

HOUSE BILL NO. 271

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A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING LAWS TO NARROW THE SCOPE OF EXECUTIVE EXEMPTIONS TO PUBLIC RECORDS REQUESTS; PROVIDING FOR A LIMITED EXECUTIVE EXEMPTION OVER CERTAIN DOCUMENTS IN STATUTE; PROVIDING FOR A WAIVER OF EXECUTIVE EXEMPTION; PROVIDING THAT THE EXECUTIVE EXEMPTION EXPIRES AT A CERTAIN TIME; ~~REQUIRING THE AWARD OF COSTS AND REASONABLE ATTORNEY FEES FOR A PREVAILING PARTY TO PUBLIC RECORDS LITIGATION;~~REVISING DEFINITIONS; AMENDING SECTIONS 2-6-1002, ~~2-6-1009,~~ AND 90-1-105, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

WHEREAS, the Montana Constitution has enshrined access to public information in the Right to Know in Article II, section 9, which states 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"; and

WHEREAS, the Right of Participation in Article II, section 8, of the Montana Constitution also ensures that the public must be given a reasonable opportunity to participate in the operation of governmental agencies prior to the final decision as may be provided by law; and

WHEREAS, these fundamental rights are the foundation on which every Montanan is able to exercise the power to hold elected officials accountable for their actions and decisions; and

WHEREAS, the Montana Supreme Court recently issued a decision in O'Neill v. Gianforte, 2025 MT 2, holding that the Governor enjoys a common law-based executive privilege, which protects certain communications and information from public disclosure; and

WHEREAS, the Legislature holds the power to change the common law through the proper and valid

1 enactment of legislation; and

2 WHEREAS, the process outlined by the majority in O'Neill is unwieldy and cumbersome, requiring an in
3 camera review by a court of all documents for which an executive privilege is asserted, causing substantial
4 costs to Montanans seeking records and to the state, adding to the workload of an already burdened judicial
5 system, and stalling the ability of a Montana citizen to receive the public information about the workings of
6 government to which the citizen is otherwise entitled; and

7 WHEREAS, to the extent that a common law executive privilege exists, the Legislature intends to
8 replace the common law privilege with a statutory exemption defining the scope and limitations of the executive
9 exemption; and

10 WHEREAS, the Legislature finds that it is in the best interest of every Montanan and to further fidelity to
11 the Montana Constitution to better define and clarify the scope of the constitutional privacy protections and to
12 uphold the long and proud tradition of open government by providing access to the documents and
13 deliberations of state and local government while also increasing government accountability and transparency.

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15 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

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17 NEW SECTION. Section 1. Limited executive exemption -- expiration of exemption. (1) The
18 governor may assert an executive exemption to withhold specific public information from a request for public
19 information under ~~sections 2-6-1003 and 2-6-1006~~ only when the governor's individual privacy interest clearly
20 outweighs the merits of public disclosure.

21 (2) THE GOVERNOR DOES NOT HAVE AN INDIVIDUAL PRIVACY INTEREST IN PUBLIC INFORMATION
22 PERTAINING TO POLICY, POLITICS, OR LEGISLATIVE MATTERS.

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24 (3) The assertion of an executive exemption must be narrowly tailored to apply to only the specific
25 information in which the governor is claiming a privacy interest. The information for which the governor is
26 asserting the executive exemption may be redacted, but only to the narrowest extent possible. A person who
27 received public information with redaction may bring an action pursuant to 2-6-1009 alleging that the application
28 of an executive exemption is overly broad. The court shall review the redacted information and assess whether

the individual privacy interest clearly outweighs the merits of public disclosure.

(4) (A) The duration for which the executive exemption lasts is only as long as the protection of the exempted information serves its underlying purpose.

(B) For exempted information that is not challenged in court or for which a court upholds the executive exemption, then the exemption expires no later than the time at which the underlying issue is resolved or after 60 days, whichever comes first.

(C) The executive exemption is waived at the time the information is voluntarily disclosed to a third party to whom the executive exemption does not apply.

(5) For the purposes of this section, an individual privacy interest clearly outweighs the merits of public disclosure as provided in 2-6-1002(1) only if the public information requested is confidential information under the provisions of 2-6-1002(1)(a) through (1)(d) (1)(E).

Section 2. Section 2-6-1002, MCA, is amended to read:

"2-6-1002. Definitions. As used in this chapter, the following definitions apply:

(1) "Confidential information" means information that is accorded confidential status or is prohibited from disclosure as provided by applicable law ~~because an individual privacy interest clearly exceeds the merits of public disclosure~~ AS PROVIDED BY APPLICABLE LAW. The term ~~includes is limited to~~ INCLUDES information that is:

(a) ~~constitutionally protected from disclosure because an individual privacy interest clearly exceeds the merits of public disclosure;~~

(A) CONSTITUTIONALLY PROTECTED FROM DISCLOSURE BECAUSE AN INDIVIDUAL PRIVACY INTEREST CLEARLY EXCEEDS THE MERITS OF PUBLIC DISCLOSURE;

~~(b)(a)~~ (B) related to judicial deliberations in adversarial proceedings;

~~(c)(b)~~ (C) necessary to maintain the security and integrity of secure facilities or information systems owned by or serving the state; and

~~(d)(c)~~ (D) designated as confidential or prohibited from disclosure by statute; or

(E) or designated as confidential through judicial decisions, findings, or orders holding that the information is confidential under one of the provisions of subsections (1)(a) through (1)(c) (1)(D).

