty Association board of directors;
RIGHT TO KNOW - Applicability of open meeting law to Montana Life and Health Insurance Guaranty Association board of directors;
STATE AGENCIES - Status of Montana Life and Health Insurance Guaranty Association;
MONTANA CODE ANNOTATED - Title 2, chapter 3, part 2; sections 2-3-102, -201, -203(1), 33-10-201, -203(3), -204 to -207, -209, -216, -217, -228, 39-71-2610;
MONTANA CONSTITUTION - Article II, section 9;
OPINIONS OF THE ATTORNEY GENERAL - 46 Op. Att'y Gen. No. 1 (1995).

HELD: The proceedings of the Montana Life and Health Insurance Guaranty Association (MLHIGA) board of directors are subject to the Open Meeting Law, Mont. Code Ann. tit. 2, ch. 3, pt. 2. Thus, the MLHIGA may close a meeting only when and to the extent that the demands of individual privacy clearly exceed the merits of public disclosure.

October 10, 1996

Mr. Mark O'Keefe
State Auditor and
Commissioner of Insurance
Mitchell Building, Room 270
P.O. Box 4009
Helena, MT 59604-4009

Dear Mr. O'Keefe:

You have requested my opinion on the following question:

Are the proceedings of the Montana Life and Health Insurance Guaranty Association (MLHIGA) board of directors subject to the Open Meeting Law, Mont. Code Ann. tit. 2, ch. 3, pt. 2?

You state that because the MLHIGA has many attributes of both a private and a public entity, questions have arisen concerning whether it is subject to the open meeting law. Specifically, the MLHIGA is required by statute to submit to the insurance commissioner a plan of operation and any amendments thereto. Mont. Code Ann. § 33-10-216. The plan and any amendments become effective upon approval in writing by the commissioner. Id. On February 29, 1996, the MLHIGA submitted an amended plan of operation to you for approval. You denied approval, determining that the MLHIGA is a public board and therefore required to provide a procedure for public participation. The MLHIGA disagrees and asserts that it is not a public board and therefore is not required to set forth in its plan of operation procedures to notify the public of its meetings.

The Montana Life and Health Insurance Guaranty Association Act was enacted

to protect policy owners, insureds, beneficiaries, annuitants, payees, and assignees of life insurance policies, health insurance policies, annuity contracts, and supplemental contracts, subject to certain limitations, against failure in the performance of contractual obligations due to the impairment of the insurer issuing the policies or contracts.

Mont. Code Ann. § 33-10-201(2). Members of the association, a class which generally includes all insurers authorized to transact life and health insurance business in Montana, are subject to assessment to provide funds to carry out this purpose and the association is authorized to assist the insurance commissioner in the detection and prevention of insurer impairments. Mont. Code Ann. § 33-10-201(3).

Article II, section 9 of the Montana Constitution sets forth the right of individuals to know the proceedings of their government:

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.

The Montana Constitution is to be given a broad and liberal interpretation. SJL of Montana v. City of Billings, 263 Mont. 142, 146, 867 P.2d 1084, 1086 (1993). The provisions of article II, section 9 are implemented by the open meeting law. Id. The Montana open meeting law states in part:

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.

Mont. Code Ann. § 2-3-203(1). The provisions of the open meeting law, like the constitutional right to know, are to be liberally construed. Mont. Code Ann. § 2-3-201.

There is no consensus among other jurisdictions which have addressed the question of whether an insurance guaranty association is a public body. In Greenfield v. Pennsylvania Insurance Guaranty Association, 353 A.2d 918 (1976), the Commonwealth Court of Pennsylvania ruled that the Pennsylvania Insurance Guaranty Association is not an agency of the Commonwealth within the meaning of a statute giving the Commonwealth Court original jurisdiction of civil actions or proceedings against the Commonwealth, which includes departments, departmental administrative boards and commissions, officers, independent boards or commissions, authorities and other agencies of the Commonwealth. The Court reviewed several attributes of the association which are similar to the MLHIGA in making its determination that the Pennsylvania association is not an agency of the Commonwealth. The Court noted that the association is entirely funded by assessments made upon its members and that it has the power to employ persons necessary to perform its functions, to borrow money, to enter into contracts, to develop its own plan of operation and select its own board of directors, and to hire its own counsel. 353 A.2d at 919-20.

