EXHIBIT 24
DATE 3/31/05
HB 794

DEPARTMENT OF ADMINISTRATION
DIRECTOR'S OFFICE

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March 30, 2005

Honorable Diane Rice, Chair
House Judiciary Committee
PO Box 200400
Helena, MT 59620-0400

Re: HB 794

Dear Representative Rice:

The Department of Administration is the record custodian for all of the state's email, and much of the electronically held information from all agencies. The Department also has several agencies that are attached administratively for which the director has little or no legal control. HB 794 threatens the director with criminal action should any data miner, abusive domestic partner or any other entity request records which are incorrectly withheld, even for awhile.

It is not clear from the bill whether the criminal conduct is to be charged to only the director or to all "public servants". See sec 7 of HB 794. In either case criminalizing the process and not allowing the public servant to be defended makes it very difficult to be a public servant. Further it makes it very difficult to render adequate legal advice to public servants.

Currently the Montana Constitution protects the privacy of individuals in Art. II, sec. 10 and protects the right-to-know in Art II, sec. 9. Neither of these rights are paramount but must be balanced. Agencies take this balancing very seriously.

As the records custodian for email records we have been asked to review emails to and from the Governor's Office on two occasions. This review entailed the review of thousands of emails sent to government or sent to others. In either case substantial privacy issues existed that required a review. I have set out below a checklist we used to help us balance the privacy versus right-to-know rights.

Had we protected information incorrectly the requestor has the right to have a court review our decision. The requestor then gets the costs and fees of their litigation paid. Criminalizing the balancing process puts a pretty heavy thumb on the scales against the fair and equal balancing of the various rights.

Here is the checklist we utilize in our review of privacy versus right-to-know rights:

CATEGORIES OF INFORMATION THAT MAY BE PROHIBITED FROM PUBLIC DISCLOSURE

The following categories of information may implicate privacy interests that outweigh the public's right to examine a document or may otherwise be prohibited from disclosure under Montana law:

1. Medical Records (*State v. Nelson*, 283 Mont. 231, 242, 941 P.2d 441 (1997))
   Medical records include discussions of an employee's or third party's medical or psychological condition, diagnosis, or treatment, or medical advice received from a health care provider. (Uniform Health Care Information Act, Mont. Code Ann. § 50-16-504(6); Mont. Const. art. II, § 9.) Medical records might also include a request for an accommodation for a medical or psychological condition and related documentation (Americans with Disabilities Act, 42 U.S.C. § 12112(d); 29 C.F.R. § 1630.14(c)(1)), or a request for leave under the Family and Medical Leave Act or other sick leave policy if the medical condition or history of an employee or an employee's family member is identified or discussed or a medical certification is provided (29 C.F.R. 825.500(g); 42 U.S.C. § 12112(d); 29 C.F.R. § 1630.14(c)(1); Mont. Code Ann. § 50-16-504(6); ARM 24.9.607(4)(b) and (c) and (5); ARM 2.21.6611(3)(b)).

2. Trade Secrets (*Mountain States Telephone and Telegraph Co. v. Dep't of Public Serv. Regulation*, 194 Mont. 277, 284, 634 P.2d 181 (1981))
   Trade secrets are generally information which is used in one's business and which gives someone an advantage over competitors who do not know it or use it. *Mountain States Tel. and Tel. Co. v. Dep't of Public Service Regulation*, 194 Mont. 277, 284, 634 P.2d 181 (1981). More specifically, trade secrets include information or computer software, including a formula, pattern, compilation, program, device, method, technique, or process that (a) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. Mont. Code Ann. § 30-14-402(4). Trade secrets might also include information furnished to the Board of Oil and Gas Conservation which is unique to the owner or operator and that would, if disclosed, reveal methods or processes entitled to protection as trade secrets. (§ 82-11-117).

   Trade secrets do not have to be held by an individual but can also be held by a corporation or other entity. *Mountain States*, 194 Mont. at 284.

