



Sept. 2, 2014

To Members of the Interim Education and Local Government Committee

Dear Sirs and Madams,

We are writing today to offer our thanks to the members of this committee and its working group who have spent much of the past year reviewing and making recommendations to Montana's very important public records laws at the request of the Legislature.

As you know, this is an area of Montana law in which Montana's news media have a very vested interest. While we were not invited to be part of the working group's discussions, we have had an opportunity to review the work and recommendations that have occurred to date and wanted to offer our thoughts and suggestions. We would welcome the opportunity to engage more in this discussion as it moves forward.

First, we want to express again our thanks for taking on this important task. The right of the people of this state to access public information is critical, and we applaud the good-faith efforts and hard work of the working group and the committee. There are many aspects of this working draft that we see as great steps forward in ensuring the public's right to know, and which we can support without hesitation. There are other aspects that give us pause, but which we believe can be addressed to our satisfaction fairly easily.

We would like to discuss those first.

1. There are several sections of the draft legislation that include definitions for what constitutes a "public agency." They are not consistent and are narrower than current law. They should be made consistent and should include legislative and judicial agencies as well to conform to current Montana Code.
2. We have a number of concerns with new Section 3. Subsection (1) accurately reflects existing law in MCA 2-6-102, including the exemption when the right to privacy "clearly exceeds the merits of public disclosure." The section contains no guidance, however, on how that standard is must be determined. Existing language in MCA 2-3-03 (3) does address that, and we would argue should be included here to be consistent. Section 3 (1) should read "Every person has a right to examine and obtain a copy of any public information of this state, except for information that is constitutionally protected from disclosure because of *an individual privacy interest, and then only if the presiding officer of the agency determines that the demands of individual privacy clearly exceed the merits of public disclosure;* or as otherwise expressly prohibited by statute." Related to

that, we take issue with the “individual privacy” wording being included in the next Subsection (2). This subsection is dealing with the issue of “individual or public safety or security of public facilities.” (emphasis added). Including a privacy provision here is misplaced, especially since it’s already addressed and defined in the previous subsection. We would ask that the two references to “individual privacy” be removed from this subsection. Finally, while we understand that most of this language was taken from existing code, we remain very concerned about the expansive exemptions spelled out in Subsection (2). “Security features” that could prompt this exemption go far beyond what we believe is appropriate or even constitutional. As examples, this exemption could be used by a correctional facility to refuse to disclose the number of correctional officers it employs, or by a school to refuse to share with parents what security measures are in place to protect students from violence. We believe this could be addressed with the inclusion of some specific language.

3. Several provisions in the draft, including Section 3 (3), and Section 17 (3) provide exemptions to Montana’s open records law for “collections of the Montana historical society when restrictions on access have been imposed by the collection creators or donors.” Once a record is given to the state, it cannot be withheld from public inspection. The state cannot except or honor such conditions when it comes to public records or information. We respectfully ask that this language be stricken.
4. Section 10, regarding distribution lists, is taken largely from existing MCA 2-6-109, but is titled differently. MCA 2-6-109 is entitled “Prohibition on distribution or sale of mailing lists,” while the new Section 10 is entitled “Prohibition on dissemination or use of distribution lists.” While the language change appears minor, replacing “sale” with “use” changes the intent more than what we believe is intended. More importantly, this provision seems based on the misconception that there is an expectation of privacy for “personal contact information” such as email addresses or phone numbers. No expectation exists. Additionally, “any list” as defined under this section could be construed to include sign-in sheets at public meetings, where no expectation of privacy exists whatsoever. The intent of MCA 2-6-109 was to thwart efforts to use public information as the source for unsolicited mailings, but the language contained in Section 10 goes beyond that. Again, we believe some simple language changes or the addition of exemptions could address this concern.
5. Section 5 (4) would allow the Montana historical society to charge “additional fees” on top of those allowed in Section 4 “for copies of materials contained in its collection to support the educational, curatorial, and interpretive efforts for which the Montana historical society was established...” This is in direct conflict with Section 4 and with the spirit of Montana’s open-records laws. Fees MAY NOT exceed the actual costs of fulfilling the records request. Demanding additional fees for any public record,

regardless of the custodian or the purported need for such fees, is inappropriate. We would ask that this language be stricken.

With those issues in mind, we are very supportive of the overall effort of this legislation to organize Montana's laws pertaining to public records and public information into one section. The addition of a singular definition for "public information," a definition that makes it clear that it does not matter what form the information is in, is long overdue. We support this change. We are in full agreement with Section 4, which includes new language codifying the procedure agencies must follow when a request for information is received from the public. Requiring a timely reply, and prohibiting a charge for time if the request takes less than half an hour to fulfill, are both big steps forward. While it is not in this section, we would like the committee to consider adding a provision establishing penalties for any agencies that fail to meet these conditions.

The Montana Newspaper Association remains very interested in assisting the committee as it continues to look at this issue and make changes to this draft legislation. Anything the MNA or its members can do to assist, we would be happy to help.

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To advance and sustain the news publishing industry in Montana.