(2) "Constitutional officer" means the governor, lieutenant governor, attorney general, secretary of

state, superintendent of public instruction, or auditor, who are the constitutionally designated and elected officials of the executive branch of government.

(3) "Constitutional officer record" means a public record prepared, owned, used, or retained by a constitutional officer.

(4) "Essential record" means a public record immediately necessary to:

(a) respond to an emergency or disaster;

(b) begin recovery or reestablishment of operations during and after an emergency or disaster;

(c) protect the health, safety, and property of Montana citizens; or

(d) protect the assets, obligations, rights, history, and resources of a public agency, its employees and customers, and Montana citizens.

(5) "Executive branch agency" means a department, board, commission, office, bureau, or other public authority of the executive branch of state government.

(6) "Historic record" means a public record found by the state archivist to have permanent administrative or historic value to the state.

(7) "Local government" means a city, town, county, consolidated city-county, special district, or school district or a subdivision of one of these entities.

(8) "Local government records committee" means the committee provided for in 2-6-1201.

(9) "Permanent record" means a public record designated for long-term or permanent retention.

(10) "Public agency" means the executive, legislative, and judicial branches of Montana state government, a political subdivision of the state, a local government, and any agency, department, board, commission, office, bureau, division, or other public authority of the executive, legislative, or judicial branch of the state of Montana.

(11) "Public information" means information prepared, owned, used, or retained by any public agency relating to the transaction of official business, regardless of form, ~~except for confidential information that must be protected against public disclosure under applicable law~~, EXCEPT FOR CONFIDENTIAL INFORMATION THAT MUST BE PROTECTED AGAINST PUBLIC DISCLOSURE UNDER APPLICABLE LAW.

(12) "Public officer" means any person who has been elected or appointed as an officer of state or local government.

(13) "Public record" means public information that is:

(a) fixed in any medium and is retrievable in usable form for future reference; and

(b) designated for retention by the state records committee, judicial branch, legislative branch, or local government records committee.

(14) "Records manager" means an individual designated by a public agency to be responsible for coordinating the efficient and effective management of the agency's public records and information.

(15) "State records committee" means the state records committee provided for in 2-6-1107."

Section 3. Section 2-6-1009, MCA, is amended to read:

~~"2-6-1009. Written notice of denial — failure to meet response deadline — civil action — costs to prevailing party in certain actions to enforce constitutional or statutory rights. (1) A public agency that denies an information request to release information or records shall provide a written explanation for the denial.~~

~~(2) — If a person who makes an information request receives a denial from a public agency and believes that the denial violates the provisions of this chapter, the person may file a complaint pursuant to the Montana Rules of Civil Procedure in district court.~~

~~(3) — If a person who makes an information request to an executive branch agency does not receive a response from the agency as required in 2-6-1006(3), the person may file a complaint in district court.~~

~~(4) — A person alleging a deprivation of rights who prevails in an action brought in district court to enforce the person's rights under Article II, section 9, of the Montana constitution or under the provisions of Title 2, chapter 6, parts 10 through 12, may shall be awarded costs and reasonable attorney fees."~~

Section 3. Section 90-1-105, MCA, is amended to read:

"90-1-105. Functions of department of commerce -- economic development. The department of commerce shall:

(1) provide coordinating services to aid state and local groups and Indian tribal governments in the promotion of new economic enterprises and conduct publicity and promotional activities within the state, nationally, and internationally in connection with new economic enterprises;

(2) collect and disseminate information regarding the advantages of developing agricultural,

recreational, commercial, and industrial enterprises within this state;

(3) serve as an official state liaison between persons interested in locating new economic enterprises in Montana and state and local groups and Indian tribal governments seeking new enterprises;

(4) aid communities and Indian tribal governments interested in obtaining new business or expanding existing business;

(5) (a) study and promote means of expanding markets for Montana products within the state, nationally, and globally; and

(b) provide training and assistance for Montana small businesses and entrepreneurs to expand markets for made-in-Montana products;

(6) encourage and coordinate public and private agencies or bodies in publicizing the facilities and attractions of the state;

(7) in collaboration with the state-tribal economic development commission, tribal governments, and other partners, develop a system for the gathering of data allowing the department to quantify on an ongoing basis the economic contributions of the tribes in Montana. The department may execute data sharing and use agreements with each tribal government. The department shall update the state-tribal relations committee on this effort and, beginning no later than December 1, 2024, and in a manner beneficial to tribal governments, policymakers, and the public, make aggregate data on the economic contributions of the tribes in Montana readily available on an ongoing basis. Disaggregated data provided by a tribal government pursuant to a data sharing and use agreement with the department and identified by the tribal government as confidential must be considered "confidential information" as defined in 2-6-1002(4)(d). The department may accept contributions and donations from individuals and organizations for the purposes of this subsection.

(8) explore the use of cooperative agreements, as provided in Title 18, chapter 11, part 1, for the promotion and enhancement of economic opportunities on the Indian reservations in Montana; and

(9) assist the state-tribal economic development commission established in 90-1-131 in:

(a) identifying federal government and private sector funding sources for economic development on Indian reservations in Montana; and

(b) fostering and providing assistance to prepare, develop, and implement cooperative agreements, in accordance with Title 18, chapter 11, part 1, with each of the tribal governments in Montana."

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