3. Employment Records
   Employment records of unelected public employees include the following:
   a. Employment applications (*Montana Human Rights Div. v. City of Billings*, 199 Mont. 434, 442, 649 P.2d 1283 (1982))
   b. Performance evaluations by employer and co-workers (*Missoulian v. Board of Regents*, 207 Mont. 513, 533, 675 P.2d 962 (1984))
   c. Self-evaluations (*Missoulian*, 207 Mont. at 518-519, 524, 533)
   d. Employer's criticisms of employee (*Missoulian*, 207 Mont. at 524, 533), or disciplinary actions (*Citizens to Recall Mayor James Whitlock v. Whitlock*, 255 Mont. 517, 522, 844 P.2d 74 (1992)), except in certain circumstances where law enforcement officers are involved (*Great Falls Tribune v. Cascade County Sheriff*, 238 Mont. 103, 775 P.2d 1267 (1989)).

e. Employee's criticisms of employer (*Missoulian*, 207 Mont. at 524, 533)
f. Employee's subjective view of employer (*Missoulian*, 207 Mont. at 524, 533)
g. Complaints or grievances by one employee against another *(Flesh v. Board of Trustees of Joint Sch. Dist. #2, Mineral and Missoula Counties*, 241 Mont. 158, 165-66, 786 P.2d 4 (1990))
h. Relationships with co-workers (*Missoulian*, 207 Mont. at 524, 533)
i. Performance or IQ testing *(Montana Human Rights Div.,* 199 Mont. at 434)
j. Explanations of absences from work or poor performance *(Montana Human Rights Div.*, 199 Mont. at 442)
k. Drug and alcohol problems *(Montana Human Rights Div.*, 199 Mont. at 442)
l. Military records *(Montana Human Rights Div.*, 199 Mont. at 442)
m. Prison records *(Montana Human Rights Div.*, 199 Mont. at 442)
n. Pre-employment investigations and reference checks (*Engrav v. Cragun*, 236 Mont. 260, 265, 769 P.2d 1224 (1989)
o. Discussion of an employee's family or health problems (*Montana Human Rights Div.*, 199 Mont. at 442; *Missoulian*, 207 Mont. at 524, 533)
p. Allegations relating to an employee's character, integrity, honesty, and personality (*Flesh*, 241 Mont. at 165)
q. An employee's responses to information contained in a personnel record (ARM 2.21.6611(3)(a))
r. Applications for benefits (42 Op. A.G. 64)
s. Interview questions, criteria, and scoring matrices (There is no specific authority that generally prevents disclosure of this category of information when the items are used as hiring tools and are not specifically related to an employee, but as a matter of policy, it does not seem wise to release the information prior to or during a job search. The Department of Administration's personnel regulations defer to the individual department's policy on the issue. *See* ARM 2.21.3727 and 2.21.3728. Documents containing this information should be pulled during this first round of review, and we will then review the relevant department's policy to determine whether the documents are subject to disclosure.)
t. Documents developed as part of an investigation, including grievance investigations, violations of department rules, policies and procedures or matters which may result in civil or criminal prosecution. Disclosure of these documents depends on a case-by-case balancing of the right to privacy and the right to know. (ARM 2.21.6611(3)(g))

Note: The above list applies only to unelected public employees. Similar employment-related information regarding the Governor or Lieutenant Governor might be subject to disclosure. This information should be pulled for further review to determine whether disclosure is required or prohibited. *Citizens to Recall Mayor Whitlock,* 255 Mont. at 523-24.

4. Records Relating to Safety

This category includes relating to public or individual safety or security of public facilities, including jails, correctional facilities, private correctional facilities, and prisons. § 2-6-102(4). Security features that may be covered by the statute include architectural floor plans, blueprints, designs, drawings, building materials, alarms system plans, surveillance techniques, and facility staffing plans, including staff numbers and locations.

5. Law Enforcement or Crime-Related Information
This category includes correspondence to or from law enforcement officials or agencies regarding crimes or possible criminal activities (Montana Criminal Justice Information Act, Mont. Code Ann. § 44-5-101, *et seq.*), including ongoing criminal investigations (*Engrav*, 236 Mont. at 264-65). This information would also include reports of crimes by victims or witnesses. (*Engrav*, 236 Mont. at 264.) Although some crime-related information is subject to public disclosure under the Montana Criminal Justice Information Act, the analysis required to make that determination becomes somewhat complicated under the Act. This information should therefore be pulled for further analysis to determine whether disclosure is required or prohibited.