In contrast, in A. S. Abell Publishing Co. v. Mezzanote, 464 A.2d 1068 (1983), the Maryland Court of Appeals held that the Maryland Insurance Guaranty Association was an agency or instrumentality of the state within the scope of the Maryland Public Information Act. The Maryland court noted that the Public Information Act was to be broadly construed in every instance with the view toward public access to the records of "any agency or instrumentality" of the state. 464 A.2d at 1071. The Maryland court held that there is no single test for determining whether a statutorily-established entity is an agency or instrumentality of the state for a particular purpose and all aspects of the interrelationship between the state and the statutorily-established entity must be examined in order to determine its status. 464 A.2d at 1072. The court held that the Maryland Insurance Guaranty Association was an agency or instrumentality of the state because of the degree of control exercised by the State over its operation and because its existence depended upon the General Assembly; it served a public purpose; its management was selected by the commissioner; it did not independently manage its affairs or enforce its regulations; its decisions were subject to reversal by the insurance commissioner; and it enjoyed a special tax and liability status. 464 A.2d at 1074. The Maryland association was in many ways similar to the MLHIGA. The MLHIGA is "under the immediate supervision of the commissioner." Mont. Code Ann. § 33-10-203(3). The insurance commissioner appoints two of the seven members of the MLHIGA board of directors and, while other members of the board are selected by member insurers, the appointments are subject to approval by the commissioner. Mont. Code Ann. § 33-10-204(1). The actions of the MLHIGA board are subject to reversal by the insurance commissioner. Mont. Code Ann. § 33-10-228(2). The MLHIGA also enjoys special tax and liability status. Mont. Code Ann. §§ 33-10-207, -209. Application of the reasoning in Abell would lead to the conclusion that the MLHIGA is a public body subject to the open meeting law.

In my opinion, the Abell decision is more in concert with the rulings of the Montana Supreme Court than the Greenfield decision. Our court has consistently followed the requirement that the constitutional right to know and the open meeting law be liberally construed. In Common Cause v. Statutory Committee, 263 Mont. 324, 330, 868 P.2d 604, 607-08 (1994), the Court held that a statutorily created committee

required to provide the governor with a list of names of possible candidates for the position of commissioner of political practices was a "public or governmental body" subject to requirements of the open meeting statute. The Court stated:

[T]he common understanding of the phrase "public or governmental body" would include a group of individuals organized for a governmental or public purpose.

263 Mont. at 330, 868 P.2d at 608. Application of this broad definition to the MLHIGA leads to the conclusion that it is a public body. The MLHIGA has a clear public purpose--to protect insured members of the public from the extraordinary event of insurance company insolvency. The MLHIGA is statutorily organized for that specific purpose.

In 46 Op. Att'y Gen. No. 1 (1995), I held that the Montana Self-Insurers Guaranty Fund (MSIGF) was a public agency subject to the Montana Open Meeting Law. I concluded in that opinion that the MSIGF met two of the criteria found in the definition of "agency" in Mont. Code Ann. § 2-3-102, in that it had statutory authority to adopt rules and enter into contracts. In reaching that conclusion I specifically reserved judgment on the question presented here, noting that the opinion request before me at that time was limited to the MSIGF and that there were potentially significant statutory differences between the statutes creating the MSIGF and those creating the MLHIGA. Id. at 6. Having now studied the question presented here, I conclude that the Montana Open Meeting Law applies to the MLHIGA.

MLHIGA suggests that the open meeting law cannot be applied to it because it spends no public funds and has no rulemaking authority. In 46 Op. Att'y Gen. No. 1, I relied on the express grant of rulemaking power in the statutes creating the MSIGF to hold that its board of directors met the statutory definition of "agency" under Mont. Code Ann. § 2-3-102(1). See Mont. Code Ann. § 39-71-2610. While the statutes creating the MLHIGA do not contain an express grant of rulemaking authority, they do require the board of directors to adopt an "operating plan," and provide that in the event of the board's failure to do so the commissioner may accomplish the same objective through the adoption of rules. Mont. Code Ann. § 33-10-216.