6. Personal Matters (Mont. Const. Art. II, § 10)
Matters of a personal nature which may implicate a privacy interest would include discussions of personal or family relationships (*Goyen v. City of Troy*, 276 Mont. 213, 222, 915 P.2d 824 (1996) (City Council hearing allowed to be closed when witnesses testified to sexual relationship with Chief of Police)), or other information in which the employee or a third party, such as a family member or a public citizen, has an expectation of privacy (Mont. Const. Art. II, § 10). This category also includes personally identifiable information collected by a government website from a website user, such as an individual's first and last name, residence or other physical address (including a street name and city or town), e-mail address, telephone number, social security number, or other unique identifying information. § 2-17-552.

7. Reports from Banks and Trust Companies (Mont. Code Ann. § 32-1-234)
This category includes reports from banks or trust companies to the Department of Administration describing resources and liabilities or other sensitive financial information.

8. Litigation Information (Mont. Code Ann. § 2-3-203(4))
This category includes discussion of litigation strategy or other litigation-related information. Some information may be subject to public disclosure, but it should be pulled for further review.

9. Other
The following is a list of miscellaneous categories of confidential information, which might not be subject to disclosure but should be pulled for further review:

Papers filed with and proceedings related to the Judicial Standards Commission (§311105)
Documents related to the ownership or pledge of public obligations (§17-5-1106)
Records of a university student, including academic records (§20-25-515), and other private student records (§20-25-511)
Records relating to the requests, use, or borrowing of library books (§22-1-1103)
Privileged information, including attorney-client communications (§26-1-803)
Communications made to a public officer in official confidence when the public interests would suffer by the disclosure (§26-1-810)
Mediation discussions and communications and related documents (§26-1-813)
Investigations of unfair trade practices involving securities transactions (§30-10-107(2))
Investigations of unfair trade practices generally (§30-14-114)
Investigative consumer reports (§31-3-113)
Hearings regarding the unsafe operation of a bank or trust or removal of an officer of a bank or trust (§32-1-910)
Records regarding age, sex, and race (§49-2-102)
Some EPA and DEQ information regarding chemical registrant data and agricultural chemical pollution of groundwater (§80-15-108)

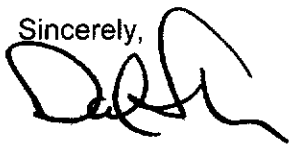
Information obtained by the Governor during an energy supply alert or emergency (§ 90-4-305(6))

There are numerous other categories of information which in all likelihood will not appear in e-mail to or from the Governor's Office but which nevertheless might not be subject to public disclosure, including the following:

Proceedings involving dissolution, criminal conversation, or seduction (§3-1-313)
Some proceedings of the Judicial Nominating Commission (§3-1-1007)
Burial site records (§22-3-807)
Privileged communications, including communications between spouses (§26-1-802); confessions to a member of the clergy or priest (§26-1-804); certain communications between a doctor and patient (§26-1-805); communications between a client and a speech-language pathologist or audiologist (§26-1-806); communications between a psychologist and client (§26-1-807); information gathered by a psychology teacher or person in the study and observation of child mentality (§26-1-808); communications between a student and an employee of an educational institution (§26-1-809); communications between a victim and an advocate (§26-1-812); and information obtained by an interpreter for a deaf person (§49-4-511)
Reports and examinations of building and loan associations by the Department of Commerce (§32-2-307)
Medical certificates, laboratory reports or statements, and applications, relating to marriage licenses (§40-1-208)
Conciliation court proceedings (§40-3-116)
Parenting proceedings, upon order of the court (§40-4-216)
Information regarding artificial insemination (§40-6-106)
Paternity proceedings (§§40-6-111, 40-6-114, 40-6-120)
Birth certificates involving paternity determination (§40-6-123)
Child abuse and neglect records (§41-3-205)
Youth placement committee meetings and records (§41-5-125)
Some Youth Court records (§41-5-215)
Some Youth Court adjudicatory hearings (§41-5-1502)
Some vital statistics information (Title 50, ch. 15)
In-hospital medical staff committee records and proceedings (§ 50-15-203)
Vehicle accident reports (§61-7-114)

I respectfully request you to not pass HB 794.

Sincerely,



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