It is not necessary, however, to resolve here the issue of whether the adoption of the "operating plan" constitutes rulemaking under MAPA. The provisions authorizing the MSIGF to enter into contracts are practically identical to those applicable to the MLHIGA. Compare Mont. Code Ann. § 39-71-2610(2) ("The [MSIGF] may carry out its responsibilities directly or by contract") with Mont. Code Ann. § 33-10-205(1)(a) ("The association may . . . enter into such contracts as are necessary and proper to carry out the purposes and provisions of this part"). Since rulemaking and contracting are listed in the disjunctive in Mont. Code Ann. § 2-3-102, either will suffice to bring an entity within the definition of "agency."

In discussing this issue in 46 Op. Att'y Gen. No. 1, I noted that the factor that distinguishes entities such as the MSIGF from ordinary business corporations is that the MSIGF "is a public organization because it has a public purpose, . . . because its powers to compel membership and assess members derive from the police powers of the state, and because it has been granted specific statutory authority to adopt public rules and enter into public contracts." For the most part, these observations apply with equal force to the MLHIGA. I need not decide the issue of whether the adoption of an "operation plan" constitutes rulemaking under MAPA, because, following the reasoning of 46 Op. Att'y Gen. No. 1, the contracting power coupled with the public purpose is sufficient to bring the MLHIGA within the reach of Mont. Code Ann. § 2-3-102(1). Upon review of the applicable statutory and case law, it is my opinion that under Montana law the MLHIGA is a public body subject to the provisions of the open meeting law.

My opinion is not changed by the inclusion in the MLHIGA Act of certain provisions indicating a legislative intent to limit public access to meetings of the association. Mont. Code Ann. § 33-10-203(3) provides that meetings or records of the association "may be opened to the public upon majority vote of the board of directors of the association." Mont. Code Ann. § 33-10-206 states that records of meetings and negotiations in which the association is discussing the activities of the association in carrying out its powers and duties

shall be made public only upon the termination of a liquidation, rehabilitation, or supervision proceeding involving the impaired insurer, upon the termination of the impairment of the insurer, or upon the order of

a court of competent jurisdiction. Nothing in this section shall limit the duty of the association to render a report of its activities under 33-10-209.

Finally, Mont. Code Ann. § 33-10-217 contains a provision that the national association of insurance commissioners' insurance regulatory information system (IRIS) ratios and listings of companies not included in the ratios must be kept confidential by the board until made public by the commissioner or other lawful authority and a provision that reports and recommendations to the commissioner upon any matter germane to the solvency, liquidation, rehabilitation, or supervision of any member insurer are not considered public documents. Mont. Code Ann. § 33-10-217(1)(d), (5). In my opinion these statutory provisions evidence a legislative determination that the business of the association in many instances involves issues where the demands of individual privacy rights or the privacy rights of insurance companies clearly exceed the merits of public disclosure.

In Belth v. Bennett, 227 Mont. 341, 740 P.2d 638 (1987), the Montana Supreme Court recognized that the insurance commissioner, when faced with a request for access to such reports in the commissioner's possession, could assert the privacy rights of insurance companies listed in the IRIS reports. To effect a constitutional interpretation of a statute allowing the commissioner to withhold certain reports from public inspection where such withholding was necessary for the protection of the person examined against unwarranted injury or was in the public interest, the Court held that the section, Mont. Code Ann. § 33-1-412(5) (since repealed), contained an exception to public inspection identical to and coextensive with the right to privacy exception to the constitutional right to know. 227 Mont. at 346, 740 P.2d at 641. The general rule is that whenever there are differing possible interpretations of a statute, a constitutional interpretation is favored over one that is not. Belth, 227 Mont. at 345-46, 740 P.2d at 641. In my opinion, the provisions of the MLHIGA Act which may be construed to limit public access to meetings of the association must be construed as coextensive with the ability of the board to determine that, in certain instances, the privacy interests of insurance companies or others outweigh the need for public disclosure. While it is beyond the scope of this opinion to question the constitutionality of these sections, this construction of the Act is consistent with the Supreme Court's expressions of the reach of article II, section 9.

THEREFORE, IT IS MY OPINION:

The proceedings of the Montana Life and Health Insurance Guaranty Association (MLHIGA) board of directors are subject to the Open Meeting Law, Mont. Code Ann. tit. 2, ch. 3, pt. 2. Thus, the MLHIGA may close a meeting only when and to the extent that the demands of individual privacy clearly exceed the merits of public disclosure.

Sincerely,

JOSEPH P. MAZUREK
Attorney General

jpm/ks/dm